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 OF THE NATIONAL LEAGUE OF CITIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, U.S. CONFERENCE OF MAYORS, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether using eminent domain, with payment of just compensation, to promote economic development in a depressed local economy—thereby creating jobs, alleviating human suffering, and otherwise promoting the public welfare—constitutes a public use under the Fifth Amendment.

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INTEREST OF THE *AMICI CURIAE*

This case is of vital importance to *amici*, whose members include state and local governments and officials throughout the United States.[1] These officials use eminent domain for many purposes, including as a fundamental tool for economic development in distressed cities like New London. Eminent domain is often indispensable for revitalizing local economies, creating much-needed jobs, and generating revenue that enables cities to provide essential services. At the same time, the condemnation power should be used prudently, as is being done by New London here. Because of the importance of these issues to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

1. During the last 50 years, this Court has handed down no less than seven rulings reaffirming that public use under the Fifth Amendment is coterminous with the police power, and that where a government objective is legitimate, "the right to realize it through the exercise of eminent domain is clear." *Berman v. Parker*, 348 U.S. 26, 33 (1954). These rulings are not fact-based, as Petitioners suggest, but instead rooted in a broad rationale recognizing that courts should defer to a legislative finding of public use unless that finding lacks a rational basis, even where a private actor stands to benefit. Early decisions of this Court likewise recognize the propriety of using eminent domain for economic ends. These long-standing rulings faithfully capture the original understanding and plain meaning of the Fifth Amendment as reflected in its text, structure, and history.

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[1] This brief was not authored in whole or in part by counsel for a party, and no person or entity other than the *amici*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of *amicus* briefs and have filed letters of blanket consent with the Clerk of the Court.

Petitioners contend that this Court should jettison its traditional rational basis test and impose heightened scrutiny that would prohibit condemnation for economic development unless there is a high degree of certainty that the condemnation will yield the expected public benefits. But the Court repeatedly has held that it "need not make a specific factual determination whether the condemnation will accomplish its objectives." *National R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 422-23 (1992). The proposed heightened scrutiny would be unworkable and transform courts into super-legislatures.

2. The variation in eminent domain law among the States properly reflects the appropriate diversity of our federal system. A narrow federal constitutional constraint on the scope of public use would inappropriately impose a uniform standard on States facing highly diverse challenges. This Court repeatedly has recognized that maintaining a tolerant federal standard permits adaptation of eminent domain to varying local conditions. The just compensation requirement ensures that condemnees are treated justly, as do other state constitutional and statutory protections.

3. Local communities across the country face daunting economic challenges that must be addressed through redevelopment programs that require the use of eminent domain. The private sector often cannot accomplish the job alone due to a range of market failures, including holdouts; obstacles to assembling an appropriate development site in urban and suburban areas; the risks associated with cleaning up "brownfield" sites; clouded property title on key parcels; and the need to improve street patterns. The Kansas City Speedway and associated retail development, as well as the Nissan auto plant in Canton, Mississippi, illustrate how eminent domain is essential to the rebirth of many economically distressed municipalities and regions.

ARGUMENT

I. ECONOMIC DEVELOPMENT IS A PUBLIC USE UNDER THE FIFTH AMENDMENT.

Of all the public purposes advanced by eminent domain, Petitioners argue that economic development alone is not a "public use" under the Fifth Amendment. On this reading, local officials could condemn Petitioners' property to create a park, enhance a scenic river vista, or pursue any other public purpose. But they cannot condemn the same property to promote economic revitalization that will create jobs and alleviate the human suffering and social devastation caused by unemployment and reduced public services. On Petitioners' view, economic development is always off-limits as a justification for eminent domain, no matter how fair the compensation, no matter how compelling the public interest in new jobs and renewed prosperity. *See* Pet. Br. 11-27.

Alternatively, Petitioners argue that the Court should jettison the traditional rational basis test and replace it with a heightened "reasonable certainty" standard of judicial review. *See id.* at 27-48. This position is both contrary to established precedent and wholly unworkable.

A. Longstanding Precedents Show that Economic Development is a Public Use.

For 50 years, without dissent, the Court repeatedly has held that the scope of public use is coterminous with the police power and that courts must defer to legislative determinations of public use. Those decisions rejected arguments, similar to those advanced by Petitioners, that private benefits generated by a condemnation render it suspect. It is not surprising, then, that every Justice on the Connecticut Supreme Court concluded that economic revitalization is a public use. *See* Pet. App. 171 (dissent) (agreeing with the majority that

"private economic development projects . . . satisfy the takings clauses of the federal and state constitutions").

Petitioners cite no federal constitutional authority remotely suggesting that economic development does not constitute a legitimate public use, and there is none. In fact, established precedent compels the contrary conclusion. In *Berman v. Parker*, 348 U.S. 26 (1954), two owners of non-blighted land challenged an urban redevelopment program in Washington, D.C. The Court unanimously held that Congress may use eminent domain to improve the quality of the urban fabric: "The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary." *Id.* at 33 (citation omitted). *Berman* stressed that where a government objective is legitimate, "the right to realize it through the exercise of eminent domain is clear." *Id.*

Several factors make this case easier than *Berman*. Here, private developers will have only leasehold interests, subjecting them to ongoing oversight by the city's agent, the redevelopment agency. *See* Pet. App. 6. Moreover, the specific plan to use eminent domain here was approved by the city council and subject to extensive public input (Resp. Br. 3-5), affording greater democratic participation than in *Berman*. *See Berman*, 348 U.S. at 29-30.

