No. 04-108

IN THE

Supreme Court of the United States

SUSETTE KELO, THELMA BRELSKY, 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 the State of Connecticut

BRIEF OF AMICUS CURIAE NEW LONDON R.R. CO., INC. IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

New London RR Co., LLC (hereinafter "NLRR") is a privately owned entity that is the owner of a parcel of real property in the City of New London, Connecticut, upon which there are two historic and architecturally unique buildings known as Union Station. Union Station is leased in part to Amtrak and Greyhound Bus Lines and provides access to municipal bus service and taxi service. Only 15% of the building is leased to Amtrak and Greyhound; the balance is being renovated for use by private tenants including, potentially, a museum. Productive use is currently being made of Union Station. Besides acting as a transportation center, Union Station also includes office space and public spaces. Thus, it is a productive, privately owned parcel.

The City of New London issued a Notice and Statement of Compensation in May 2003, indicating its intent to take by eminent domain an easement across the land of NLRR for the purpose of constructing an enclosed, elevated walkway that would connect a parking garage to the land owned by Cross Sound Ferry, Inc. (hereinafter "Cross Sound"). The walkway would cross the land owned by NLRR as well as the railroad lines owned by Amtrak and other railroad entities. *Amicus* NLRR has filed suit against the City of New London seeking a permanent injunction enjoining the City from acquiring an interest in NLRR's property and from proceeding with the construction of the pedestrian walkway. The case is currently pending in the

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[1] Pursuant to Rule 37, blanket letters of consent from the parties have been filed with the Clerk of the Court. In accordance with Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than the *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

Superior Court for the Judicial District of New London. No findings have yet been made by the Superior Court.

The design and location of this sky-bridge were first proposed by Amtrak in the late 1990s under substantially different circumstances, when Amtrak intended to build a Sky Station atop the structure over the railroad tracks. Thus the bridge would have served both the railroad patrons as well as the ferry patrons. In addition, the New London Development Corporation planned a new Neptune Building adjacent to the parking garage. Both construction projects have been abandoned. The City alleges that the proposed walkway will also connect to a public park, but it actually will only connect to the land owned by Cross Sound, where Cross Sound intends to build a ferry terminal. The pedestrian walkway would not provide easier access to the train station or the public park since both can more easily be accessed on the street level. The only true beneficiary of the pedestrian walkway would be Cross Sound.[2]

The owners and agents of Cross Sound have applied political pressure to the City of New London in order to secure the easement and construct the walkway. The City's proposal is driven not by public interest, but by political influence applied by private interests. In fact, Cross Sound is subsidizing the funding for the pedestrian walkway and the City of New London will spend little to none of its own funds to build the walkway.

The walkway is actually intended to benefit primarily Cross Sound. Any public benefit of the walkway will be incidental and illusory, as it will discourage members of the public from patronizing public and private amenities and

[2] These facts are as alleged in *amicus* NLRR's complaint against the City of New London, pending in a Connecticut Superior Court. The court has not made any findings of fact.

establishments in the City of New London. The structure, as designed, will be as close as five feet to Union Station and will obstruct its appearance and diminish its historic and aesthetic value. It will render unusable the current parking area for Greyhound buses, requiring that they be loaded and unloaded on the public street, creating safety hazards and obstructing vehicular traffic. It will also render unusable a portion of NLRR's land which is used for public parking for those who use the public transportation facilities at Union Station.

The stated purpose of the walkway, according to Cross Sound, is to permit ferry passengers to "seamlessly transfer (from trains and cars) without ever having to step outside." Such a seamless transfer would only increase the frustration of local merchants who already see more than a million passengers a year get off the ferries and exit directly out of town. The plan is not being driven by the City's needs, but by the economic needs of Cross Sound, a private entity which has a purely seasonal interest in transporting its passengers to its high speed ferries.

