No. _____

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 Petition For A Writ Of Certiorari To The Supreme Court Of Connecticut

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX VOLUME I, PAGES 1 TO 190

SAWYER LAW FIRM, LLC
SCOTT W. SAWYER
The Jill S. Sawyer Building
251 Williams Street
New London, CT 06320
(860) 442-8131

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
SCOTT G. BULLOCK*
DANA BERLINER
Suite 200
1717 Pennsylvania Ave., NW
Washington, DC 20006
(202) 955-1300
Counsel for Petitioners

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

What protection does the Fifth Amendment's public use requirement provide for individuals whose property is being condemned, not to eliminate slums or blight, but for the sole purpose of "economic development" that will perhaps increase tax revenues and improve the local economy?

PARTIES TO THE PROCEEDINGS

Petitioners, who were plaintiffs below, are Susette Kelo; Thelma Brelesky; Pasquale Cristofaro; Wilhelmina and Charles Dery; James and Laura Guretsky; Pataya Construction Limited Partnership; and William Von Winkle.

Respondents, who were defendants below, are the City of New London, Connecticut; and the New London Development Corporation.

RULE 29.6 DISCLOSURE STATEMENT

None of the Petitioners is a corporation.

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The decision of the Supreme Court of Connecticut of which review is sought is reported at *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004) and republished in the Appendix at App. 1-190. The decision of the Superior Court of Connecticut, Judicial District of New London, is unreported and reproduced in the Appendix at App. 191-424.

JURISDICTION

The decision and judgment of the Supreme Court of Connecticut was entered on March 9, 2004. The motion for reconsideration filed by the Petitioners was denied on April 20, 2004. (App. 427). This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case implicates the public use provision of the Takings Clause of the Fifth Amendment to the United States Constitution. App. 428. The statute involved is Connecticut General Statutes, Chapter 132, §§ 8-186 *et seq.,* "Municipal Development Projects," reproduced in the Appendix at App. 429-453.

STATEMENT

Petitioner Wilhelmina Dery was born in her house in the Fort Trumbull neighborhood of New London, Connecticut in 1918. She lives there now, as she has for her entire

life, along with her husband of over fifty years and the rest of her family. She and her neighbors, the other Petitioners in this case, stand to lose their homes through eminent domain to make way for private business development. Mrs. Dery's city government and a private development corporation hope that the new development projects will create more tax revenue and jobs than the homes that currently occupy this peninsula of land along the Thames River. Petitioners have poured their labor and love into their homes. They are places where they have lived for years, have raised their families, and have grown old. Petitioners do not want money or damages. They merely seek to stop the use of eminent domain to take away their most sacred and important of possessions: their homes.

The Fort Trumbull neighborhood originally consisted of approximately 115 land parcels with a mixture of homes and small businesses. App. 4. On January 18, 2000, respondent City of New London ("the City") adopted the Fort Trumbull Municipal Development Plan ("development plan") as prepared by respondent New London Development Corporation ("NLDC"), a private, nonprofit development corporation. App. 8. The development plan covers approximately ninety acres and is divided into seven "parcels" of land slated for different development projects. App. 5-6. The instant case concerns homes located on two parcels of the plan area: four properties owned by three Petitioners are situated on Parcel 3, which is currently slated for development as private office space and parking,[1] while eleven homes owned by four Petitioners

[1] The parcel was also originally slated for a health club, but that use has been moved to Parcel 1.

are situated on Parcel 4A, which is designated in the development plan as "Park Support." *Id*.

The NLDC will own the land located in the development area but lease it to private developers. App. 6. At the time of the trial, the NLDC was negotiating with Corcoran Jennison, a private developer, to enter into a ninety-nine year lease for development projects in parcels 1, 2, and 3 of the area. App. 6-7. Under the terms of the lease, Corcoran Jennison would pay the NLDC the rent of $1 per year. App. 7. Corcoran Jennison would then develop the land and select tenants for the projects. *Id*.

When it adopted the development plan, the City delegated to the NLDC the power of eminent domain to acquire properties within the Fort Trumbull development area. App. 8. In October 2000, the NLDC voted to use eminent domain to acquire the remaining properties in the Fort Trumbull area from owners who would not sell voluntarily, including homes owned by Petitioners. *Id*. Starting in November 2000, the NLDC began to file the condemnation actions against Petitioners that gave rise to the present case. *Id*. The NLDC brought all condemnation actions in this case not under Connecticut's urban renewal law (C.G.S. Chapter 130, §§ 8-124, *et seq.*), which permits the use of eminent domain to clear slums or blighted areas, but rather under C.G.S. Chapter 132, §§ 8-186, *et seq.*, which governs Municipal Development Projects.

Under Connecticut law, property owners in the context of an eminent domain action can only challenge the amount of compensation offered, not the right of the government to take property. So, wishing to keep their homes, Petitioners brought the instant action on December 20, 2000 seeking

declaratory and injunctive relief, and other relief under C.G.S. Chapter 916 and 42 U.S.C. § 1983. App. 8. Petitioners alleged that Respondents' exercise of eminent domain violated the U.S. and Connecticut Constitutions, C.G.S. Chapter 132, and the New London City Charter.

Following a seven-day bench trial in 2001, the New London Superior Court issued a 249-page Memorandum of Decision (App. 191-424), which granted permanent injunctive relief and dismissed the eminent domain actions against the Petitioners who live on Parcel 4A of the development area while upholding the takings of the properties of the Petitioners on Parcel 3. App. 9, 424. With regard to Parcel 4A, the trial court ruled that Respondents had not demonstrated necessity for the condemnations and that the condemnations lacked assurances of future public use, because the Respondents had not identified the future use. App. 343-350. The trial court ruled in favor of the Respondents on the remaining claims. Although the trial court ruled against the Parcel 3 property owners, it granted an injunction, allowing the owners to remain in their homes while the case was resolved in the appellate courts. App. 412-424.