In *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984), another case involving transfer of condemned land to private individuals, the Court unanimously confirmed that public use is "coterminous" with the police power. *Id.* at 240. Eight years later, the Court again unanimously reaffirmed that public use "is coterminous with the regulatory power," even where a condemnation "result[s] in the transfer of ownership from one private party to another." *National R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 422 (1992).

Repeated decisions of this Court reaffirm these bedrock principles.[2]

Petitioners argue that these cases can be explained away because they have "facts of independent public significance." Pet. Br. 24. But the rationale of *Berman*, *Midkiff*, *National Railroad*, and similar rulings is not fact-based. These rulings stand on an expansive and common rationale recognizing that the concept of public use is as inclusive as the police power. Even the *amici* professors supporting Petitioners acknowledge that the ruling below is "in keeping with" *Midkiff*. Br. *Am. Cur.* David Callies *et al*. 3.

Older cases, too, approve the use of eminent domain to foster economic development. In *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9 (1885), the Court upheld a state "Mill Act," which authorized downstream mill builders to flood land of upstream riparian owners, to secure "the advantages inuring to the public from the improvement of water power and the promotion of manufactures." *Id.* at 19; *see also Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527 (1906) (approving condemnation of a right of way for an aerial bucket line for a private mining company); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 161 (1896) (approving condemnation for the irrigation of private land and comparing public use justifications for eminent domain with those for taxation). New London's use of eminent domain for economic development falls squarely within this longstanding tradition.

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[2] *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 232 (2003) (government may condemn property for any reason justifying a tax or user fee); *First English Evan. Luth. Church v. County of Los Angeles*, 482 U.S. 304, 321 (1987) ("[T]he decision to exercise the power of eminent domain is a legislative function 'for Congress and Congress alone to determine.'") (citations omitted); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491 n.20 (1987); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1014 (1984).

B. The Text, Structure, and History of the Fifth Amendment Show that Economic Development is a Public Use.

Berman, *Midkiff*, *National Railroad*, and similar precedents faithfully capture the original meaning of the Takings Clause. The term "public use" never was intended to limit eminent domain only to condemnations where the public would own or have access to the expropriated property. As has been long noted, the language of the Takings Clause does not impose any limitation other than the payment of just compensation. *See* John Lewis, *A Treatise on the Law of Eminent Domain* ii (1888). There is no evidence the Framers were concerned about the purposes for which eminent domain is employed where it is subject to legislative control. *See* Matthew P. Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings" Clause*, 53 Hastings L. J. 1245, 1299-1301 (2002).

The plain meaning of the term "public use," both now and at the Founding, encompasses not only public ownership and access, but also the public enjoyment of benefits.[3] In keeping with this plain meaning, as early as 1837 the Court recognized that eminent domain could be used to promote "the public interest and convenience." *Charles River Bridge v. Warren Bridge*, 36 U.S. 420, 542 (1837) (observing that state legislators had taken and extinguished a ferry franchise through eminent domain because "the public interest and convenience would be better promoted by a bridge in the same place"). The public interest plainly includes economic prosperity since "[t]he object and end of all government is to

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[3] *E.g.*, *Webster's Encyclopedic Unabridged Dictionary* 2097 (1996) (meaning of "use" includes "service or advantage in" and "help; profit; resulting good"); 1 N. Webster, *American Dictionary of the English Language* (1st ed. 1828) (meaning of "use" includes "advantage" and "production of benefit").

promote the happiness and prosperity of the community." *Id.* at 547.

Because the language of the Takings Clause does not impose any limitation other than the payment of just compensation, the constitutional text suggests that the means-end validity of eminent domain generally should be determined under the Due Process Clause, as it would be for any legislative action. Indeed, to our knowledge, only once in its entire history has this Court invalidated government action under the U.S. Constitution for taking property for a purely private use, and it did so under the Due Process Clause. In *Missouri Pacific Ry. Co. v. Nebraska*, 164 U.S. 403 (1896), the Court set aside as a violation of due process an order of a Nebraska agency requiring a railroad to allow farmers to build a grain elevator on the station grounds. In *Midkiff*, the Court noted the extremely limited reach of *Missouri Pacific*, emphasizing that the "order in question was not, *and was not claimed to be*, . . . a taking of private property for a public use under the right of eminent domain." *Midkiff*, 467 U.S. at 241 (quoting *Missouri Pacific*, 164 U.S. at 416; emphasis added in *Midkiff*).[4]

In the end, it makes no practical difference whether the Court embraces the Due Process Clause as the means-end limitation on eminent domain, or treats "public use" as "coterminous with the scope of a sovereign's police powers." *Midkiff*, 467 U.S. at 240. Where "the eminent domain power is rationally related to a conceivable public purpose, the Court

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[4] *See also Fallbrook Irrigation Dist.*, 164 U.S. at 160 (public use issues raised by condemnation "where there is no color of necessity therefor . . . and simply for the purpose of gratifying the taste of the owner"); *Southwestern Ill. Dev. Auth. v. National City Envtl., L.L.C.*, 710 N.E.2d 896, 902 (Ill. App. Ct. 1999) (invalidating a taking where the condemning agency characterized it as one "for *private use*"), *aff'd*, 768 N.E.2d 1 (Ill. 2002).

has never held a compensated taking to be proscribed by the Public Use Clause." *Id.* at 241.

C. Petitioners' Proposed Heightened Scrutiny is Unprecedented and Unworkable.

Petitioners alternatively argue that this Court should impose heightened scrutiny for economic development projects. They contend that courts should allow eminent domain for economic development only where "the government can show that there is reasonable certainty that the project will . . . yield the public benefits that are used to justify the condemnation." Pet. Br. 36.