This Court's decision in *Kelo* will have an impact on the interpretation of takings law in all contexts, not just that of economic development. NLRR is in a unique position to comment on this matter in that it is also having land condemned by the City of New London, where the public purpose is questionable. As in the case before this Court, the City of New London is attempting to take land by eminent domain based on political motivations, in order to please a more powerful private entity. In the present case, that entity is Pfizer; in NLRR's case, that entity is Cross Sound. This Court's decision will have an impact on NLRR's pending case against the City of New London as it will define the limits of public use and determine the standard of review to be applied when reviewing a taking of land by a

municipality. A stringent standard for public use needs to be articulated by this court, not just for application to cases of condemnation for purposes of economic development, but for all condemnation cases, particularly where the taking disproportionately benefits a private party. As a party to a condemnation action not premised on economic development, NLRR has an interest in how this Court's decision will affect the level of scrutiny used by the court in determining whether the taking of its land is truly for the public use.

SUMMARY OF ARGUMENT

The Supreme Court's interpretation of the term "public use" and the scrutiny that is applied to takings cases will have a profound effect not just on takings for economic development, but on all takings law. The broader issue to be decided by this Court is how much deference should be given to a municipality's determination that a use is for the public good. One of the fundamental issues in the case to which NLRR is a party is the procedure by which the court balances public and private interests when property is acquired by eminent domain. *Amicus* NLRR urges this Court to set forth a clear statement that when a taking benefits private interests, a heightened scrutiny standard of review will be applied. The potential for abuses in the exercise of eminent domain is high when a private party will benefit from the taking; thus, a heightened scrutiny standard of review is necessary to guard against such abuses. Without heightened scrutiny, a municipality has unbridled discretion to define public use in any manner that fits its decision to condemn, leaving it open to political pressure from private entities. The effect of such political pressure has been amply demonstrated by the conduct of the City of New London in its attempted condemnation of land in the Fort Trumbull area

as well as in its attempted condemnation of NLRR's land. In both instances, the City has based its decision to condemn land on the wants and needs of politically powerful, private entities.

ARGUMENT

I. The Appropriate Level of Scrutiny to Apply to Takings Cases in Which a Private Party Will Benefit, Whether or Not Based on Economic Development, is Heightened Scrutiny.

The issue in this appeal goes beyond just whether economic development meets the public use requirement. The broader issue is how much deference should be given to a municipality's determination that a use is in the public good. If *Kelo v. New London* is upheld, the door is open for a municipality to define public use as expansively as it wishes without meaningful judicial review to check its power. The *Kelo* majority held that as long as the appropriate authority had *rationally* determined that the taking would promote economic development, it is a valid public use. *Kelo v. City of New London*, 843 A.2d 500, 528 (2004). The dissent in the Connecticut Supreme Court suggested the application of heightened scrutiny in the form of a four-prong test. *Id.* at 587-91. Some form of heightened scrutiny is the correct standard to apply. However, this heightened scrutiny standard of review should not be limited to just economic development takings, but should apply to all takings cases where a private party stands to benefit from the exercise of eminent domain against another private entity.

A. Background on the Connecticut Supreme Court Majority and Dissent Views on the Level of Scrutiny to Apply to Economic Development Takings Cases.

The majority of the Supreme Court for the State of Connecticut in *Kelo* concluded "that an economic development plan that the appropriate legislative authority *rationally has determined* will promote municipal economic development, constitutes a valid public use for the exercise of the eminent domain power under both the federal and Connecticut constitutions." *Kelo*, 843 A.2d at 528 (emphasis added). The majority applied a level of scrutiny akin to rational basis. The implication of applying a rational basis standard of review to takings cases is that a municipality is given unbridled authority to determine what it considers a public use, without meaningful judicial review. The result is that a municipality can make its decisions on whether to take land by eminent domain, an action which deeply affects the property interest of another, based on political pressure from a private party.

