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 AMICUS CURIAE OF PROFESSORS DAVID L. CALLIES, JAMES T. ELY, PAULA A. FRANZESE, NICOLE STELLE GARNETT, JAMES E. KRIER, DANIEL R. MANDELKER, JOHN COPELAND NAGLE, JOHN NOLON, J.B. RUHL, SHELLEY ROSS SAXER, A. DAN TARLOCK, LAURA UNDERKUFFLER, AND EDWARD F. ZIEGLER IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

INTEREST OF THE AMICI CURIAE

David L. Callies is the Benjamin A. Kudo Professor of Law at the University of Hawaii's William S. Richardson School of Law. Professor Callies is one of the nation's recognized authorities on the law of land use and property.[1] Nicole Stelle Garnett teaches land use and property law at Notre Dame Law School. The following law professors who teach and write on the subjects of property and land use join Professors Callies and Garnett in asking the Court to apply an intermediate standard of review in deciding the sufficiency of public use in eminent domain cases, reversing the Connecticut Supreme Court in *Kelo v. City of New London*: James T. Ely, Vanderbilt University; Paula A, Franzese, Seton Hall University; James E. Krier, University of Michigan Law School; Daniel R. Mandelker, Washington University School of Law; John Copeland Nagle, Notre Dame Law School; John Nolon, Pace University; J.B. Ruhl, Florida State University; Shelley Ross Saxer, Pepperdine University; A.Dan Tarlock, Chicago-Kent College of Law; Laura Underkuffler, Duke University; Edward F. Ziegler, University of Denver.

STATEMENT OF THE CASE

The Petitioners all own homes or rental properties in the Fort Trumbull neighborhood of Respondent City of New London, Connecticut. In 1998, New London approved

[1] Counsel for the parties did not author this brief in whole or in part. All parties have consented to the filing of this brief. Copies of the consent are filed with the Clerk. Jeff Kumer, who is not a party to the case, provided a contribution towards the printing and submission of this brief.

a redevelopment plan that enabled Respondent, New London Development Corporation to condemn Petitioners' lots and lease the condemned property to a private commercial developer. New London made no finding that the Petitioner's property was crime-ridden or otherwise "blighted" as required by Connecticut's slum-renewal laws, chapter 130 of Connecticut's statutory code, *see* Conn. Gen. Stat. Ann. §§ 8-124 to -69w (West 2001 & 2004 Supp.). Instead, Respondents invoked the authority of chapter 132 of Connecticut's statutory code, the municipal-development chapter. *See* Conn. Gen. Stat. Ann. §§ 8-186 to -200b (West 2001 & 2004 Supp.). That chapter gives local development agencies broad powers to "acquire by eminent domain real property" whenever cities allow them to do so. *Id.* § 193(a). Respondents' only justification for condemning Petitioners' land was – and remains – that it would be economically advantageous for New London to redistribute their land to private developers. The city council found that transferring the title of Petitioners' property to a private developer would create jobs, increase tax revenues, and encourage economic growth throughout New London. *See Kelo*, 843 A.2d at 508-11.

Petitioners sued, alleging that New London had taken their properties for a private use, in violation of public use limitation of the Fifth Amendment, which states, "[N]or shall property be taken for public use. . . ." U.S. Const. amend. V. Petitioners asserted that the speculative economic benefits to be gained by upscaling a neighborhood do not count as "public uses" and that there can be no public use when "private parties retain control over the parcels' use." *Kelo*, 813 A.2d at 519. The Connecticut Supreme Court ("the court below") rejected Petitioners' claims. The court held that the public use limitation should be given a "purposive formulation" and that legislative declarations of

public use should be granted broad deference. *Id.* at 523. Specifically, it concluded,

> "Public use" may therefore well mean public usefulness, utility or advantage, or what is productive of general benefit; so that any appropriating of private property by the state under its right of eminent domain for purposes of great advantage to the community, is a taking for public use.

Id. at 522 (italics removed). This Court granted certiorari.

SUMMARY OF THE ARGUMENT

The Connecticut Supreme Court's decision was in keeping with *Hawai Housing Authority v. Midkiff*, 467 U.S. 229 (1984), which provides that legislative assertions of public use should be subjected to rational basis review. The application of such broadly deferential review in public use cases is inappropriate. Application of rational basis review to the exercise of eminent domain in cases such as this effectively eviscerates the Fifth Amendment's public use limitation. Moreover, lower courts' responses to the exponential increase in the use of eminent domain for generalized "economic development" has resulted in a hodgepodge of decisions variously upholding and striking down such condemnations on similar facts. These cases make clear that many state courts are uncomfortable with granting governmental entities *carte blanche* authority to condemn property for speculative "economic development" projects.

This case offers the Court an important opportunity to revisit the application of rational basis review in public use cases and to articulate a more appropriate intermediate

standard of review that will reinvigorate the protections guaranteed by the Fifth Amendment's Takings Clause. An appropriate standard would protect the prerogatives of legislatures to establish the appropriate *ends* of government action (*e.g.*, to decide that certain areas of New London, Connecticut should be redeveloped). It would merely require that a government justify a decision to resort to eminent domain as the *means* of achieving those goals.