This proposal is wholly untethered from this Court's eminent domain jurisprudence. Longstanding precedents under the public use provision explicitly reject such heightened scrutiny. "The proper inquiry before this Court is not whether the provisions in fact will accomplish their stated objectives. Our review is limited to determining that the purpose is legitimate and that Congress rationally could have believed that the provisions would promote that objective." *Ruckelshaus*, 467 U.S. at 1015 n.18; *accord National Railroad*, 503 U.S. at 422-23 ("[W]e need not make a specific factual determination whether the condemnation will accomplish its objectives.").

Petitioners' proposed heightened scrutiny also is unworkable. They leave their "reasonable certainty" standard largely undefined, but even a "reasonable likelihood" test would be highly problematic. It often is impossible to predict the future success of a new economic enterprise of the size and complexity of the Fort Trumbull project, or of the individual businesses that make up that project.[5] Potential delays caused

[5] *See* Brian Headd, *Redefining Business Success: Distinguishing Between Closure and Failure*, 21 Small Bus. Econ. 51, 58 (2003),

by years of litigation over probability of success would likely preclude the use of eminent domain for economic development in many cases. Heightened scrutiny would alter market signals by injecting additional risk, and markets would protect against this risk by increasing costs through higher interest rates for municipal bonds or terminating the development opportunity.

If government officials pursue ill-considered ventures, the appropriate remedy should be left to the voters. Democratic oversight works well for redevelopment projects using eminent domain because the entire community bears the cost of acquiring the land and thus has a strong interest in ensuring that condemnations are prudent. Public proceedings, like the extensive public meetings and hearings held in New London (*see* Resp. Br. 3-5), allow condemnees to bring these issues to the fore, and media scrutiny promotes public consideration and participation. Market signals, such as investor interest in municipal bonds, also help affirm the viability of redevelopment projects.

In contrast, the judiciary is ill-equipped to predict the outcome of complex economic undertakings. While legislatures have the resources and time to engage in complex fact-finding and economic analysis, such decisions "are not wisely required of courts." *Pegram v. Herdrich*, 530 U.S. 211, 221 (2000); *accord Midkiff*, 467 U.S. at 243 ("[E]mpirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts."). Petitioners would have courts review contracts and land use laws to ensure there are binding "contractual, statutory, or other minimum standards" that will make economic success a reasonable certainty. Pet. Br. 37. Heightened scrutiny would transform the courts

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http://www.sba.gov/advo/stats/bh_sbe03.pdf (about one-third of new businesses fail).

into super-legislatures or boards of land use appeal, inundating them with requests by holdouts to review the details of economic development projects across the board.

Petitioners' "reasonable certainty" standard also would harm many landowners. When a municipality announces a development project, many affected landowners want to sell their land as soon as possible. The marketplace often is unavailing because ordinarily few people want to buy land that will be acquired by the government. But the municipality often is unable to proceed with land acquisition until it can acquire *all* land needed for the project; developers reasonably insist on assemblage of the entire project site before proceeding with a multi-million dollar project. Under current law, land acquisition can begin when local officials have a rational basis for believing the project will advance a public purpose. But under heightened scrutiny, acquisitions might be delayed for years because local officials could not condemn land held by holdouts until the officials could show to a reasonable certainty that the project would be successful. And these holdouts would have every incentive to challenge a "reasonable certainty" showing in court to gain leverage in extorting large compensation awards.

These concerns are by no means hypothetical. In Norwood, Ohio, about 70 properties were needed to expand a complex of shops and offices to promote economic growth in that financially strapped city.[6] More than 60 owners agreed to sell voluntarily, but they could not sell because a handful of owners held out, even though they were offered 125% of market value.[7] So outraged were the 60+ landowners that many joined with the city in opposing the holdouts' lawsuit,

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[6] *See* Cindi Andrews, *Some in Norwood Fight to Sell Homes*, Cincinnati Enquirer, Oct. 11, 2003, *available at* 2003 WL 62434526.

[7] Steve Kemme, *Norwood Battle Puts Life on Hold*, Cincinnati Enquirer, July 18, 2004, *available at* 2004 WL 79970802.

planting yellow signs in their yards protesting that they were being "Held Hostage" by the holdouts' counsel.[8] Among the landowners held in limbo were the Vogelsongs, who were forced to pay two mortgages and exhausted one of their pension funds and tapped into another until the holdout issue was resolved. Michelle Vogelsong directed her anger not at the city, but at the holdouts' counsel: "It's aggravating. People who aren't even residents here are holding up the best thing that's happened to Norwood in a long while."[9] For Jeanne Dawson, an 83-year-old blind retiree, the delay "meant the loss of three opportunities to move into a retirement home."[10] Heightened scrutiny would allow many more holdouts to exploit their monopoly position at the expense of other landowners.

Some *amici* supporting Petitioners make the peculiar argument that *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), support heightened scrutiny of eminent domain. Br. *Am. Cur.* David Callies *et al*. 24. But *Nollan* and *Dolan* address situations where the government sought to acquire property interests without paying any compensation by imposing permit conditions requiring dedications of property. The opinions carefully explain that heightened scrutiny was justified by the concern that government could extort property for free in the guise of granting permits. *See Nollan*, 483 U.S. at 841 (noting "heightened risk that the purpose is avoidance of the compensation requirement"); *Dolan*, 512 U.S. at 385 (relating heightened scrutiny to doctrine of "unconstitutional conditions"). One obvious remedy for the Nollans and Mrs.

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[8] *See* Andrews, *supra* note 6.