Furthermore, prior to *Kelo*, Connecticut precedent supported a court's authority to determine whether the implementation of a claimed public use would actually be for the public use in the specific case. *See Connecticut College v. Calvert*, 88 A. 633, 636 (Conn. 1913). Thus, under existing precedent, it would have been appropriate for the court in *Kelo* to examine whether or not the use "is or will be administered as a public or as a private use." *Connecticut College*, 88 A. at 636. As the dissent in *Kelo* pointed out, the majority opinion overruled the precedent which provides that "a trial court charged with determining whether the *actual* use being made of the property taken will in fact be for a public or private purpose need not defer to the views of the local legislative body." *Kelo*, 843 A.2d at 583.

The dissent of the Connecticut Supreme Court in *Kelo*, written by Justice Zarella, proposed heightened scrutiny in the form of a four-prong test to apply to takings by economic development to determine whether or not the taking is truly for the public use. *Kelo*, 843 A.2d at 587-91. The first prong would encompass a consideration of whether the statutory scheme which authorized the taking is facially constitutional. The burden of proof would be on the party opposing the taking to prove that it is unconstitutional. *Id.* at 587-88.

If the statutory scheme passes the facial test, the court moves to the second prong of the test. Under the second prong, the party opposing the taking has the burden of proving that the primary intent of the plan is to benefit private, rather than public, interests. *Id.* at 588.

Under the third prong, the burden shifts to the *taking party* to prove that the specific economic development will in fact result in a public benefit. *Kelo*, 843 A.2d at 588. In evaluating the third prong, the dissent recommended that the taking party "assume the burden of proving, by clear and convincing evidence, that the anticipated public benefit will be realized. Consideration under this proof involves an independent evaluation of the evidence by the court, with no deference to the local legislative authority." *Id.* at 596.

If after evaluating the third prong, it is determined that the taking *will* be for a public purpose, then the court moves to the fourth prong of the test. Under the fourth prong, the party opposing the taking must prove that the specific condemnation at issue is not reasonably necessary to implement the plan. *Id.* at 591.

The application of this test to the facts of *Kelo* led the dissent to conclude that the taking was not constitutional

because the evidence was not clear and convincing that the property taken would actually be used for a public purpose. *Id.* at 601.

It should be noted that the dissent appeared to limit this four-prong test to takings for economic development purposes. However, the test can and should be adapted to apply to all takings cases in which a private party stands to benefit. There is a strong possibility of abuse in all cases where a private party benefits from a municipality's exercise of eminent domain against another private party, not just in those instances where the taking is for economic development purposes. The dissent even recognized that the "adoption of a burden shifting analysis also is consistent with the takings procedure followed in other jurisdictions that do not place the burden of attacking a routine taking on the property owner, as Connecticut does." *Kelo*, 843 A.2d at 591. A standard of review which does not give complete deference to local legislative bodies has been adopted by other states in takings cases not based on economic development. As the *Kelo* dissent points out, "judicial review to determine whether a particular use will *in fact* be for a public or private purpose has been an accepted practice for nearly a century." *Id.* at 585.

B. Other Jurisdictions Have Given Less Deference to Local Legislative Determinations of Eminent Domain.

While Connecticut is not the only jurisdiction to allow municipalities great deference in their decisions to condemn land, many jurisdictions look at the actual use as well as the intent of the municipality in taking the land. These jurisdictions give less deference to the local legislative body's determination and perform a more stringent judicial

review of the taking. Those jurisdictions which perform a more exacting review demonstrate proper ways to review a taking of private property for a use which is alleged to benefit the public. While not specifically called heightened scrutiny by these jurisdictions, the court's independent analysis of whether the use will actually benefit the public, without deference to the municipality's determination, functionally serves the same purpose.