An appeal by the Petitioners and a cross-appeal by the Respondents to the Connecticut Appellate Court followed. The Supreme Court of Connecticut transferred the appeal and cross-appeal to itself pursuant to C.G.S. § 51-199. App. 2 n.3. On March 9, 2004, a four-justice majority of the Connecticut Supreme Court affirmed in part and reversed in part, holding that none of the challenged condemnations violated the U.S. or Connecticut constitutions or C.G.S. Chapter 132. App. 3. Three of the justices concurred in part with the majority but dissented on the "majority's

conclusions . . . pertaining to private economic development as a public use under the Connecticut and federal constitutions and the taking of [Petitioners'] properties on parcels 3 and 4A." App. 135-36.

The majority opinion in this case held that the public use clauses of the U.S. and state constitutions authorize the use of eminent domain for economic development that will supposedly increase tax revenue and improve the local economy. App. 25-79. The standard adopted by the majority focused on the intent and motives of the government in determining whether the condemnation satisfied the public use requirement of the U.S. Constitution. App. 28, 39, 42. In contrast, the dissenting opinion, while agreeing that economic development was validly declared a public purpose under Connecticut law, went on to establish a test that evaluated whether the primary intent of the economic development plan was to benefit public interests; whether a specific economic development will, in fact, result in public benefit; and whether the condemnation is reasonably necessary to implement the plan. App. 134-190. The dissenting justices found that the condemnations of Petitioners' homes failed that test.

The Connecticut Supreme Court denied Petitioners' motion for rehearing on April 20, 2004. App. 427. On the same day, the Court stayed its judgment pending resolution of the instant petition for certiorari or, if applicable, a decision on the merits. App. 425-426.

Petitioners do not seek review by this Court of the other issues decided by the Connecticut Supreme Court but rather petition for review of the primary issue in this case: the limits under the public use requirement of the

U.S. Constitution when government takes land for private economic development.

REASONS FOR GRANTING THE WRIT

I. THIS CASE RAISES A SUBSTANTIAL FEDERAL QUESTION ON AN ISSUE OF NATIONAL IMPORTANCE CONCERNING THE LIMITS ON EMINENT DOMAIN AUTHORITY FOR PRIVATE ECONOMIC DEVELOPMENT UNDER THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION.

This is not a case that concerns the use of eminent domain for a traditional public use such as a road or public building; nor does it concern the use of eminent domain for the purpose of urban renewal/blight removal such as the condemnations upheld in *Berman v. Parker*, 348 U.S. 26 (1954), and its progeny. Rather, this case presents a vital constitutional question that this Court has never before addressed: whether the public use clause of the Fifth Amendment to the U.S. Constitution authorizes the exercise of eminent domain to help a government increase its tax revenue and to create jobs.

The use of eminent domain for the creation of tax revenue and jobs is the broadest expansion of eminent domain authority yet realized. Urban renewal condemnations are limited to slums and blighted areas. But economic development condemnations can occur in any area, as long as the city can conceive of a possibly more profitable use of the property that might therefore produce more tax dollars. Any home can be condemned because few if any homes generate as much tax revenue or as many jobs as an office building; any small or medium-sized business

can be condemned because the land will always produce more taxes as a larger business.

The Connecticut Supreme Court ruled that this Court's decisions in *Berman* and *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984), supported the expansion of eminent domain authority to include takings for private economic development projects. Petitioners are homeowners who ask this Court to grant this petition to determine the constitutional limits on the use of eminent domain for private development.

The dissenting justices in this case captured precisely the expansion of eminent domain countenanced by the majority and the significance of this constitutional question facing the courts:

> '[A]s an incident to its sovereignty, the Government has the authority to take private property for a public purpose.' At the time that our federal constitution was written, a government taking meant just that, namely, a taking for a government purpose such as for a public building. As the population grew and the collective needs of our society changed, however, the takings power was construed more broadly. Government authorities condemned private properties not just for a "public use," but also to achieve a "public benefit" such as the elimination of urban blight. Today, an even more expansive interpretation of public use in certain jurisdictions permits the taking of property for private economic development. To many, this represents a sea change in the evolution of the law of takings because it blurs the distinction between public purpose and private benefit and cannot help but raise the specter that the power will be used to favor purely private interests. This case therefore

> presents the court with a rare and timely opportunity to address a constitutional issue of great significance, that is, whether there are limits to the government's authority to take private property by eminent domain when the public purpose is private economic development, and, if so, how those limits should be defined and enforced.

Kelo, 843 A.2d at 574-75 (citations omitted) (App. 134-35). Likewise, this case presents this Court with a unique and timely opportunity to examine this federal constitutional issue of great significance: the limits to eminent domain authority in the area of private economic development.

The use of eminent domain for private development projects is not only an issue in Connecticut. It is a growing, nationwide controversy. A recent study documented that between 1998 and 2002 alone, there were over 10,000 filed or threatened condemnations that involved private-to-private transfers of property in 41 states. Berliner, *Public Power, Private Gain: A Five Year, State-By-State Report Examining The Abuse Of Eminent Domain* (2003) (available at http://www.ij.org/publications/castle/).[2] News reports throughout the country also document rampant takings of homes and businesses for use by other private parties, including developers and big-box retail stores. *See*, *e.g.*, Cauchon, *Pushing the Limits of 'Public Use*,' USA Today, April 1, 2004; George, *Testing the Boundary Lines of Eminent Domain*, The New York Times, March 31, 2004; Cass, *Government Seizure of Homes Targeted*, The Boston

[2] The study only documented cases available from public sources. Because many private condemnations go unreported in public sources, the actual number of private-to-private eminent domain cases is most likely much higher than the confirmed numbers of the study.