[9] Kemme, *supra* note 7. Donna Laake, who also is paying two mortgages, lamented: We haven't had our side of the story told too much." Andrews, *supra* note 6.

[10] Steve Kemme, *Residents Remain in Limbo*, Cincinnati Enquirer, Mar. 28, 2004, *available at* 2004 WL 72712753.

Dolan was payment of compensation. It defies logic, as well as precedent, to extend these exaction decisions to fully compensated takings where such risks do not exist.

II. EXISTING STATE AND LOCAL PROTECTIONS FOR PROPERTY OWNERS IN EMINENT DOMAIN CASES REFLECT THE APPROPRIATE DIVERSITY OF OUR FEDERAL SYSTEM.

The Court has long recognized that different States have different approaches to eminent domain and public use due to the diversity of local circumstances. Indeed, "[p]roperty interests . . . are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). As early as 1923, the Court stressed that the determination of an appropriate public use "is influenced by local conditions," and courts "should keep in view the diversity of such conditions and regard with great respect the judgments of state courts upon what should be deemed public uses in any state." *Rindge Co. v. Los Angeles County*, 262 U.S. 700, 705-06 (1923).

To our knowledge this Court has never reversed a state court decision finding that a taking constitutes a public use, regardless of whether similar takings might violate constitutional or statutory constraints in another State. For example, the Court upheld New Hampshire's "Mill Act" against a federal constitutional challenge even though other States had concluded similar statutes violated "their respective Constitutions." *Head*, 113 U.S. at 18.

In *Clark v. Nash*, 198 U.S. 361 (1905), the Court explained this deference to state court judgments on public use, upholding a Utah statute that permitted condemnation of rights

of way for irrigation ditches necessary for private farming and mining:

> Where the use is asserted to be public, and the right of the individual to condemn land for the purpose of exercising such use is founded upon or is the result of some peculiar condition of the soil or climate, or other peculiarity of the State, where the right of condemnation is asserted under a state statute, we are always, where it can fairly be done, strongly inclined to hold with the state courts, when they uphold a state statute providing for such condemnation. . . .
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> . . . This court has stated that what is a public use may frequently and largely depend upon the facts surrounding the subject, and we have said that the people of a State, as also its courts, must in the nature of things be more familiar with such facts.

Id. at 367-68; *accord Fallbrook Irrigation Dist.*, 164 U.S. at 159-60 ("[W]hat is a public use frequently and largely depends upon the facts and circumstances surrounding the particular subject-matter . . . .").

In other words, the irrigation measure like that upheld in *Clark* might not be a public use in Connecticut. But while Connecticut is not arid, it does have several older urban areas with seriously declining economic bases, the economic redevelopment of which requires the use of eminent domain. A narrow federal requirement for public use would improperly impose a uniform standard on States facing highly diverse challenges. Maintaining a flexible federal standard permits adaptation of eminent domain to the diverse needs of States, as has been the practice throughout our history.

Petitioners and their *amici* discuss various state court decisions that limit eminent domain. But nothing in the Federal Constitution prevents States from placing greater restrictions on the use of eminent domain as a matter of state constitutional or statutory law, and several have done so. In

rejecting the federal public use claim of one property owner who relied extensively on state precedents, Justice Holmes wrote for a unanimous Court: "If the state constitution restricts the legislature within narrower bounds that is a local affair, and must be left where the state court leaves it." *Strickley*, 200 U.S. at 531.

Washington's constitution, for example, provides an "absolute prohibition against taking private property for private use" (subject to specific exceptions) and also expressly makes "the question of public versus private a judicial question." *Manufactured Housing Communities of Washington v. State*, 13 P.3d 183, 188 (Wash. 2000). Washington's courts thus do not follow *Berman* or *Midkiff* due to the different language of its constitution. *Id.* at 189.

Michigan provides another pertinent example because Petitioners offer *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), as a model for how this Court should construe the federal Constitution. But the history of Michigan's interpretation of its own Takings Clause shows why *Hathcock* should have no influence on interpreting the federal Constitution. Michigan had long viewed economic development not to be a public use; it had even held its own Mill Act to be unconstitutional, in contrast to this Court's construction of the federal Takings Clause. *Compare Ryerson v. Brown*, 35 Mich. 333 (1877) (necessity for general mill act less than in other States) *with Head v. Amoskeag Mfg. Co.*, 113 U.S. at 26 (upholding New Hampshire's Mill Act). The *Hathcock* court's decision turns entirely on its reading of where Michigan law stood when the state constitution was adopted in 1963; it pointedly ignores *Berman* and *Midkiff*, as well as general questions of the balance between individual and community interests. *Hathcock*, 684 N.W.2d at 780-85. It would be bizarre for this Court to accord weight to a

Michigan decision that affords no weight to this Court's precedents.[11]

Most States have anticipated or adopted the general approach to public use charted by this Court, although with variations. *See* 2A P. Nichols, *Eminent Domain* § 7.02[5] (3d ed. 2003, J. Sackman ed.). For example, the court below took a "flexible approach" (Pet. App. 30) but still ruled as a matter of Connecticut constitutional law that a taking would violate the public use clause if "the taking was primarily intended to benefit a private party, rather than primarily to benefit the public." *Id*. at 68. It carefully reviewed the lower court findings and the record before concluding that the project constituted a public use.