The Washington Supreme Court, in considering whether a particular taking was for the public use, looked at the facts and circumstances surrounding the taking to determine whether the use of the property would actually be for the public use. *State ex. rel. Tacoma Industrial Co. v. White River Power Co.*, 82 P.150 (Wash. 1905). The court held that the general public must have a definite and fixed use of the property to be condemned; that "this public use must be clearly a needful one for the public, one which cannot be given up without obvious general loss and inconvenience"; and that "it must be impossible, or very difficult at least, to secure the same public uses and purposes other than by authorizing the condemnation of private property." *Id.* at 152.[3]

Washington has continued to apply this test over the years and presently requires that "[a] decree of public use and necessity to condemn may be entered only when (1) the use is really public, (2) the public interests require it, and (3) the property to be condemned is necessary for the purpose." *Schreiner v. City of Spokane*, 874 P.2d 883, 887 (Wash. Ct. App. 1994). The Supreme Court of Washington has acknowledged that "not every legislative declaration of

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[3] *Amicus* recognizes that the taking at issue in the White River case would have condemned the property for the use of a private corporation. Nonetheless, the examination of the circumstances surrounding the taking can be applied in other takings cases.

public use will survive scrutiny by the court, which has, under the constitution, the responsibility of determining whether the use be really public." *Petition of Seattle*, 638 P.2d 549, 558-599 (Wash. 1981) (affirming trial court's holding that project which condemned private land for the principal reason of providing more shopping areas was not a valid public use). Thus, Washington has looked beyond whether the local legislative body's determination was rational and requires a showing that the public interest requires the public use and that the taking of the particular property is necessary.

Delaware has also looked at the actual effects of a project in determining whether it is truly for the public use. The Delaware Supreme Court has held that "a primary purpose determination in a constitutional context will normally turn upon the 'consequences and effects' of a proposed project. However . . . a reviewing court may consider evidence concerning the 'underlying purpose' of a public authority in proposing a project." *Wilmington Parking Auth. v. Land with Improvements*, 521 A.2d 227, 232 (Del. 1987). Delaware has held that private property may not constitutionally be condemned "if the primary purpose of the condemnation is the transfer of the property to private use." *Randolph v. Wilmington Hous. Auth.*, 139 A.2d 476, 483 (Del. 1958).

Illinois, even though noting that economic development is an important public purpose, has held that "to constitute a public use, something more than a mere benefit to the public must flow from the contemplated improvement." *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*, 768 N.E.2d 1, 9 (Ill. 2002), *cert. denied*, 537 U.S. 880 (2002) (finding that it was not a sufficient public purpose that the taking would allow a

private corporation to grow, prosper and contribute to positive economic growth in the region).

Arkansas courts have also not allowed municipalities unfettered deference in reviewing whether a use is truly for the public. "Whether or not a proposed use for which private property is to be taken, even with legislative sanction, is a public or private use is a judicial question which the owner has a right to have determined by the courts." *City of Little Rock v. Raines*, 411 S.W.2d 486, 493 (Ark. 1967).

Kentucky has held that "no 'public use' is involved where the land of A is condemned merely to enable B to build a factory or C to construct a shopping center." *City of Owensboro v. McCormick*, 581 S.W.2d 3, 8 (Ky. 1979). The court expressed concern that:

> [i]f public use was construed to mean that the public would be benefited in the sense that the enterprise or improvement for the use of which the property was taken might contribute to the comfort or convenience of the public, or a portion thereof, or be esteemed necessary for their enjoyment, there would be absolutely no limit on the right to take private property. It would not be difficult for any person to show that a factory or hotel or other like improvement he contemplated erecting or establishing would result in benefit to the public, and under this rule the property of the citizen would never be safe from invasion. *Id.* at 6.

The Supreme Court of South Carolina has also examined whether or not the property to be condemned would truly be used for public use. The

court reasoned that the "involuntary taking of an individual's property by the government is not justified unless the property is taken for public use – a fixed, definite, and enforceable right of use, independent of the will of a private lessor of the condemned property." *Georgia Dept. of Transportation v. Jasper County*, 586 S.E.2d 853, 857 (S.C. 2003).