Globe, May 12, 2003; Starkman, *Tracking the Abuse of Eminent Domain*, The Wall Street Journal, May 7, 2003; Carnahan, *Domain Game*, Forbes, December 9, 2002; Humphries, *The Uninvited Bulldozer*, Christian Science Monitor, April 26, 2001. These condemnations, to paraphrase the words of the dissenting justices in this case, unquestionably blur the line between public purpose and private benefit and raise the specter that eminent domain authority is now being used to favor purely private interests. Moreover, as set forth below in this petition, these controversies have sparked numerous, often conflicting, court decisions.

The scope of this national phenomenon – and the litigation and controversy it engenders – demonstrates the importance of and the urgent need for this Court to address the limits of eminent domain authority under the U.S. Constitution. Eminent domain is one of the most awesome powers a government has at its disposal. As early as 1795, this Court described eminent domain as "the despotic power." *Vanhorne's Lessee v. Dorrance*, 2 U.S. 304, 312 (1795). Eminent domain uproots families from their homes and businesspeople from their stores. With eminent domain, the government can force an elderly couple in their eighties, like two of the Petitioners in this case, to move from their home of over 50 years. The dangers inherent in such an extreme power led the drafters of the U.S. Constitution to place limits on its use, including the requirement that takings be for "public use." Given the vast expansion of eminent domain authority to include the taking of homes and businesses so that the land can be transferred to private interests for economic development, it is imperative that this Court determine the limits on government's eminent domain authority so that the public use requirement does not become a nullity. The homes of Petitioners

and the homes and businesses of property owners throughout the country hang in the balance.

II. STATES HAVE ADOPTED CONFLICTING AND INCONSISTENT STANDARDS FOR DETERMINING WHETHER CONDEMNATIONS FOR PRIVATE DEVELOPMENT MEET THE CONSTITUTION'S PUBLIC USE REQUIREMENT.

As the Connecticut Supreme Court recognized, the states are sharply divided on the question of whether eminent domain for economic development alone, rather than for the elimination of blight, constitutes a public use. *See Kelo*, 843 A.2d 532 (App. 50). Among the states that have considered the issue, no one legal test predominates. Indeed, nearly every state has devised its own test. Some state decisions explicitly cite to the U.S. Constitution or federal cases.[3] Some interpret only the state constitution,[4]

[3] *Daniels v. Area Plan Comm'n*, 306 F.3d 445, 459 (7th Cir. 2002); *Wilmington Parking Auth. v. Land with Improvements*, 521 A.2d 227, 231 (Del. 1987); *Randolph v. Wilmington Hous. Auth.*, 139 A.2d 476, 480 (Del. 1958); *Baycol, Inc. v. Downtown Dev. Auth.*, 315 So.2d 451, 455 (Fla. 1975); *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.,* 768 N.E.2d 1, 7 (Ill. 2002); *Prince George's County v. Collington Crossroads, Inc.* 339 A.2d 278, 287 (Md. 1975); *Poletown Neighborhood Council v. City of Detroit*, 304 N.W. 455, 459 (Mich. 1981); *City of Bozeman v. Vaniman*, 898 P.2d 1208, 1214 (Mont. 1995); *City of Jamestown v. Leevers Supermarkets*, 552 N.W.2d 365, 369, 374 (N.D. 1996).

[4] *City of Little Rock v. Raines*, 411 S.W.2d 486, 491 (Ark. 1967); *City of Owensboro v. McCormick*, 581 S.W.2d 3, 6 (Ky. 1979); *Opinion of the Justices*, 131 A.2d 904, 907 (Me. 1957); *Opinion of the Justices*, 250 N.E.2d 547, 553 (Mass. 1969); *Merrill v. City of Manchester*, 499 A.2d 216, 217 (N.H. 1985); *Georgia Dept. of Transportation v. Jasper County*, 586 S.E.2d 853, 855 (S.C. 2003); *Petition of Seattle*, 638 P.2d 549, 554 (Wash. 1981).

and some cite to neither,[5] leaving the reader and future litigants to guess. This chaos is not, however, an example of healthy state experimentation. Instead, it shows courts seeking understanding of any continued vitality to the federal public use restriction. With the passage of the Fourteenth Amendment, the United States extended a baseline of protection of individuals' rights throughout the country. On the question of public use, however, that baseline is absent. Some courts, like Illinois and Michigan, give some content to the federal public use requirement. Others, like Maryland and Connecticut, find that it imposes no test or substantive protection. The division in state court rulings, and the profusion of legal tests among the state courts, demonstrate that the lower courts desperately need guidance from this Court.

A. State Supreme Courts Are Almost Evenly Split On The Issue Of Whether Property May Be Taken For Business Development Alone.

Seven states, now including Connecticut, definitely allow condemnations for private business development alone. Eight definitely forbid the use of eminent domain to transfer property to private parties when the purpose is not the elimination of slums or blight. Another three have indicated they probably will find such condemnations unconstitutional. More states will confront this difficult legal question in the coming months and years.

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[5] *General Bldg. Contractors, L.L.C. v. Bd. of Shawnee County Comm'rs*, 66 P.3d 873 (Kan. 2003); *City of Minneapolis v. Wurtele*, 291 N.W.2d 386 (Minn. 1980); *Appeal of City of Keene*, 693 A.2d 412 (N.H. 1997); *In the Matter of Port of New York Auth.*, 219 N.E.2d 797 (N.Y. 1966); *Cannata v. City of New York*, 11 N.Y.2d 210 (N.Y. 1962).

1. States that Say Yes

In addition to Connecticut, Kansas, Maryland, Michigan, Minnesota, New York, and North Dakota all have held that simply increasing tax revenue and creating jobs are public purposes and that eminent domain for the purpose of private development is constitutional. *See General Bldg. Contractors, L.L.C. v. Bd. of Shawnee County Comm'rs*, 66 P.3d 873, 882-83 (Kan. 2003) (condemnation for industrial use and Target distribution center); *Prince George's County v. Collington Crossroads, Inc.*, 339 A.2d 278, 283-88 (Md. 1975) (condemnation for industrial park); *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 458-60 (Mich. 1981) (condemnation for General Motors plant); *City of Minneapolis v. Wurtele*, 291 N.W.2d 386, 390 (Minn. 1980) (condemnation for hotel, retail, and office space); *Cannata v. City of New York*, 11 N.Y.2d 210, 214-15 (N.Y. 1962) (condemnation for industrial park);[6] *City of Jamestown v. Leevers Supermarkets*, 552 N.W.2d 365, 369 (N.D. 1996) (condemnation for supermarket).