This Court's longstanding deference to state and local approaches to public use will not result in any systematic unfairness to property owners. All condemnees receive what the Takings Clause guarantees them: just compensation. Petitioners suggest that homeowners suffer intangible losses that are not compensated, but even if true it would not support a restrictive reading of public use. Rather, the argument bears on the Court's interpretation of "just compensation." *See, e.g.*, *United States v. 564.54 Acres of Land*, 441 U.S. 506, 512 (1979). That issue is not before the Court here.[12]

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[11] In any event, the rule embraced in *Hathcock* provides far too rigid an interpretation of public use for the U.S. Constitution. It is insensitive to the locally determined need for economic development or the care with which it is carried out. The rule applies only when a private entity will own the property, but not to cases where a public entity retains ownership, which would perversely encourage governments to maintain ownership and control of developments that might be better managed by private enterprise. *Hathcock* also protects to the same extent long-term home-owners and short-term speculators in undeveloped land, even though the former might suffer subjective losses but not the latter.

[12] Many States and the Federal Government provide additional funding to condemnees beyond just compensation. For example, Connecticut has

States also place many statutory and constitutional prerequisites on recourse to eminent domain, particularly for economic redevelopment. For example, under Connecticut's urban renewal laws that address blight, local officials may condemn structures that are not substandard, but only if "essential to complete an adequate unit of development." Conn. Gen. Stat. § 8-125(b). The Connecticut Supreme Court reads this provision to require local officials to consider whether existing owners can be integrated into redevelopment projects. *See Pequonnock Yacht Club, Inc. v. City of Bridgeport*, 790 A.2d 1178, 1185 (Conn. 2002). Under Connecticut's economic development laws, the provisions invoked by New London here, local officials must show that condemnations are primarily intended to benefit the public (Pet. App. 68), and provide other reasonable assurances that condemnations will advance the public interest. *Id*. at 71-110, 122-33. Commentators agree that redevelopment projects today are carried out with greater sensitivity to the value of existing communities.[13]

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enacted the Uniform Relocation Assistance Act, Conn. Gen. Stat. § 8-266 *et seq*., under which more than $10 million in relocation assistance is available to Petitioners and other landowners within the Fort Trumbull site (on average more than $100,000 per affected landowner, in addition to fair market value). J.A. 206-07.

[13] *See* Alan Altshuler & David Luberoff, *Mega-Projects: The Changing Politics of Urban Public Investment* 43 (2003) ("solidly entrenched" consensus among local officials that redevelopments "should proceed only if their negative side effects were negligible, or at least fully mitigated"). The excesses of urban renewal during the 1950s and 1960s that Petitioners' *amici* discuss were curbed by federal legislation that fostered more careful consideration of the consequences of demolition, such as the National Historic Preservation Act, 16 U.S.C. § 470 *et seq*., Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 3303(c), and the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq*. These statutes typically also restrict States when they use federal money or require federal approvals for their redevelopment plans.

III. EMINENT DOMAIN IS A VITAL ECONOMIC DEVELOPMENT TOOL FOR MANY COMMUNITIES.

After acknowledging Petitioners' personal dreams and desires, the trial court recognized that the city officials in New London "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." Pet. App. 196. State and local governments across the country face similarly daunting economic challenges, particularly for the poorest members of those communities. Some local economies have been especially hard hit:

> ► Milwaukee, once known as the "toolbox to the world," has been devastated by relentless global competition. African-American males in the city have suffered almost twice the drop in employment that the nation endured during the Great Depression. In one generation, Milwaukee "has turned from a place of unrivaled opportunity for blacks into a locus of downward mobility without equal among other big U.S. cities."[14]

Congress amended the federal urban renewal program several times and finally terminated it in 1974.

Petitioners and their *amici* try to create the impression of an epidemic of abuse by citing to an Institute for Justice document that purports to identify instances of abuse. *E.g.*, Pet. 8 (citing Dana Berliner, *Public Power, Private Gain* (Institute for Justice 2004)); Br. *Am. Cur.* Better Gov't Ass'n 5-6 (same). But the term "abuse" as used in this document includes *any* project in which the land was to be turned over to a private entity (Berliner, *supra*, at 2), a criterion rejected by *Berman*, *Midkiff*, *National Railroad*, and countless other federal and state cases.

[14] Associated Press, *Loss of Manufacturing Jobs Hits Milwaukee's Black Community Hard*, St. Paul Pioneer Press, Dec. 9, 2004, at 3B, *available at* 2004 WL 95865925.

> ► North Carolina residents know firsthand the local devastation caused by the loss of textile jobs to overseas production. During the last ten years, our nation has lost more than half of its textile jobs. This year brings a further lifting of federal protections for U.S. textile mills from foreign competition, thereby "exposing an already troubled industry to the full force of globalization."[15]
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> ► Last year, General Motors announced it will close its Baltimore plant, the most recent blow in a steady decline of the city's manufacturing base. Baltimore's steel industry has been cut by about 90 percent, and during the 1990s the city lost a shipyard and other large employers, forcing city officials "into extreme make-overs they would just as soon have lived without."[16]
>
> ► Missouri lost 94,500 jobs during the 20-month period ending December 2003, the worst rate of decline among the 50 States. A major clothing manufacturer closed its plant due to lower labor costs in Latin America, and other large employers also have left the State for other countries.[17]

Petitioners' *amici* belittle economic development projects as a mere sop to politically connected private interests. *E.g.*, Br. *Am. Cur.* Better Gov't Ass'n 5. This disparaging view reflects a fundamental misunderstanding of local officials. Local governments do not exist to enrich a select few, but to solve problems and provide services that all citizens need and demand. The millions of dollars provided by revitalization

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[15] Paul Blustein, *On Pins and Needles: As Quotas Expire, U.S. Textile Industry Braces for Change*, Wash. Post, Dec. 31, 2004, at E1, *available at* 2004 WL 101233910.