ARGUMENT

In *Kelo v. City of New London*, 268 Conn. 1, 843 A.2d 500 (2004), the City condemned unblighted, economically viable residential lots for private commercial development as part of a plan for the "economic revitalization" of a similarly unblighted area. *See Id.* at 26-54, 843 A.2d at 519-536. These condemnations were upheld below under this Court's broadly-stated rational review standard for public use as articulated in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S. Ct. 2321, 81 L. Ed. 2d 186 (1984). *See Kelo*, 268 Conn. at 28, 843 A.2d at 520. Application of rational basis review to the exercise of eminent domain in cases such as this one effectively eviscerates the Fifth Amendment's public use limitation. Moreover, lower courts' responses to the exponential increase in the use of eminent domain for generalized "economic development" has resulted in a hodgepodge of decisions variously upholding and striking down such condemnations on similar facts. In revisiting its jurisprudence on public use, this Court needs to either expand on its existing rational basis review standard or to provide a different, intermediate standard of review so as to reinvigorate the

protections guaranteed by the Fifth Amendment's Takings Clause.

I. The Division in the Lower Courts Reflects Discomfort with the Total-Deference Approach to Eminent Domain

Under current federal standards, courts could approve virtually every exercise of eminent domain. True, the Court has never suggested that the government has limitless power to take property by eminent domain. As Justice O'Connor observed in *Midkiff*, 467 U.S. at 239, "[t]here is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use." The Court concluded in *Berman v. Parker*, 348 U.S. 26, 32, 75 S. Ct. 98, 99 L. Ed. 27 (1954), and again in *Midkiff*, 467 U.S. at 240, that a court's role "is an extremely narrow one." Specifically, the Court indicated that an exercise of eminent domain was subject to rational basis review. *See Midkiff*, 467 U.S. at 241 (citations omitted); *Berman*, 248 U.S. at 26. That is, an exercise of the eminent domain power will not be invalidated so long as it is "rationally related to a conceivable purpose" or "palpably without reasonable foundation." *Midkiff*, 467 U.S. at 241 (citations omitted). The application of rational basis scrutiny effectively renders the public use limitation meaningless because there is always some *conceivable* justification for condemning property. *See* Cass Sunstein, *Lochner's Legacy*, 87 Colum. L. Rev. 873, 891 (1987) ("[I]t is said that the public use requirement has been rendered effectively unenforceable"). For example, if rational basis review governs, courts should always approve the taking of property for "economic development." Surely such takings might serve some *conceivable* public purpose, no

matter how speculative. *See Midkiff*, 467 U.S. at 241 (citations omitted).

Interestingly, lower courts purporting to apply rational basis review sometimes find a taking irrational. Other courts interpret state public use provisions to require heightened scrutiny. This resistance to the application of rational basis review in public use cases suggests profound discomfort with the logic of the *Midkiff* decision. It also renders the application of public use provisions random at best. The two most recent state supreme court decisions, reaching opposite conclusions on similar facts, are simply the most recent examples.

The Michigan Supreme Court recently overruled its earlier *Poletown* case, *see Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981), in *County of Wayne v. Hathcock*, 471 Mich. 445, 684 N.W.2d 765 (2004), holding that a generalized economic benefit to the public was not a public use "simply because one entity's profit maximization contributed to the health of the general economy." *Id.* at 481, 684 N.W.2d at 786. Indeed, the court took great pains to strike at the heart of the Poletown opinion holding that "*Poletown*'s conception of a public use – that of alleviating unemployment and revitalizing the economic base of the community – has no support in the Court's eminent domain jurisprudence. . . ." *Id.* at 482, 684 N.W.2d at 787 (footnote omitted). Therefore, the condemnation of nonblighted land for an airport technology park for economic development purposes was unconstitutional. *Id.*

Hathcock is in stark contrast to the Connecticut Supreme Court's recent decision in *Kelo*. There, the court concluded that construction of commercial and residential

development associated with a nearby global research facility in order to create jobs and increase taxes and other revenues in New London was sufficient public use to justify the condemnation of several residences on the project site: "We conclude that economic development projects created and implemented [pursuant to statutory authority] that have the public economic benefits of creating new jobs, increasing tax and other revenues, and contributing to urban revitalization, satisfy the public use clauses of the state and federal constitution." *Kelo*, 268 Conn. at 26, 843 A.2d at 520. Although the two state supreme courts came to different conclusions on adequacy of public use, both condemnations would probably pass constitutional muster under the relaxed, deferential rational basis standard of review which this Court used in *Midkiff*. *See Midkiff*, 467 U.S. at 241 (citations omitted). Neither is "impossible" or "palpably without reasonable foundation." *Id.* But surely this Court could not have envisioned, let alone predicted, the extent to which state and local governments would stretch the limits of *Berman* and *Midkiff* to find a public use in the mere economic revitalization (read "upgrading") of perfectly viable stand-alone residential neighborhoods and businesses. In both *Kelo* and *Hathcock*, the project area is blight-free. *See Kelo*, 268 Conn. at 26, 843 A.2d at 520; *Hathcock*, 471 Mich. at 499, 684 N.W.2d at 796. The condemned parcels do not represent islands of viable use in a sea of blight, as in *Berman*. *See Berman*, 348 U.S. at 35.