[6] The New York Court of Appeals has not directly ruled on whether economic development itself is a public use, although that conclusion is implicit in *Cannata, supra*, and *Courtesy Sandwich Shop, Inc. v. Port of New York Auth.*, 190 N.E.2d 402, 404-06 (N.Y.), *app. dismissed*, 375 U.S. 78 (1963) (condemnation for commercial development in conjunction with port development met public purpose requirement). The area in *Cannata* was not a "slum," but it was still "substandard," *Cannata*, 11 N.Y.2d at 215, which distinguishes it from a pure economic development condemnation in which the condition of the area is irrelevant. The *Courtesy Sandwich Shop* condemnations took place pursuant to the state's authority over ports, which is a more traditional public use. Thus, neither directly rule on the constitutionality of economic development as a valid purpose for condemnation. The Appellate Division, however, has ruled explicitly that private business development is a public use. *See Vitucci v. New York City School Construction Authority*, 735 N.Y.S.2d 560 (App. Div. 2001) (expansion of area employer was public use because it would contribute to local economy).

2. States that Say No

Arkansas, Florida, Illinois, Kentucky, Maine, Montana, South Carolina, and Washington all hold that condemnation for the purpose of increased taxes and jobs, rather than the elimination of slums or blight, is not a public use. *See City of Little Rock v. Raines*, 411 S.W.2d 486, 494-95 (Ark. 1967) (condemnation of agricultural property in order to sell or lease it to private industries not public use); *Baycol, Inc. v. Downtown Dev. Auth.*, 315 So.2d 451, 455-59 (Fla. 1975) (condemnation for shopping mall not public purpose); *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.,* 768 N.E.2d 1, 9-11 (Ill. 2002), *cert. denied*, 537 U.S. 880 (2002) (condemnation for racetrack expansion not public use, even though it would contribute to economic growth in region);[7] *City of Owensboro v. McCormick*, 581 S.W.2d 3, 5-8 (Ky. 1979) ("No 'public use' is involved where the land of A is condemned merely to enable B to build a factory"); *Opinion of the Justices*, 131 A.2d 904, 906-07 (Me. 1957) (act permitting condemnation for industrial development unconstitutional); *City of Bozeman v. Vaniman*, 898 P.2d

[7] The Connecticut Supreme Court believed that the *SWIDA* decision did not reflect a categorical rejection of condemnations for economic development but instead represented "the outer boundary" of the use of eminent domain for primarily private purposes. *Kelo*, 843 A.2d at 536 (App. 57-58). Petitioners cannot agree. While the Illinois Supreme Court certainly found that the agency's primary purpose was to assist a private party in its land acquisition, the court also squarely rejected the notion that economic development itself was a public use. The court explained that all businesses create economic benefit to the region and that this public benefit was necessarily "incidental." In light of the *SWIDA* court's explanation of its holding, the Connecticut court's attempted marginalization of the case is not tenable. *See SWIDA*, 768 N.E.2d at 22-23 (Freeman, J., dissenting) (interpreting *SWIDA* majority opinion as precluding condemnations for economic development alone).

1208, 1214 (Mont. 1995) (chamber of commerce could not occupy 40% of visitors center to be built on land taken by eminent domain); *Georgia Dept. of Transportation v. Jasper County*, 586 S.E.2d 853, 856-57 (S.C. 2003) (condemnation for business development not for public use); *Petition of Seattle*, 638 P.2d 549, 556-57 (Wash. 1981) (disallowing plan to use eminent domain to build retail shopping, where purpose was not elimination of blight).

3. States that Say Probably Not

Delaware, New Hampshire, and Massachusetts all have indicated that they are unlikely to uphold condemnations for private development in the absence of blight. *See Randolph v. Wilmington Hous. Auth.*, 139 A.2d 476, 484-85 (Del. 1958) (although upholding a condemnation to eliminate a slum area, the court expressed "the very gravest doubt" as to whether the state could condemn in future cases based on the fact that the property was "not used in the most efficient or economical manner"); *Merrill v. City of Manchester*, 499 A.2d 216, 217-19 (N.H. 1985) (condemnation for industrial park not a public use where no harmful condition was being eliminated); *Opinion of the Justices*, 250 N.E.2d 547, 558 (Mass. 1969) (declaring proposed stadium act invalid because resulting economic benefits to area did not establish public use).

B. The States Have Been Unable To Develop A Consistent Legal Standard For Evaluating Whether Condemnations Are For A Public Use.

State courts are obviously struggling with how to apply the public use requirement in situations where the condemned property will be transferred to a private party

and the purpose is economic development. All courts agree, in general, that if the primary purpose is public and the private benefits incidental, then the condemnation passes constitutional muster. All agree that, conversely, if the primary purpose is private and the public benefits incidental, then the condemnation is unconstitutional. When property is condemned for the elimination of slums or blight, courts find that the elimination of blight is the primary purpose and benefits to private parties are incidental. However, when the purpose is simply to increase taxes and jobs by condemning for private business, further analysis is required. Unfortunately, it seems there is little agreement on what that further analysis should be. Among states that agree that economic development can be a public use, some apply minimal scrutiny and some use heightened scrutiny. Among the states that find economic development is not a public use, there are several competing tests.