[16] Associated Press, *Loss of Manufacturing Jobs Means a Makeover for Baltimore*¸ AP Newswires, Nov. 17, 2004.

[17] Shashank Bengali, *Loss of Manufacturing Jobs Cuts Especially Deep in Southwest Missouri Town*, Kan. City Star, Feb. 17, 2003, *available at* 2003 WL 4025326.

projects can mean more jobs and more money for vital government services across the board, including more police officers and firefighters, support for senior citizens, better pre-natal care, adolescent pregnancy prevention, more teachers and better-equipped schools, and more effective child-abuse prevention.

Urban waterfront redevelopment like New London's is especially attractive for several reasons. It draws people back from the suburbs and into the city to live and play. It capitalizes on the dramatic improvement in the water quality of our rivers and lakes in recent decades.[18] It creates jobs and tax revenue. It breathes new life into abandoned waterfront factories, warehouses, and shipyards rendered obsolete by economic change. It often includes river walks and other areas of public recreation that provide synergistic benefits and unite the community.[19]

The use of eminent domain often is essential to assemble a critical mass of property needed for development in metropolitan areas because market failures make it impossible for the private sector to do the job alone. These market failures include the difficulty of assembling an appropriately-sized development site due to holdouts; the legal risks associated with cleaning up lightly contaminated "brownfield" sites; clouded property title on key parcels; the need to improve street patterns; and decisions by existing businesses to leave nearby land vacant to prevent competitors from entering the market.[20] Local officials use eminent domain to address these and other market failures by acquiring parcels, providing for

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[18] Douglas M. Wrenn, *Urban Waterfront Development*, 15 St. Mary's L. J. 555, 556 (1984) (improvements in water quality have stimulated waterfront development).

[19] *See id.* at 556-58.

[20] Colorado Municipal League, et al., *Urban Renewal in Colorado* 41-46 (C. White ed., Sept. 2004).

cleanup, clearing title, and removing other obstacles to development.[21] *Amicus* Norquist argues that economic development should be left to the private sector. *See* Br. *Am. Cur*. John Norquist 3. But in many instances market failures require a public-private partnership, including the use of eminent domain, to remove barriers to investment.[22]

Grassroots organizations often support these efforts. In Boston, city officials have worked closely with a non-profit community organization to provide affordable housing and breathe life back into decaying neighborhoods.[23] Eminent domain was the "only way to acquire a coherent area of land on which to implement its plan" because "[d]eveloping only the city-owned land would defeat the goals of critical mass and community-controlled neighborhood redevelopment."[24]

Professor Epstein acknowledges that "holdout risks" can be a serious impediment to economic development that requires the use of eminent domain. *See* Br. *Am. Cur.* Cato Inst. 22. He argues, however, that the market failure caused by hold-outs is "a complete nonproblem" in New London because the

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[21] *Id.*

[22] *Id.*

[23] *See* Elizabeth A. Taylor, *The Dudley Street Neighborhood Initiative and the Power of Eminent Domain*, 36 B.C. L. Rev. 1061, 1077-81 & n.190 (1996) (describing how a non-profit group formed by La Alianza Hispana, Cape Verdean Community House, Casa Esperanza, St. Patrick's Church, and other neighborhood organizations is helping to revitalize a "wasteland" area of "trash-filled vacant lots" less than two blocks from downtown Boston).

[24] 36 B.C. L. Rev. at 1080. *Amicus* Jane Jacobs argues that the private sector can address holdouts because private developers can "use specialized agents" and "negotiate with individual owners in secret" to trick holdouts into selling. Br. 14. Takings jurisprudence, however, should not turn on the availability of deceptive negotiating practices. In contrast, New London's redevelopment occurred in the sunshine of public hearings and media scrutiny.

city could simply build around them. *Id.* at 23. But Petitioners' land is located in the middle of Fort Trumbull peninsula, falls within a floodplain, and needs to be raised by adding fill to allow for new development. J.A. 3-4; Pet. App. 95 n.85. Building around them would leave them literally underground. More fundamentally, this myopic theory would encourage countless holdouts in future projects to exploit their monopoly position over land needed for economic development to secure more compensation than is constitutionally required. Because this compensation would come from the municipal fisc, it would unfairly benefit a few at the expense of the many.

Petitioners argue that the Fort Trumbull project is distinguishable from condemnations for economic development previously approved by this Court, such as those under the Mill Acts, because those early condemnations were location-specific. Pet. Br. 21-23. They blithely assert that hotels and offices are "ubiquitous" and can be built anywhere. *Id.* at 22. But the Fort Trumbull project and other waterfront projects are as location-specific as any mill. The Fort Trumbull project is integrated with the historic state park and economically tied to other facilities in the area that will supply customers to the retail shops. The very purpose of waterfront development is to revitalize areas abandoned by water-dependent industries such as shipbuilding and warehouses that fell into disuse with the rise of jet aircraft, the interstate highway system, and the decline of water-dependent industries.[25]

Petitioners might argue that because they do not challenge the holding in *Berman*, their argument does not jeopardize projects where any portion of the project consists of blighted property. But this position would be unacceptably arbitrary. Federal constitutional authority to assemble land through

[25] *See* Wrenn, *supra*, 15 St. Mary's L. J. at 556-57.

eminent domain for redevelopment should not turn on whether any portion of the land, however small, is blighted. The concept of blight is itself an economic concept, "a pattern of deterioration and decay of economic vitality in cities or neighborhoods." Willem van Vliet, ed., *The Encyclopedia of Housing* 32 (1998). Thus, the line between blight and under-use is sometimes exceedingly blurry, and attempts to distinguish blight elimination from economic development often elevate form over substance. For example, the highly successful Riverside Plaza redevelopment in Estes Park, Colorado, was driven by the need to revitalize the local economy after a devastating flood in 1982. Although certain condemned parcels might have been blighted, the primary purpose was not to remove eyesores, but to re-energize the local economy.[26]