While the *Hathcock* and *Kelo* opinions represent polar extremes on sufficiency of public use to support condemnation for the purpose of economic revitalization, there are other egregious examples.

The remainder of this Part provides summaries of cases illustrating the division in the lower courts. State

and federal courts (applying state law) have found sufficient public use in:

J.C. Penney Corp. v. Carousel Center Co., 306 F. Supp. 2d 274 (N.D.N.Y. 2004). The court held that Syracuse Industrial Development Agency's condemnation of plaintiff's lease in a shopping center in order for the shopping center's owner to redevelop the shopping center was not merely for private use, because "advancing the general prosperity and economic welfare of both the residents of the City and the general population of the State, promoting tourism and attracting visitors from outside the economic development region, promoting employment in the City, and increasing the tax base as well as tax revenues" was for a public use. *Id.* at 280.

City of Shreveport v. Shreve Town Corp., 314 F.3d 229 (5th Cir. 2002). The court held that the City of Shreveport's condemnation of Shreve Town Corporation's lot for the purpose of building a parking lot for a new convention center showed a public purpose, as "the public purpose requirement was satisfied because the expropriation resulted in an economic benefit to the community." *Id.* at 234 (citing *City of Shreveport v. Chanse Gas Corp.*, 794 So. 2d 962, 973 (La. Ct. App. 2001)).

General Building Contractors, L.L.C., v. Board of Shawnee County Commissioners of Shawnee County, 275 Kan. 525, 66 P.3d 873 (2003). County filed eminent domain petition to attract economic development by establishing an industrial park. *Id.* at 526, 66 P.3d at 875. GBC's business sold services or products outside the traditional market area of county, but county wanted employers who would bring in new dollars, jobs, and demand for services. *Id.* at 528, 66 P.3d at 876. GBC's property was slated for a

new building and county knew a major employer would require control of adjoining property. *Id.* The court held that public purpose, public use, and public welfare, are all terms that must be broad and inclusive. *Id.* at 540, 66 P.3d at 883 The fact that the possibility for a private party to make a profit exists does not divest the act of its public use and purpose. *Id.*

Minneapolis Community Development Agency (MCDA) v. OPUS Northwest, LLC, 582 N.W.2d 596 (Minn. 1998). Opus owned the parcels to be condemned and bid on the Minneapolis Community Development's project. *Id.* at 598. City wanted to put a mid-priced retail store, parking complex, extended skyway access, and office building in the area so it contracted with Ryan Corp for the development and eventual ownership of project. *Id.* Retail store would be owned and operated by Dayton Hudson, which would place a Target in the building. *Id.* Opus's bid was rejected in spite of it offering to build a $120 million office building without government subsidies because Opus could not secure a mid-priced retailer. *Id.* The Court's review of condemnation is very narrow and heightened scrutiny for a condemnation that benefits private interests was "out of touch with the national trend." *Id.* at 599 (citation omitted). Condemnation to create jobs and improve tax base have sufficient public purpose. *Id.* (citation omitted).

In re West 41 Street Realty LLC v. New York State Urban Development Corporation, 298 A.D.2d 1, 744 N.Y.S.2d 121 (2002). Six property owners challenged the condemnation of land across Eighth Ave. from the Port Authority Bus Terminal because the benefit inured to the New York Times (plan was to build a high rise for a new Times headquarters, provide an additional 700,000 sq. ft. of office space for other tenants, build condos, new

subway entrance, 350-seat auditorium, gallery and retail space). *Id.* at 3, 744 N.Y.S.2d at 123. The court held that public use only requires "an evident utility on the part of the public" and the public benefit is broadly defined. *Id.* at 6, 744 N.Y.S.2d at 125 (quoting *Bloodgood v Mohawk & Hudson R.R.*, 18 Wend. 9, 14 (N.Y. 1837). So long as the project is rationally related to a conceivable purpose, it is constitutional. *Id.* at 6, 744 N.Y.S.2d at 125 (citations omitted).