1. Some states review official statements of primary purpose with extreme deference.

In this case, the Connecticut Supreme Court adopted a standard that finds a condemnation lacks public purpose only if the *intention* of the governing body is to benefit a private party. 843 A.2d at 541 (condemnation constitutional unless "the taking was primarily intended to benefit a private party"). Thus, if the condemnor was motivated by the goal of public benefit, the condemnation is for public use. *See, e.g., Kelo*, 843 A.2d at 537-39 (App. 60-63) (explaining that city and NLDC met all Pfizer's requirements, but their *motivation* was public). Other states use a similar standard.[8]

[8] *See Prince George's County v. Collington Crossroads, Inc.*, 339 A.2d 278, 287-88 (Md. 1975) (condemnation constitutional because no

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2. Some states apply heightened scrutiny to determine whether the public purpose is primary or incidental.

In its well-known decision in *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), the Michigan Supreme Court, perhaps concerned about the breadth and impact of its ruling, attempted to limit it by creating a heightened scrutiny standard:

> Where, as here, 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. Such public benefit cannot be speculative or marginal but must be clear and significant if it is to be within the legitimate purpose as stated by the Legislature.

304 N.W.2d at 459-60. Delaware and, probably, North Dakota also have adopted heightened scrutiny.[9]

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intent to benefit single private party); *City of Minneapolis v. Wurtele*, 219 N.W.2d 386, 390 (Minn. 1980) ("a public body's decision that a project is in the public interest is presumed correct unless there is a showing of fraud or undue influence"); *see also General Bldg. Contractors, L.L.C. v. Tolbert*, 66 P.3d at 883 (finding that since economic development is a public purpose, the condemnation was constitutional); *In the Matter of Port of New York Auth.*, 219 N.E.2d 797, 797-99 (majority opinion), 799-800 (Van Voorhis, J., dissenting) (criticizing majority for denying owners the opportunity to make a factual showing at trial that particular condemnation lacked primary public purpose).

[9] *See Wilmington Parking Auth. v. Land with Improvements*, 521 A.2d 227, 231 (Del. 1987); *Wilmington Parking Auth.*, 521 A.2d at 232 (primary purpose determined by looking at objective "consequences and effects" of the taking); *see also City of Jamestown v. Leevers*, 552 N.W.2d 365, 372-74 (N.D. 1996) (despite finding of public use in general, remanding for determination of primary purpose of condemnation and citing *Poletown's* heightened scrutiny standard).

Although both the instant case and *Poletown* cite *Berman v. Parker*, the Connecticut Supreme Court explicitly rejected heightened scrutiny and Michigan's requirement that the claimed benefits of the project be both "clear" and "significant," 304 N.W.2d at 459-60. *See Kelo*, 843 A.2d at 529 n.39 (App. 45 n.39) (declining to adopt *Poletown* test), 544 n.62 (App. 73 n.62) (rejecting dissent's position that future public benefits must be reasonably certain).

The dissent in this case also proposed a type of heightened scrutiny, using a four-step test in which the court evaluates: (1) whether the statutory scheme is facially constitutional; (2) whether "the primary intent of the particular economic development plan is to benefit . . . public [ ] interests;" (3) whether "the specific economic development contemplated by the plan will, in fact, result in public benefit;" and (4) whether the condemnation is reasonably necessary to implement the plan. 843 A.2d at 587-92 (App. 159-70). The dissent's test differs from the majority's in that it requires courts to evaluate not just motivation but also the real public benefit the project will produce.

3. Some states hold that economic benefits are dependent on private ones and therefore incidental.

Other states have focused even less on subjective motivation or the extent of possible public benefit and instead asked whether the public benefit results from the taking itself or whether it is an indirect or derivative benefit. These courts have concluded that eminent domain to eradicate slums or blight is a primary public purpose, because the benefit occurs as a direct consequence of removing the offending conditions. *See Randolph v. Wilmington Hous. Auth.*, 139 A.2d 476 (Del. 1958) ("once the

slum is cleared and the primary purpose of the act accomplished the Authority must do something with the land"); *Baycol*, 315 So.2d at 457 (clearing slum is primary purpose that is identical whether the later construction is private or public); *cf. Kelo*, 843 A.2d at 578-79 (dissent) (explaining that in blight condemnations, the public purpose is accomplished immediately).

On the other hand, where the public benefit occurs only as an indirect or derivative effect of the private development, then a number of states find the public benefit is "incidental" and insufficient to sustain a finding of public use.[10] Florida and Washington use a similar method, but instead of asking if the benefit is direct or indirect, they use a "but-for" test that asks if the public benefit would exist absent private benefit. If so, then the public purpose is primary, and any other private benefits will not defeat the condemnation. However, if the public use would not exist but for the private one, then the private purpose is primary and the public use incidental.[11]

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[10] *See, e.g., City of Little Rock v. Raines*, at 494 (distinguishing condemnations to eliminate blight where the transfer to private parties occurs "after the public purpose was accomplished" and condemnations for economic development where the purpose is the transfer to the private business); *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.,* 768 N.E.2d 1, 10-11 (Ill. 2002) (describing economic benefit as "trickle-down" effect); *see also City of Owensboro v. McCormick*, 581 S.W.2d 3, 6-7 (Ky. 1979) ("Every legitimate business . . . indirectly benefits the public"); *Opinion of the Justices*, 131 A.2d 904, 907-08 (Me. 1957) (fact that project may be beneficial "in a broad sense" does not mean there is any direct public use); *Georgia Dept. of Transportation v. Jasper County*, 586 S.E.2d 853, 856, 857 (S.C. 2003) (property may not be taken "on vague grounds of public benefit to spring from a more profitable use").

[11] *See Baycol*, 315 So.2d at 456 ("the tail cannot wag the dog"); *Petition of Seattle*, 638 P.2d at 556-57 (private retail was "essential" to the project, not "incidental" to the public uses, so private use was

(Continued on following page)

The related approaches used by Arkansas, Florida, Illinois, Kentucky, Maine, South Carolina, and Washington are thus completely different than Connecticut's decision in this case, because the Connecticut Supreme Court does not distinguish between direct and immediate public benefit (as in removal of slums harmful to the public) and indirect and attenuated public benefits (as in condemnations for transfer to private businesses that will perhaps make a profit and then will perhaps provide increased tax revenue and jobs). According to Connecticut, as long as the city has come up with a chain of causation that could eventually lead to some public benefits in the form of tax revenues and jobs, then that is the primary purpose. According to the other states, when public benefits occur only indirectly and are dependent upon the realization of private benefit, then the public benefit is incidental and the condemnation therefore lacking in public use.