Moreover, limiting eminent domain for redevelopment to blight removal would have the unjust effect of confining condemnation to the dwellings and businesses of the very poor, while immunizing the more affluent. *See* Bruce Fein, *Eminent Domain, Eminent Nonsense*, Wash. Times, Oct. 12, 2004, at A16 (describing the Fort Trumbull project as a "middle class reenactment of *Berman*" and criticizing Petitioners' effort "to make the Constitution pivot on Marxist-like class distinctions" by limiting condemnation for redevelopment to blighted land). It would be capricious in the extreme to read the U.S. Constitution as prohibiting the Fort Trumbull project, but to allow an identical project to go forward in another community simply because a small portion of the development site happens to be blighted.[27]

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[26] *Urban Renewal in Colorado*, *supra* note 20, at 47-48.

[27] To the extent Petitioners' brief might be read to suggest that local officials may condemn *only* blighted parcels, this position was categorically rejected in *Berman*, where the Court upheld the condemnations at issue even though the complainants owned a non-blighted department store. *See* 348 U.S. at 31.

Below, *amici* describe in greater detail two economic redevelopment projects which, like Fort Trumbull, involved condemnation of non-blighted land: the Kansas Speedway and the Canton, Mississippi, auto plant. As is sometimes the case when economic development projects are undertaken pursuant to the democratic process, there were some landowners who opposed these projects and did not sell voluntarily. But their objections do not detract from the enormous public benefits resulting from these projects or the undeniable "public use" to which the land is now being put. Nor was there any certainty that these projects, particularly the speedway, were going to succeed, but succeed they did. Petitioners would preclude every community from enjoying the benefits of similar projects in the future.

A. The Kansas Speedway and Retail Success Story

In 1997, Kansas City, Kansas, and Wyandotte County had been struggling economically for almost fifty years.[28] Government revenues were dropping, and tax rates were climbing, creating "the kind of downward cycle that is hard to reverse."[29] The county had been burdened for generations by poverty, crime, and a stagnant economy.[30]

What changed the fortunes of Kansas City and Wyandotte County are the Kansas Speedway and the retail development that it sparked. In order to save its residents from the consequences of further economic decline like fewer job opportunities, higher taxes, and weakened public services, local officials made the difficult decision to use eminent

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[28] Rick Alm, *Learning From Past Mistakes Paved Way for Kansas Speedway's Success*, Kan. City Star, Oct. 1, 2002, *available at* 2002 WL 26158033.

[29] Dale Garrison, *Biggest Deals of the Past 30 Years*, Ingram's, Jan. 2004, http://www.ingramsonline.com/jan_2004/bigdeals4.html.

[30] *See* Alm, *supra* note 28.

domain to acquire property for the speedway.[31] The public benefits of the speedway and related development are "a glorious success for a once-struggling county."[32]

The speedway's wealth also has been spread throughout the region. One study found that $89.3 million flowed into the local economy on race days at the track during the first season, and the larger metropolitan area reaped "$150 million in economic activity, including $70 million in local workers' wages and $10 million in increased business tax collections."[33] But the most important economic impact of the speedway has come from the retail development that the speedway sparked, a 400-acre retail project called Village West that is "headed toward 10 million visitors a year."[34]

Village West probably would not have been possible without the speedway. As noted by Mayor Carol Marinovich, retailers were reluctant to go to Wyandotte County because of its small population, and local officials needed to create "a destination, a draw, that would bring retail," even without a large population.[35]

The decision to use the speedway as a catalyst for economic development was initially controversial, with critics harping that the project was doomed to failure.[36] But the benefits for the people of Wyandotte County and Kansas City

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[31] Lisa Scheller, *Where Did They Go? Wyandotte Residents Displaced by Kansas Speedway Now Settled In*, Tonganoxie Mirror, July 28, 2004, http://www.tonganoxiemirror.com/section/archive/story/6613.

[32]Lance Dickie, *NASCAR's Lucrative Lure; Is It Right for the Northwest?*, Seattle Times, Sept. 19, 2004 at D1, *available at* 2004 WL 58951653.

[33] Alm, *supra* note 28.

[34] Dickie, *supra* note 32.

[35] Garrison, *supra* note 29. *See also* Dickie, *supra* note 32.

[36] Alm, *supra* note 28.

are now clear. The Village West tourism district will create approximately 4,000 new jobs.[37] Within the next several years, the state and local governments will receive $53 million in annual tax revenue from the development.[38] The once moribund housing market has revived, with single-family housing starts increasing by 146% between 2000 and 2003.[39] In the last seven years, tax rolls have swelled with $700 million worth of new real estate development.[40]

None of these benefits would have occurred without the use of eminent domain. Before the speedway existed, there were no market forces swirling around the 400-acre Village West site, which had previously been "in the middle of a demographically barren nowhere."[41] The government had to create the conditions for economic development, and it had to use eminent domain to do so. Without the efforts of local officials, including the use of eminent domain, the jobs for local residents, the revenue for local businesses, and the funds for local services simply would not exist.

Although some of the former landowners did not want to leave their homes, many support the project seven years later. For example, Joyce Vaught, one of the homeowners whose land was condemned for the speedway, is one of these converts: "At first I was pretty bitter about having to [move] . . . , we'd lived there for so long. But now I love it." She

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[37] Mark Wiebe, *Village West to Get New Tenants*, Kan. City Star, Jan. 29, 2003, *available at* 2003 WL 4023705.