Vitucci v. New York School Construction Authority, 289 A.D.2d 479, 735 N.Y.S.2d 560 (2001). Landowner's truck repair and selling business was condemned for the construction of a new school. *Id.* The school was not built and the defendants determined that the area would benefit from the creation of an urban renewal project. *Id.* It chose to expand a neighboring food production business. *Id.* Court explained that public use and public purpose are broadly defined as encompassing virtually any project that may further the public benefit, utility, or advantage. *Id.* at 480, 735 N.Y.S.2d at 562 (citing 51 N.Y. Jur. 2d Eminent Domain § 22 (2003)). "If a municipality determines that a new business may create jobs, provide infrastructure, and stimulate the local economy, those are legitimate public purposes which justify the use of the power of eminent domain." *Id.* at 481, 735 N.Y.S.2d at 562 (citing *Sunrise Props. v. Jamestown Urban Renewal Agency*, 206 A.D.2d 913, 614 N.Y.S.2d 841 (1994)).

City of Toledo v. Kim's Auto & Truck Service, Inc., 2003 WL 22390102 (Ohio Ct. App. Oct. 17, 2003) (unpublished decision). City wished to attract a new Jeep plant so City Council directed Planning Commission to develop an urban renewal plan to alleviate slum and blight conditions and allow for economic development. *Id.* at *1. Appellant's automobile service station was in the urban renewal area. *Id.* Appellant argued the City manipulated the blight by

purchasing lots and allowing lots to deteriorate and be stripped by vandals, and that the land was taken to benefit a private corporation, not the public, and the Jeep plant resulted in a new loss of 800 jobs and its tax abatement resulted in loss of tax revenue. *Id.* at *2. Judicial review of a municipality's determination to taken land is limited; if it is rationally related to a conceivable public purpose the taking is allowed. *Id.* at *4 (citing *Midkiff*, 467 U.S. at 241). In Ohio "public use" should be read as synonymous with "public welfare." *Toledo*, 2003 WL 22390102 at *4. Appellant contended that the public benefit here was incidental due to the loss of taxes and jobs. *Id.* "However, appellee apparently determined that, despite these losses, keeping the Jeep manufacturing jobs in Toledo and eliminating blight in the neighborhood was conducive to the public welfare." *Id.* "Necessary" includes what is reasonably convenient or useful to the public. *Id.* at *5.

On the other hand, state and federal courts (applying state law) have found public use wanting in:

Daniels v. The Area Plan Commission of Allen County, 306 F.3d 445 (7th Cir. 2002). The court held that the defendant Area Plan Commission of Allen County's vacation of plaintiff landowner's restrictive covenant (which limited the uses in the area to single family dwellings), so that a developer could build commercial establishments in the area and incidentally remove vacant houses, did not show a "public use," because (1) mere economic redevelopment was deemed insufficient by the Indiana legislature and (2) the developer was not bound to build anything that would benefit the public, therefore rendering the purpose of the vacation private. *Id.* at 465.

99 Cents Only Store v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123 (C.D. Cal. 2001). The court held that the City of Lancaster and the Lancaster Redevelopment Agency's ("Lancaster's") condemnation of a store in order to accommodate an adjacent store's, Costco, expansion did not evidence a public purpose, since "the only reason [Lancaster] enacted the Resolutions of Necessity was to satisfy the private expansion demands of Costco[,]" *id.* at 1129, and the prevention "future blight" thereby is not a valid public purpose, as it is unsupported by any authority or factual findings, *id.* at 1130.

Beach-Courchesne v. City of Diamond Bar, 80 Cal. App. 4th 388, 95 Cal. Rptr. 2d 265 (2000). Lack of evidence that a redevelopment project area was blighted required invalidation of redevelopment plans. *Id.* at 391, 95 Cal. Rptr. 2d at 268. Redevelopment area was an affluent suburb with high median income, mid-high home values, and low crime. *Id.* at 392, 95 Cal. Rptr. 2d at 268. However, City's general plan explained that retail commercial uses generated "significantly more municipal revenues as compared to costs." *Id.* The court held that there was insufficient evidence of blight, potential blight was not sufficient, the entire record failed to connect any alleged blight to the proposed remediation, mere generalities in the City's finding were not taken at face value. *Id.* at 403, 95 Cal. Rptr. 2d at 276. "The CRL is not simply a vehicle for cash-strapped municipalities to finance community improvements." *Id.* at 407, 95 Cal. Rptr. 2d at 279.

Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency, 82 Cal. App. 4th 511, 98 Cal. Rptr. 2d 334 (2000). The court overturned trial court's determination that the administrative record supported Town's finding that the Project Area was blighted. *Id.* at 521, 98

Cal. Rptr. 2d at 339. "The touchstone of redevelopment is the elimination of blight on developed lands, not the instigation of economic development on forested lands." *Id.* at 544, 98 Cal. Rptr. 2d at 355. Just because an area could be more profitable if redesigned does not mean it sufficiently prevents economically viable use. *Id.* at 555, 98 Cal. Rptr. 2d at 362.

Southwestern Illinois Development Authority v. National City Environmental, L.L.C., 199 Ill. 2d 225, 768 N.E.2d 1 (2002). On a rehearing from previous order in favor of the Southwestern Illinois Development Authority ("SWIDA"), court held that SWIDA did not have the authority to take property from NCE and convey it to Gateway International Motorsports ("Gateway"). *Id.* at 242, 768 N.E.2d at 11. Gateway had a successful car racetrack, needed more parking space, and asked SWIDA to condemn neighboring land. *Id.* at 228, 768 N.E.2d at 4. Neighboring landowner NCE had been at that location since 1975 and employed 80 to 100 people. *Id.* at 229, 768 N.E.2d at 4.