4. Some states weigh the net public and private benefits to determine the primary purpose.

While Arkansas, Delaware, Florida, Illinois, Kentucky, Maine, South Carolina, and Washington all use some kind of analysis of the direct or indirect nature of the public benefits, New Hampshire, Massachusetts and, to some extent, Montana engage in a weighing of the public and private benefits and costs, with perhaps some consideration

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primary purpose); *see also Daniels v. Area Plan Commission,* 306 F.3d 445, 464-65 & n.19 (7th Cir. 2002) ("the [condemnation] only benefits the public if [the private developer] benefits first, and even then if the commercial development is completed and successful").

of whether they are direct or indirect.[12] Net benefit is measured by weighing "the benefits of the proposed project and the benefits of the eradication of any harmful characteristics of the property in its present form, reduced by the social costs of the loss of the property in its present form." *Merrill*, 499 A.2d at 217. Connecticut declined to weigh the costs of a condemnation project. *See Kelo*, 843 A.2d at 541 (App. 67-68 n.58).

In short, a homeowner moving across the country will find widely varying interpretations of her constitutional rights. In Connecticut, the Constitution allows her home to be taken for private development almost automatically. In Illinois, the Constitution forbids taking her home unless she lives in a blighted area. And in New Hampshire, she'll just have to wait and see what the courts say. Moreover, if she challenges the condemnation, the court in Connecticut will ask whether the government intended primarily to benefit private parties, while in many other states, the courts will engage in a more searching review of the objective consequences and benefits of the condemnation.

The Takings Clause, and indeed the entire U.S. Constitution, provides the baseline of the rights of U.S. citizens. Although states may provide more protection, they may not provide less. *See, e.g., Harper v. VA Dep't of*

[12] *See Appeal of City of Keene*, 693 A.2d 412, 416 (N.H. 1997) (court must determine if there is "a public purpose for the taking and that, on balance, a probable net benefit to the public [will result] if [the] taking occurs for the intended purpose."); *Opinion of the Justices*, 250 N.E.2d 547, 558-60 (Mass. 1969) (stadium could potentially be a public purpose but statute was not written to assure sufficient public benefits or "equitable use," as opposed to private benefits); *City of Bozeman v. Vaniman*, 898 P.2d 1208, 1214 (Mont. 1995) (holding that private benefit of 40% of building was not incidental).

Taxation, 509 U.S. 86, 102 (1993), *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985). It is clear from the conflicting authorities and profusion of legal tests that state courts do not know what that baseline constitutional protection might be. The states urgently need guidance from this Court and clarification of the constitutional public use requirement as they face the increasingly common practice of condemnations for private development alone.

III. UNLIKE OTHER RECENT PETITIONS FOR CERTIORARI ON PUBLIC USE, THIS ONE PRESENTS A CLEAR LEGAL DISPUTE ABOUT THE CONSTITUTIONAL LIMITS ON CONDEMNATIONS FOR PRIVATE DEVELOPMENT ALONE.

This is not the first time in recent years that this Court has seen a petition for writ of certiorari to review a proposed condemnation for private development. However, most of the other cases involved condemnations pursuant to blight determinations and thus have not presented this Court with an opportunity to address eminent domain for the sole purpose of economic development. This case presents the issue with a fully-developed record and legal decisions and is not muddied by procedural difficulties that could frustrate review.

The legal issue could not be more clearly presented to this Court: What, if any, limits does the U.S. Constitution's public use requirement place on government's ability to use eminent domain for the purpose of generating tax revenue and increasing employment? The Connecticut Supreme Court's decision engages in a lengthy analysis of the public use requirement and the standard of subjective motivation that it adopts. There is also a lengthy dissent,

again addressing the public use of economic development condemnations and setting forth a detailed proposed legal standard for evaluating such condemnations. Moreover, both the majority and dissenting opinions directly address the application of the U.S. Constitution's Takings Clause, *Berman v. Parker,* and *Hawaii Hous. Auth. v. Midkiff* to the case. *Kelo*, 843 A.2d at 525-30 (App. 37-42), 578-80 (App. 140-46). The dissent in particular explains how this case differs from both *Berman* and *Midkiff* and harmonizes those decisions with its standard of greater scrutiny of municipal decisions regarding particular economic development condemnations. *Id*. at 578-80 (App. 140-46). Moreover, after a seven-day trial and a trial court decision exceeding 200 pages, it is fair to say that the factual record is extraordinarily well-developed.

Most of the other recent cases petitioning for certiorari have challenged a condemnation under the auspices of a blight designation. *See, e.g., City of Las Vegas Downtown Redev. Agency v. Pappas*, 76 P.3d 1, 6-7 (Nev. 2003), *cert. denied*, case no. 03-972, 2004 U.S. LEXIS 1990 (Mar. 8, 2004); *West 41st St. Realty, L.L.C. v. New York State Urban Dev. Corp.*, 744 N.Y.S.2d 121, 123-24 (N.Y. App. Div. 2002), *cert. denied*, 537 U.S. 1191 (2003); *Housing & Redev. Auth. v. Walser Auto Sales, Inc.*, 630 N.W.2d 662, 666-67 (Minn. Ct. App. 2001), *aff'd by an equally divided court*, 641 N.W.2d 885 (Minn. 2002), *cert. denied*, 537 U.S. 974 (2002). In reviewing such a case, this Court would first need to evaluate if the blight designation was proper and thus whether the case was controlled by *Berman v. Parker*, and then, if it found problems with the blight designation, address the issue of whether the Constitution allows condemnation of non-blighted areas for economic development. The instant case presents none of those extra steps. The *only* issue is whether an area may be condemned not

because that particular area is blighted but because the *city* desires greater tax revenues. Moreover, because the condemnation does not take place under the blight statutes, *Berman v. Parker* does not control.