New Hampshire courts examine the proposed condemnation to determine "whether the expenditures will be primarily of benefit to private persons or private uses, which is forbidden, or whether they will serve public purposes for the accomplishment of which public money may properly be used." *Merrill v. City of Manchester*, 499 A.2d 216, 217 (N.H. 1985). In *Merrill*, the court conducted an independent examination of the extent to which the proposed project would benefit the public. *Id.*

C. Some Jurisdictions Have Specifically Applied "Heightened Scrutiny" to Takings Which Will Benefit Private Interests.

Some jurisdictions apply a type of heightened scrutiny to takings which will benefit private interests. Although not identical to the four-prong, burden-shifting form of heightened scrutiny suggested by the *Kelo* dissent, these forms place more of a burden on the taking party to show that the use will benefit the public and do not allow the local legislative body complete deference.

Michigan has applied a type of heightened scrutiny to eminent domain cases where a specific private interest stands

to benefit from the taking. In *Poletown Neighborhood Council v. City of Detroit*, the court held that, where "the condemnation power is exercised in a way that benefits specific and identifiable private interests, a court inspects with heightened scrutiny the claim that the public interest is the predominant interest being advanced." 304 N.W.2d 455, 459-460 (Mich. 1981). Interestingly, the majority opinion of the Connecticut Supreme Court in *Kelo* relied heavily on *Poletown* to support its holding that revitalizing the economic base of an area is primarily a public purpose, with the private interest being incidental. *Kelo*, 843 A.2d at 528-31. Yet the *Kelo* majority declined to follow *Poletown*'s standard of applying heightened scrutiny when specific and identifiable private interests will be benefited by the taking. *Id.* at 531.

Notably, just months after the Connecticut Supreme Court decided *Kelo*, *Poletown* was overruled by the Michigan Supreme Court in *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004). The *County of Wayne* court essentially adopted the position of the dissent in *Poletown*, which argued: "this Court has *never* employed the minimal standard of review in an eminent domain case which is adopted by the [*Poletown*] majority . . . . Notwithstanding explicit legislative findings, this Court has always made an *independent* determination of what constitutes a public use for which the power of eminent domain may be utilized." *County of Wayne*, 684 N.W.2d at 785, citing *Poletown*.

The Michigan Supreme Court, in *County of Wayne*, held that "[t]o justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain." *County of Wayne*, 684 N.W.2d at 786. The court held that

the condemnations at issue, which would condemn the land of private owners to build a technology park, were unconstitutional because they did not meet the public use requirement. The Michigan Supreme Court further noted that "if one's ownership of private property is forever subject to the government's determination that another private party would put one's land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, 'megastore,' or the like." *Id.* at 786.

The Supreme Court of North Dakota followed the precedent of Michigan in *Poletown* and applied heightened scrutiny where the condemnation power was being used in a way that benefited specific and identifiable private interests. *City of Jamestown v. Leevers Supermarkets*, 552 N.W.2d 365, 373 (N.D. 1996). The court held that in order for a taking to be valid, "the project must be primarily for a public rather than private purpose." *Id.* at 374.

Florida has placed the burden on the *taking party* to show that the use is truly a public use and that the taking is reasonably necessary. The Supreme Court of Florida has noted that:

> [t]he power of eminent domain is one of the most harsh proceedings known to the law. Consequently, when the sovereign delegates this power to a political unity or agency, a strict construction must be given against the agency asserting the power. The burden is on the condemning authority to establish a public purpose and reasonable necessity for the taking. *Baycol, Inc. v. Downtown Dev. Auth.*, 315 So.2d 451, 455 (Fla. 1975).

In *Baycol*, the Florida Supreme Court reversed the order taking the petitioner's property, finding that, "without the private development there would be no public need for the parking cited as the sole basis for condemnation." *Id.* at 458. The court examined what the actual use of the property would be and determined that there must first be a showing of public necessity or public use before eminent domain can be utilized. *Id.*