SWIDA argued the public purpose served via the condemnation was threefold (condemnation would foster economic development, promote public safety, and prevent or eliminate blight) and that any distinction between public purpose and public use has evaporated. Court held the terms were not indistinguishable. *Id.* at 237, 768 N.E.2d at 8. The court was not persuaded that the condemnation would serve a sufficient public use even though the new parking lot would make lines for parking shorter and pedestrian access to the track safer. *Id.* at 239, 768 N.E.2d at 10. Economic growth from an increase in Gateway's business was not a public use. *Id.* The court weighed the benefit to the public derived from the taking against

Gateway's benefit, and held that the "condemnation clearly was intended to assist Gateway in accomplishing their goal in a swift, economical, and profitable manner." *Id.* at 240 10.

Casino Reinvestment Development Authority v. Banin, 320 N.J. Super. 342, 727 A.2d 102 (1998). Property owners argued the primary purpose of the condemnation was to achieve a private benefit. *Id.* at 344, 727 A.2d at 103. Trump proposed a $28.6 million hotel redevelopment project and requested that the Casino Reinvestment Development Authority ("CRDA") use eminent domain powers to acquire parcels Trump had not been able to acquire independently. *Id.* at 348, 727 A.2d at 106. These parcels had homes and businesses on them. *Id.* Court held CRDA acquired the property to allow Trump to use it for any purpose so long as it fits within the definition of "hotel development project and appurtenant facilities." *Id.* at 349, 727 A.2d at 106. This was analogous to giving Trump a blank check with respect to future development on the property for casino hotel purposes. *Id.* at 358, 727 A.2d at 111.

City of Virginia Beach v. Christopoulos Family, L.C., 2000 WL 33595021 (Va. Cir. Ct. Aug. 10, 2000) (unpublished decision). City sought to condemn Family's property to build a parking garage. *Id.* at *1. City had contracted with a developer to build a four-star hotel and accompanying park and the garage was needed because of that development. *Id.* Family argued that this use of eminent domain power too greatly benefited private development. *Id.* at *2. The court held that the contract divested the City of control over "the terms and manner of enjoyment . . . independent of the rights of the private owner appropriated to the use" and the developer's use of the property

exceeded incidental benefit because the developer could dictate how the City was to exercise its power over a public parking garage. *Id.* at *10.

See also, Aaron v. Target Corp., 269 F. Supp. 2d 1162 (E.D. Mo. 2003) (federal court found federal jurisdiction, then granted temporary restraining order against condemnation, which was based on an improper finding of blight and lacked public use); *Bailey v. Myers*, 206 Ariz. 224, 76 P.3d 898 (Ariz. Ct. App. 2003) (condemnation of brake shop for hardware store for purposes of economic development lacked public use); *Ga. DOT v. Jasper County*, 355 S.C. 631, 586 S.E.2d 853 (2003) (condemnation for private marine terminal that would provide significant local economic benefit not for public use).

So state courts (or federal courts applying state law) have thus found such condemnations void for lack of adequate public use in Arizona, California, Georgia, Illinois, Indiana, Michigan, Missouri, New Jersey and Virginia; other courts in Connecticut, Kansas, Louisiana, Ohio, Minnesota and New York have upheld such condemnations for general economic revitalization purposes on similar facts.

II. The Court Should Subject "Public Use" Claims to Intermediate-Level Scrutiny

As the foregoing examples illustrate, rational basis review as presently conducted by state courts (and federal courts applying state standards) leads to conflicting results, often upholding the exercise of eminent domain for

a vaguely-articulated public use the benefits of which accrue most specifically and directly to private owners. Courts should – and a few do – examine cases with more care than the rational basis test suggests. *See Midkiff*, 467 U.S. at 241 (citations omitted). This Court should either reinterpret or explain its rational basis test in a way that forecloses the use of eminent domain for the all-but-impossible public uses illustrated in the previous section or direct that courts instead undertake some sort of intermediate scrutiny beyond rational basis, as the Court has done with respect to land development conditions in *Nollan v. South Carolina Coastal Council*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

The Court's application of rational basis scrutiny to "public use" claims flows naturally from its conclusion in *Berman* that the eminent domain power is coterminous with the police power. *See Berman*, 348 U.S. at 31 ("We deal, in other words, with what has traditionally been known as the police power."); *see also Midkiff*, 467 U.S. at 240 ("The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers.") Having made this conclusion, the Court concluded without difficulty that an exercise of eminent domain is merely one possible means to achieve the entire range of permissible governmental ends. *See Berman,* 348 U.S. at 32 ("Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end."); *accord*, *Midkiff*, 467 U.S. at 240 (quoting *Berman*).