Other cases have presented additional procedural inconveniences. Some were appeals from state appellate courts and thus lacked definitive state supreme court decision and analysis. *See Bugryn v. City of Bristol*, 774 A.2d 1042 (Conn. App.), *cert. denied*, 534 U.S. 1019 (2001); *Housing & Redev. Auth. v. Walser Auto Sales, Inc.*, 630 N.W.2d 662 (Minn. App. 2001), *aff'd by an equally divided court*, 641 N.W.2d 885, 891 (Minn. 2002) (affirming by majority that case was not moot but divided on merits), *cert. denied*, 537 U.S. 934 (2002). One case appealed a condemnation in conjunction with an airport and thus involved issues far afield from economic development. *See Piedmont Triad Airport Auth. v. Urbine*, 554 S.E.2d 331 (N.C. 2001), *cert. denied*, 535 U.S. 971 (2002). *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.,* 768 N.E.2d 1, 9-11 (Ill. 2002), *cert. denied*, 537 U.S. 880 (2002), which did involve a condemnation purely for economic development and is the closest to this case, found the condemnation unconstitutional under the U.S. Constitution but also on independent grounds under the Illinois Constitution. The instant case offers a uniquely simple and clear legal presentation of the federal constitutional issue in an area usually fraught with thorny factual and procedural issues.

It has been fifty years since this Court addressed the use of eminent domain for private redevelopment in *Berman v. Parker*, 348 U.S. 26 (1954). *Berman*, however, authorized the taking of a severely troubled area. *See Berman*, 348 U.S. at 30 ("64.3% of the dwellings were

beyond repair . . . 57.8% of the dwellings had outside toilets, 60.3% had no baths . . . 83.8% lacked central heating."); *Schneider v. District of Columbia*, 117 F. Supp. 705, 709 (D.D.C. 1953) (district court in *Berman* case found general death rate in area 50% higher, tuberculosis death rate 250% higher, and syphilis death rate more than 600% higher than average for District of Columbia). It is quite different to ask if an area that is not harmful to the public may be condemned because other parts of the city may benefit.

Midkiff was twenty years ago, and it addressed the regulation of oligopolies, which, as *Midkiff* pointed out, represents "a classic exercise of a State's police powers." *See Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 242 (1984). As explained by the dissent in this case, and evidenced by the decisions in *SWIDA* and other cases, neither *Berman* nor *Midkiff* necessarily controls how courts should evaluate the constitutionality of eminent domain for the sole purpose of economic development. *See Kelo*, 843 A.2d at 593-95 (App. 170-74); *SWIDA*, 768 N.E.2d at 8-9. As the dissent explained, for example, it is possible to accept a legislative finding of public purpose and yet to find that particular condemnations do not in fact sufficiently benefit the public to survive constitutional scrutiny. *See id.*; *cf. SWIDA*, 768 N.E.2d at 26-27 ("the government does not have unlimited power to redefine property rights") (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 (1982)). Yet a number of courts, including the court below, have concluded that *Midkiff* dictates that, absent overwhelming evidence of bad faith or official corruption, all uses of eminent domain must be affirmed. *See*, *e.g.*, *Leevers Supermarkets*, 552 N.W.2d at 371 (property owner "failed to demonstrate bad faith or fraud"); *Wurtele*, 291 N.W.2d at 390 (government's finding that "a project is in the public interest is presumed

correct unless there is a showing of fraud or undue influence"). Other states have been unable to reach a consistent analytical framework for evaluating takings for private parties. The need for that framework – and for guidance from this Court on the application of the federal public use requirement – will only grow as more states face the increasingly common use of eminent domain for private business development alone.

IV. THE STANDARD ADOPTED BY THE COURT BELOW DRAINS THE PUBLIC USE REQUIREMENT OF THE U.S. CONSTITUTION OF ANY MEANING OR SUBSTANCE.

In upholding the use of eminent domain for private economic development projects, the Connecticut Supreme Court paid lip service to the continued existence of the public use requirement. *Kelo*, 583 A.2d at 543 (App. 71) The standard it adopted, however, nullifies the public use clause of the U.S. Constitution. Any condemnation of private property for a private business passes constitutional muster in Connecticut so long as the government *claims* that the purpose of the condemnation is to improve the city's tax base and to increase employment. As nearly all homes and small businesses generate fewer tax dollars and jobs than a larger business, condemnation of any of them would satisfy the public use requirement of the U.S. Constitution. If all private businesses are "public uses," then it is hard to imagine what could be a private use.

> The majority has created a test that can aptly be described as the "Field of Dreams" test. The majority assumes that if the enabling statute is constitutional, if the plan of development is drawn in good faith and if the plan merely states that there are economic benefits to be realized, that is

> enough. Thus, the test is premised on the concept that "if you build it, [they] will come," and fails to protect adequately the rights of private property owners.