As the dissent in *Kelo* explains, Connecticut's general procedure for condemning land under any circumstances is harsh on the landowner. In Connecticut, the burden is on the property owner attacking a taking. *Kelo*, 843 A.2d at 591. In Connecticut, the taking party only needs to allege that the taking is necessary for a public use and the burden is on the property owner to attack it by filing an injunction. *Id.* at 592. In many other jurisdictions, the taking party must file a petition in court to take property, in which the property owners are joined. *Id.* at 592; 27 AM. JUR. 2D *Eminent Domain* § 479 (2004). A hearing is then held where the court determines if the taking party has the right to condemn the land and sometimes the necessity of the condemnation. *Kelo*, 843 A.2d at 592; 27 AM. JUR. 2D at § 479. The burden in these jurisdictions is on the taking party to establish its right to condemn. *Kelo*, 843 A.2d at 592; 27 AM. JUR. 2D at § 479.

D. Heightened Scrutiny Must Be Applied to Eminent Domain Cases or the Fifth Amendment of the Constitution Loses Its Meaning.

This Court has previously taken the approach that as long as "the exercise of 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." *See Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 241 (1984). In the present case, the court is reconsidering that standard as it applies to economic redevelopment takings. However, whatever standard of review this Court decides to apply in economic redevelopment takings ought to apply to other takings actions where private interests stand to benefit as well, given the same potential for municipal overreaching.

The four-prong test set out by the dissent in *Kelo* provides a methodical manner in which to assess whether the proposed use is truly for the benefit of the public. The dissent's four-prong test requires the court to look at whether the project is *actually* likely to produce a public benefit, not just whether the condemning party *intends* it to produce a public benefit. The petition for certiorari in this case was granted to restore meaning to the public use requirement of the United States Constitution. While the specific issue for this Court to determine is the appropriate checks on eminent domain power in reviewing condemnations for private economic development, the standard set forth by this Court will be influential in all takings cases, including the one to which *amicus* is a party.

A heightened scrutiny standard should be adopted not just when the purpose of a taking is economic development, but in any takings case in which a private party is alleged to receive a disprportionate benefit at the expense of a property owner whose property is subject to condemnation. Otherwise the individual municipality can determine what it considers a public purpose without meaningful judicial review. The reviewing court should examine what the real public benefit is going to be; otherwise municipalities will be allowed to succumb to pressure by more powerful or wealthy private interests. Based on the decision of the Connecticut Supreme Court in *Kelo*, the public use requirement of the

Constitution has virtually no meaning since any determination by a municipality with any rational explanation will meet the standard.

In *Kelo*, Pfizer, by wanting to expand into New London, was able to influence the City of New London's development plan. Likewise, Cross Sound's plans to build a terminal and its desire for the pedestrian bridge have influenced the City of New London's development plan in the action to which *amicus* NLRR is currently a party. Private entities cannot be allowed to control a municipality's decisions on when and where to take land by eminent domain. If such a policy is condoned by this Court, any wealthier private party could persuade a municipality to condemn property so that it can be used for its own private purposes, with the argument that it will benefit the public.

If a municipality is given unbridled discretion to determine if a condemnation is for the public use, local politics and pressure can lead to a municipality taking the land of one private party to its detriment and to the benefit of another private party. The Fifth Amendment of the Constitution cannot be interpreted so broadly as to allow the taking of private property for only ancillary public benefit. Allowing a municipality unfettered discretion to determine what it considers public use is more than just state experimentation; it is municipality experimentation. This court must articulate a heightened standard of review for public use determinations in order to restore some amount of uniformity to takings law.

The Connecticut Supreme Court dissent's four-prong test should be adopted, but not just to apply to condemnations for economic development, but for all condemnation actions in which a private interest stands to benefit from the taking. The condemnation currently

affecting *amicus* NLRR is not for economic development in the sense of creating new jobs or increasing tax revenues, but rather is to benefit the private business of Cross Sound over the private interest of private landowners. There should be grave concern with the broad definition of public use being employed by the City of New London, regardless of whether the stated purpose is for economic development. There need to be guidelines set out by this Court so that a municipality cannot define public use in any way it wishes without a meaningful form of judicial review.

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of the State of Connecticut should be reversed.

Respectfully Submitted,

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