This conclusion is flawed as a matter of both history and logic. *First*, there is widespread agreement across the academic spectrum that the public use clause was intended to delimit a range of acceptable "ends" that could be achieved through an exercise of eminent domain. *See, e.g.*, Nicole Stelle Garnett, *The Public Use Question as a Takings Problem*, 71 Geo. Wash. L. Rev. 934, 939 (2003) (surveying literature); Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 162-81 (1985) (arguing that the Fifth Amendment's Takings Clause was designed to enable the government to condemn land for public uses, not to seize land to advance the broadly defined public interest.); Thomas W. Merrill, *Rent Seeking and the Compensation Principle*, 80 N.W. L. Rev. 1561, 1569 (1986) ("The Supreme Court has largely abandoned the requirement that the power of eminent domain be devoted to public rather than private ends."); Cass Sunstein, *Lochner's Legacy*, 87 Colum. L. Rev. 873, 891 (1987) ("The public use requirement traditionally meant that property had actually to be used by the public. But gradually the requirement was expanded to refer to any plausible justification"). *See also* Brief of Claremont Institute Center for Constitutional Jurisprudence, *Kelo v. City of New London* (No. 04-108) (surveying early cases interpreting the public use limitation).

Even assuming that the departure from this narrower interpretation of the *ends* which can be achieved through the exercise of eminent domain is water under the constitutional bridge, it is illogical to state that the eminent domain power and police powers are coterminous. *See Midkiff*, 467 U.S. at 240. As Professor Merrill has observed:

> This pronouncement has dismayed commentators because the outer limit of the police power has traditionally marked the line between *non-compensable* regulation and compensable takings of property. . . . Legitimately exercised, the police power requires no compensation. Thus, if public use is truly coterminous with the police power, a state could freely choose between compensation and noncompensation anytime its actions served a 'public use.' This approach would seemingly overrule the entire takings doctrine in a single stroke.

Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61, 70 (1986). This obvious distinction between the police power and the eminent domain power undercuts the rationale for applying rational basis review in the public use context. "Hands-off" rational basis scrutiny generally is justified by the need to guarantee that the legislature, not the courts, determines which policies to pursue. *See Midkiff*, 467 U.S. at 242-243. But, judicial scrutiny of the exercise of eminent domain would not limit the range of policies that a government may pursue. Rather, a more searching inquiry in public use cases would merely serve to draw a line – a line that logically *must* exist – between two permissible *means* of achieving the broad set of government *ends* authorized by the police power. As Professor Merrill observes, judicial review of the *ends* of government action requires courts to make judgments about "the legitimate functions and purposes of the state." Thomas W. Merrill, Article, *The Economics of Public Use*, 72 Cornell L. Rev. at 65. On the other hand, "a more narrowly focused and judicially manageable inquiry" would ask "where and how government should get property, not what it may do with it." *Id.* at 66.

III. Rational Basis Review Is Inappropriate Because Eminent Domain Exercised for a *Specific* Purpose

Rational basis review requires a court merely to satisfy itself that the government action advances some *conceivable* public purpose. *See FCC v. Beach Communications*, 508 U.S. 307, 313, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993). Nor is the government required to articulate a justification for its action. *Id.* at 315. But, the eminent domain power is not exercised for *conceivable* purposes. The eminent domain power always is exercised to advance specific purposes. In fact, established rules governing the forced taking of private property universally require an *ex ante* statement of the "ends" justifying the condemnation. In most states, and for all takings by the federal government, eminent domain is a judicial proceeding. After satisfying the necessary prerequisites, the condemning entity files an action against the persons whose property it seeks to take. 6 Nichols on Eminent Domain § 24.05[1] (2004). And, the condemning entity must submit pleadings which, *inter alia*, describe the land to be taken, and, importantly, set forth the public use for which it is being taken. *Id.* at § 26A.02[1] (excerpting state statutes). *See also* Fed. R. Civ. P. 71A(c)(2) (directing that "the complaint [for condemnation of property] shall contain a short and plain statement of . . . the use for which the property is to be taken").

The fact that the government must already justify every exercise of eminent domain with an *ex ante* statement of purpose undercuts *Midkiff*'s insistence that a proper respect for the prerogatives of the political branches requires courts to speculate about *conceivable* justifications for an exercise of eminent domain. *See*