[38] Randy Covitz, *Track is a Green Light for County; Speedway Brings a Lot to Wyandotte*, Kan. City Star, Oct. 9, 2004, *available at* 2004 WL 94408340.

[39] Rox Laird, *Kansas City-Wyandotte County Have Merged—and Become a Top Tourist Destination*, Des Moines Register, Oct. 17, 2004, at O1, *available at* 2004 WL 90799574.

[40] Laird, *supra* note 39.

[41] Alm, *supra* note 28.

also is pleased with how the speedway and Village West area has grown. "It's beautiful and . . . it just amazes me when you go down there to eat how there are all those places and they're busy. It's just a beautiful thing."[42]

B. The Canton Success Story

In the 2000 census, Mississippi ranked 49th in median household income ($31,000), 50th in personal per capita income ($20,000), first in overall poverty (20 percent), and first in child poverty (27 percent).[43] The State recently lost more than 50,000 manufacturing jobs, suffering through "several years of devastating factory closures."[44]

When the Nissan Motor Company chose Madison County, Mississippi, as the site for a major manufacturing plant in 2000, state officials recognized that this could have a transformative effect on the State.[45] Mississippi used eminent domain to acquire the more than 1,400 acres needed for the Nissan plant. Landowners on the site received an average of $18,000 an acre[46] for property that had been selling for about $2,300 an acre a few years earlier.[47] A handful of owners

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[42] Scheller, *supra* note 31.

[43] *See* U.S. Census Bureau, *State Rankings—Statistical Abstract of the United States* (2004), *available at* http://www.census.gov/statab/www/ranks.html.

[44] Barbara Powell, *Economy Will be Barbour's Big Challenge as Governor*, Commercial Appeal, Nov. 16, 2003, at B4, *available at* 2003 WL 66406270.

[45] *See, e.g.*, Reed Branson, *Mississippi OKs $295 Million in Incentives for Nissan*, Commercial Appeal, Nov. 7, 2000, at A1, *available at* 2000 WL 27940695.

[46] David Firestone, *Black Families Resist Mississippi Land Push*, N.Y. Times, Sept. 10, 2001, at A10.

[47] John Porretto, *Last Owners Settle in Nissan Land Fight*, Commercial Appeal, Apr. 10, 2002, at DS5, *available at* 2002 WL 3469169.

objected to the use of eminent domain for the Nissan project, but they eventually settled with the State.[48]

The State's use of eminent domain authority has greatly benefited its residents: "[T]he arrival of Nissan in Madison County breathed new life into Mississippi."[49] The Nissan plant employs 5,300 workers at full capacity.[50] These workers earn hourly wages of between $13.25 and $25 (between $27,500 and $52,000 a year, well above the state-wide per capita income), plus competitive fringe benefits.[51] Tens of thousands of more jobs are expected just in Madison County, with 16,200 predicted by sometime this year, and 29,000 by 2010.[52]

Not surprisingly, Madison County has felt the most direct impact from the plant. "Madison County, especially its southern areas, has become a synonym for growth."[53] The "assessed value of land, property, vehicles, and utilities in the county exceeded $1 billion for 2004, up 36 percent from the year before."[54] This higher tax base means more money for public services that benefit county residents.

The Nissan plant's benefits have also spread beyond Madison County's borders. The plant's workforce comes from

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[48] *Id.*

[49] Lynne Jeter, *Driving Change: Nissan Adds Punch to Region's Economy*, Miss. Bus. J., Nov. 29, 2004, at S12, *available at* 2004 WL 87315606.

[50] *Id.*

[51] Josee Valcourt, *Southern Auto Plants: Fringe Benefits Keep Packages Competitive*, Clarion-Ledger, Feb. 22, 2004, at 1C.

[52] Jeter, *supra* note 49.

[53] Eric Stringfellow, *Utility Chief Needs New Economic Agenda*, Clarion-Ledger, July 6, 2004, at 1B.

[54] *Glimpse of the Future 2: Residents Describe Plant's Massive Impact on Area*, Montgomery Advertiser, Aug. 22, 2004, *available at* 2004 WL 84752391.

eighty of the State's eighty-two counties, including many places that were hard hit by other plant closures.[55] The higher-than-average wages paid by Nissan and its suppliers could eventually boost manufacturing wages throughout the entire State, as other employers compete for skilled workers.[56] "It's a reality that Nissan's being here is changing things," a representative for the Mississippi Manufacturers Association told a reporter. "It's offering choices and opportunities for people."[57]

For individual Mississippians, the plant has been life-transforming: "Before I came to Nissan, it was like being covered over with dirt. I was in debt. I was buried," said one Nissan worker.[58] Another worker, who used to make $9 an hour handling raw chicken parts on an assembly line, will soon earn $21 an hour at Nissan. "My job has really changed my life," she said, "It keeps me going."[59]

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[55] Josee Valcourt, *Spending $365 million: Is State's Investment in Nissan Paying Off?*, Clarion-Ledger, Dec. 21, 2003, at 1C.

[56] Lynne Jeter, *The Nissan Effect, A Better Mississippi All Around*, Miss. Bus. J., June 23, 2003, at 19, *available at* 2003 WL 12776857.

[57] *Id.*

[58] Gary Pettus, *Nissan + 1, Thanks to Better Pay, Bills Lighter, Dreams Brighter, Workers Say*, Clarion-Ledger, May 30, 2004, at 9I.

[59] Valcourt, *supra* note 55.

CONCLUSION

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

Respectfully submitted,

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