Kelo, 843 A.2d at 602 (App. 189) (footnote omitted). Only the utterly incompetent could fail to devise a hypothetical chain of events whereby any use of eminent domain could lead to economic growth.[13]

The Connecticut Supreme Court held that economic development, sought through the transfer of property to private parties for their own use, nonetheless constitutes a public use because of the possible economic benefits to the government from such private activities. *Kelo*, 843 A.2d at

[13] To give but one example, the District of Columbia meets the exact same criteria identified by New London and the Connecticut Supreme Court as justifying the use of eminent domain. The District needs more tax revenue, and it has high unemployment in comparison to the greater metropolitan area. *Compare Kelo*, 843 A.2d at 510 (App. 7). DC is a small city with much of its land devoted to tax-free purposes. *Id.* Under the Connecticut court's reasoning, that justifies condemnation anywhere in DC. Georgetown would be no more exempt than anywhere else. Certainly, the city might decide to use eminent domain in an actually blighted neighborhood, but economic development condemnations are not tied to the condition of the area. If developers were more interested in Georgetown than Southwest, the city could condemn there. Georgetown's somewhat upscale shopping could be replaced by truly expensive designer shopping, more like that on Rodeo Drive in Los Angeles. Georgetown's older townhomes could be replaced by office buildings, which would produce both more taxes and more jobs. The District could condemn the buildings on Wisconsin, plus a few blocks on either side, and lease it to a developer for $1 per year. And it would all be for the public purpose of economic development. Would Rodeo Drive actually work in Georgetown? It doesn't matter. *Compare Kelo*, 843 A.2d at 541 n.58 (App. 67 n.58) (court should not consider social costs). Would successful businesses and viable homes be uprooted? Again, it doesn't matter. *Compare Kelo*, 843 A.2d at 560-61 (App. 104-05, 107). The city intends that its $1 lease to the developer will produce economic growth, and that is enough.

528, 531 (App. 42, 48). The standard for public use adopted by the majority opinion focuses overwhelmingly on the intent and motive of the government decision-makers in determining whether condemnations are for "public use," *Id*. at 527-58 (App. 42) (placing "overwhelming emphasis on the legislative purpose and motive behind the taking"). Thus, proof of actual fraud, dishonesty, or illegal *ultra vires* activity might violate "public use," but apparently nothing else would.

In order to be faithful to the first principles of constitutional construction, there must be distinct substance and meaning to the requirement of "public use" as opposed to the general prohibition against government malfeasance. "Public use" must, instead, mean something about the relationship of the condemnation to the use or benefit of the public. As the dissent observed, in slum elimination cases and in *Midkiff*, the benefit to the public was the direct result of the taking itself: the removal of a slum regardless of the ensuing use, or the direct divestiture of oligopolistic private ownership, respectively. *Id*. at 578-80 (App. 141-46). In the case of takings for economic development, however, the taking is just the first link in a long and tenuous chain of causation subject to numerous and uncertain contingencies before the *public* receives any benefit. Allowing constitutional limitations to be satisfied by such attenuated causal chains effectively destroys such limitations. *Cf. United States v. Morrison*, 529 U.S. 598, 615 (2000) (reasoning that follows a "but-for causal chain . . . to every attenuated effect" implicating an enumerated power is "unworkable if we are to maintain the Constitution's enumeration of powers").

Indeed, in the instant case, the Court held that the taking provided a public benefit even though it was being

taken for (1) a private office building that the developer admitted would not be built unless the market changes, 843 A.2d at 559-60 (App. 102-03); 596-98 (App. 177-81) (dissent); and (2) some other, unknown, use, *Id.* at 570-72 (App. 125-28). Under the Connecticut Supreme Court's rule, only an utter failure to even *try* to concoct some possible chain of events would result in the rejection of a proposed condemnation for private ownership and development. But an invented public benefit gloss can be put on virtually any taking of land for economic development, no matter how private in nature, turning the public use requirement then into a matter of whether the municipal body has a "stupid staff." *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1025 n.12 (1992). As this Court further pointed out in *Lucas*, "the Takings Clause requires courts to do more than insist upon artful [justifications]." *Id*.

The dissent sets forth one legal standard that retains an independent meaning for the public use clause. *See Kelo*, 843 A.2d at 587-92 (App. 159-70). It first asks, consistent with *Berman* and *Midkiff*, if the enabling legislation is facially constitutional. *Id.* at 587-88 (App. 160). Then, the dissent inquires, as does the majority, if the subjective intent was to primarily benefit a private party. *Id.* at 588 (App. 160). The majority ends its analysis there. The dissent, however, adds further analysis of the objective indicia of private and public benefit. It next asks if "the specific economic development contemplated by the plan will, in fact, result in a public benefit." *Id.* (App. 161). This is a purely objective inquiry. Finally, it inquires if the specific condemnation is reasonably necessary. *Id.* at 591 (App. 166). Under the dissent's test, courts should review the first, second, and fourth factors with substantial deference to the government. *Id.* at 587-91 (App. 159-66).

Thus, the main difference between the majority and the dissent is the third part of the dissent's test, which asks for an actual, objective assurance that the particular project will result in the claimed public benefits, without giving deference to the government's determination. Like many other state supreme courts, the dissent concludes that eminent domain for economic development is not like other exercises of eminent domain. The public benefit, if any, occurs far in the future. *Id.* at 578-79 (App. 141-42), 596-600 (App. 177-86) (plan in effect for thirty years). The public benefit is achieved, if at all, only as a result of substantial private benefit, not through any action of government. *Id.* at 579-80 (App. 142-45) (transfer of property to private parties "essential, rather than incidental, to achieving the public purpose"). These features of the use of eminent domain to increase tax revenue create a greater, constitutionally significant, risk that eminent domain will be used for private use and private profit and necessitate the more searching test applied by the dissent.

Granting this petition is appropriate to restore some recognizable meaning to the public use requirement of the U.S. Constitution. The dissent's suggested standard of review is one plausible means of giving the public use requirement substance; other states provide other tests. *See, supra*, Part IIB. Of course, the petition stage is not the time to resolve the issue of the proper standard. But this is certainly the time to accept review of this case in order to resolve the issue and put some meaningful check on abuses of eminent domain authority and to provide guidance to government officials, property owners, and courts in reviewing condemnations for private economic development.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully ask this honorable Court to grant the petition.

Respectfully submitted,

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
SCOTT G. BULLOCK*
DANA BERLINER
Suite 200
1717 Pennsylvania Ave., NW
Washington, DC 20006
(202) 955-1300

SAWYER LAW FIRM, LLC
SCOTT W. SAWYER
The Jill S. Sawyer Building
251 Williams Street
New London, CT 06320
(860) 442-8131

**Counsel of Record*