Midkiff, 467 U.S. at 240 (citations omitted). The Court has held that such speculation is inappropriate when the government has *articulated* the purpose of its policy. In several equal protection cases, the Court has rejected the "conceivability" test under circumstances present with *every* exercise of eminent domain – that is, where the government stated, with particularity, the purpose of its action. For example, in *Allegheny Pittsburgh Coal v. County Commission*, 488 U.S. 336, 109 S. Ct. 633, 102 L. Ed. 2d 688 (1989), the Court considered an equal protection challenge to a county's practice of reassessing property for tax purposes only when title changed hands. The Court invalidated the assessment scheme because similarly situated property owners bore drastically different tax burdens. *Id.* at 341. Three years later, in *Nordlinger v. Hahn*, 505 U.S. 1, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992), the Court rejected an equal protection challenge to California's Proposition 13, which had a nearly identical effect. In distinguishing the cases, the Court relied upon the fact that the county in *Allegheny Pittsburgh Coal* had asserted that its assessment scheme was "rationally related to its purpose of assessing properties *at true current value*." *Id.* at 15. (Which, as a matter of logic, it could not be.) The Court then implied that, when the government articulates a purpose for its action, it will be held to it: "The Equal Protection Clause does not demand for purposes of rational basis review that a . . . governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification. . . . [But] the Court's review does require that a purpose may conceivably or may reasonably have been the [decisionmaker's] purpose and policy." *Id.* at 15 (citations omitted). The Court cited as authority for this proposition *Wheeling Steel Corporation v. Glander*, 337 U.S. 562, 69 S. Ct. 1291, 93

L. Ed. 1544 (1949), observing that "[a]fter the Court in *Wheeling Steel* determined that the statutory scheme's stated purpose was not legitimate, the other purposes did not need to be considered because 'having declared their purpose, the . . . statutes left no room to conceive of any other purpose for their existence.'" *Nordlinger*, 505 U.S. at 16 n.7 (quoting *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 530, 79 S. Ct. 437, 3 L. Ed. 2d 480 (1959)).

IV. The Court Should Resolve the Confusion in the Lower Courts by Adopting Intermediate Means-Ends Scrutiny in Public Use Cases

The confusion in the lower courts – and the widespread resistance to the application of rational basis review – is itself a signal that the total-deference rule is not appropriate. One reason that lower courts may have a particularly difficult time is that the traditional public use inquiry demands, like substantive scrutiny of economic regulations enacted pursuant to the police power, an inquiry into the appropriate *ends* of government action. (The court must decide, for example in this case, "is economic development a public use?" or "is economic development in the public interest?") For the reasons discussed above, courts understandably wish to avoid this ends-oriented inquiry. A more judicially manageable inquiry would focus instead on whether eminent domain is the appropriate *means* by which a government may pursue desired policies. A focused means-oriented inquiry would also have the salutary effect of resolving the confusion in the lower courts. It is apparent that many judges facing real-life abuses of the eminent domain power are demanding more than a "conceivable" justification for a condemnation. While some have simply concluded that "economic

development" alone is not a public use, others demand that the condemning entity justify their decision to resort to eminent domain to advance the goal of economic development.

One possible model for discerning an appropriate means-oriented test for eminent domain can be found in the regulatory takings context. In *Dolan*, 512 U.S. 302, state courts were similarly divided on the appropriate standard of review for regulatory "exactions." The Court considered several different state-court-developed tests for reviewing exactions and then concluded that the test that most closely approximated the correct federal standard required "the municipality to show a 'reasonable relationship' between the required dedication and the impact of the proposed development." *Id.* at 391. It expressed concern, however, that the phrase "reasonable relationship" might be confused with lax rational basis review and chose the "rough proportionality" standard as its rough equivalent. *Id.* The Court defined the rough proportionality formula as follows: "No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related in both nature and extent to the impact of the proposed development." *Id.*

The *Dolan* compromise requires a relatively narrow means-based inquiry; it does not preclude the government from pursuing their regulatory goals, but it does limit how those goals may be pursued. The fact that the government has choices about how to acquire land to advance the public interest permits courts to formulate a similar test to review an exercise of eminent domain. When the government decides that it needs property to advance the public interest, it can purchase it on the market, condemn it, or,

in some cases, demand it as an exaction. If the government decides to proceed with a condemnation, it makes additional choices about how to exercise the power of eminent domain: Should it avail itself to "quick take" procedures? If the property is to be transferred to a private party following the condemnation, should the government simply delegate its power of eminent domain to the ultimate beneficiary? Should that beneficiary be required to guarantee that the property will be used for the purpose for which it is to be condemned?

Because the government can, and does, make decisions about how to acquire land, a court reviewing a public use challenge could require a showing similar to that demanded in an exactions case: Can the government link the means by which and purpose for which it seeks to acquire land? That is, can the government demonstrate that a given exercise of eminent domain was "reasonably necessary" for, or "related in nature and extent" to, the public purpose for which the condemnation power was invoked? *See Nollan*, 483 U.S. at 834 ("We have long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests'") (quoting *Agins v. Tiburon*, 447 U.S. 255, 260, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980). This inquiry would continue to reflect the prevailing view that the legislature, rather than the judiciary, is better able to determine what projects are in the public's interest. It would reject, however, the conclusion that the court need only satisfy itself that "the exercise of eminent domain power is rationally related to a *conceivable* public purpose." *Midkiff*, 467 U.S. at 241 (citations omitted). Instead, the courts would ask the government to establish a link

between the exercise of eminent domain and the *particular purpose* for which it was condemned.

While this represents a departure from current constitutional standards, it would map rather easily onto standard eminent domain procedures. The established procedures for taking property, discussed above, simplify means-ends analysis by requiring, *ex ante*, a statement of the "ends" justifying the condemnation. The purpose used to justify the taking in these pleadings, which must be stated with particularity in many states could easily serve as the "ends" portion of the public use equation, just as the "impact of the proposed development" is used for rough proportionality review of exactions, *Dolan*, 512 U.S. at 391.

Such a test might be applied in several different fact-dependent ways. First, a court might ask whether the exercise of eminent domain substantially advances the government's policy goals. Generalized statements about the necessity for a taking, are inadequate. The government might instead be required to prove its case – to demonstrate that the project cannot go forward without the property and that the property is unavailable except through coercive means. Additionally, an application of a reasonable necessity test might take a form of means-ends scrutiny familiar in other areas of constitutional law – inquiry into whether the government's actions are "over-inclusive" (or, at least theoretically, "under-inclusive"). A court seeking to determine whether a condemnation is "related in nature and extent" to the public purpose justifying it might ask whether the government is acquiring too much land or whether the government needs the particular parcel of land at issue. Some state courts already entertain such challenges, permitting property owners to

argue that the size of the taking is excessive. An over-inclusive/under-inclusive analysis might follow the dissent's suggestion below that the city should be required to prove that their need for the land is not purely speculative, that the proposed use of the land is reasonably certain to come to pass, etc. Finally, means-ends scrutiny in a public use case might entail a court evaluating the procedural details of an exercise of eminent domain. For example, the government's decision to exercise "quick-take" powers or to delegate the power of eminent domain to a private beneficiary might trigger heightened scrutiny.[2]

Whatever the precise formulation adopted by the Court, the government should be required to make some sort of individualized determination of the need for the particular parcel in question before condemning private property. At a bare minimum, "a condemnor should be expected to establish that the public at large will be benefited by the exercise of eminent domain, and that less intrusive means of acquiring property are not availing. Generalized statements as to the necessity for a taking, sometimes veering toward mere speculation, should not be regarded as adequate." James W. Ely, Jr., *Can the Despotic Power be Tamed? Reconsidering the Public Use Limitation on Eminent Domain*, A.B.A. Prob.& Prop. (Nov./Dec. 2003),

[2] Quick-take statutes permit the government to obtain title and possession of property prior to a final judgment in an eminent domain action. *See* Declaration of Taking Act, ch. 307, 46 Stat. 1421 (1931) (codified as amended at 40 U.S.C. §§ 3114-3116 (supp. 2003)); 6 Nichols on Eminent Domain § 24.10. The Court previously has rejected facial challenges both to quick take procedure and to the delegation of eminent domain powers. *See Cherokee Nation v. S. Kan. Railway Co.*, 135 U.S. 641, 10 S. Ct. 965, 34 L. Ed. 295 (1890). The Court need not revisit these holdings in order to adopt our suggestion that a resort to these procedures should be carefully scrutinized.

available at http://www.abanet.org/rppt/publications/magazine/2003/nd/ely.html (last visited Nov. 28, 2004).

Just as the Court required project-specific findings of nexus and proportionality to support dedications of land as conditions for land development permits in *Dolan*, the Court should now require the government to make a specific, individualized determination to ensure that "a controlling purpose of the condemnation is the removal of blight or slums that endanger the public health, morals, safety or welfare." *Hathcock*, at 796 (Weaver, J., concurring in part and dissenting in part). *See also Richardson v. City and County of Honolulu*, 124 F.3d 1150, 1168 (9th Cir. 1997) (O'Scannlain, Diarmuid F., concurring in part and dissenting in part) ("Because the *Nollan-Lucas-Dolan* trio increased the level of scrutiny given to police power regulations, identifying some of them as takings, it stands to reason that the same increased scrutiny should be given to outright condemnation. If a taking does not have the required fit – perhaps something like *Nollan*'s "essential nexus" – between its proclaimed public use and its actual effect, then it should be invalid under the Public Use Clause.")

CONCLUSION

This Court should remand and direct the lower court to reconsider Respondents' decision to resort to eminent domain under the appropriate intermediate scrutiny standard. The lower court's approval of the condemnations proceeded under the broad deferential standard articulated in *Midkiff*. A remand is especially appropriate in light of the inherently speculative benefits of "economic

development" projects,[3] *see, e.g.*, INSTITUTE ON TAXATION AND ECONOMIC POLICY, MINDING THE CANDY STORE: STATE AUDITS OF ECONOMIC DEVELOPMENT 35-41 (summarizing fifteen state audits that show economic development incentives are generally ineffective), and the uncertain role that that Petitioners' land will play in advancing the goal of redevelopment.

Respectfully submitted,

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[3] The speculative nature of the "economic development" goal should be contrasted with the more immediate need to eliminate "blight." As discussed previously, Respondents did not find that Petitioners' properties were blighted.