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

PETITION FOR REHEARING

INSTITUTE FOR JUSTICE
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INTRODUCTION

Petitioners ask this Court to reconsider its closely divided opinion in *Kelo v. New London*. In upholding the use of eminent domain for private economic development, this Court commented that the decision would not encourage any abuse of power. Yet, in the scant time since the decision, it has already become clear that local governments and private interests have taken the decision as a straightforward green light, with no constraints upon the exercise of the power of eminent domain. In light of this disturbing trend, Petitioners ask the Court to rehear this case.

Even if the Court is unwilling to rule for Petitioners, it still should grant rehearing and vacate and remand for reexamination of the facts in light of the new standard it announced. The Court's opinion articulated a new standard – one in which there is some examination of the extent of the public benefits and private benefits to particular private parties. Generally, when this Court announces a new standard, it vacates and remands. Petitioners request that instead of simply affirming, this Court vacate and remand for reconsideration of the facts by the Connecticut courts in light of the now-announced standard.

I. The Abuse Of Eminent Domain For Private Economic Development Has Already Begun And This Court Should Rehear This Matter To Provide Protections For Home And Small Business Owners.

In her dissenting opinion, Justice O'Connor wrote that under the Court's ruling, "[n]othing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory." *Kelo v. New London*, No. 04-108, slip op. at 11 (June 23, 2005) (O'Connor, J., dissenting). The majority opinion dismissed these possibilities and others raised by Petitioners as "hypothetical cases" and a "parade of horribles." *Kelo v. New London*, No. 04-108, slip op. at 16, 17 (June 23, 2005). Nothing could be further from the truth. In a mere three-week period from this Court's decision, the floodgates are

already opening to abuse of eminent domain for private economic development, to the great detriment of home and small business owners throughout the country.

While a Motel 6 has not yet been taken for a Ritz-Carlton, other lower-tax-producing businesses are being taken for higher-tax-producing ones. For example, hours after the *Kelo* decision, officials in Freeport, Texas began legal filings to seize two family-owned seafood companies to make way for a more upscale business: an $8 million private boat marina. Thayer Evans, *Freeport moves to seize 3 properties*, Houston Chronicle, June 24, 2005.

Homes are already being taken for shopping malls. On July 12, 2005, Sunset Hills, Missouri voted to allow the condemnation of 85 homes and small businesses. This is the first step in allowing the use of eminent domain against the property owners to build a planned $165 million shopping center and office complex by the private Novus Development Corporation. Cathy Lenny, *Sunset Hills gives developer green light*, St. Louis Post-Dispatch, July 13, 2005. Also in Missouri, the City of Arnold plans to take 30 homes and 15 small businesses, including the Arnold Veterans of Foreign Wars (VFW) post, for a Lowe's Home Improvement store and a strip mall. Jake Wagman, *Local Impact*, St. Louis Post-Dispatch, June 24, 2005. Arnold Mayor Mark Powell "applauded the [*Kelo*] decision." *Id*.

Other examples from across the country demonstrate this disturbing trend:[1]

- **Baltimore, Maryland**

  The City of Baltimore is moving to acquire shops on the city's west side for private development. Ronald M. Kreitner, executive director of Westside Renaissance, Inc., a private organization coordinating the project with the city's development corporation said: "If there was any hesitation because of the Supreme Court case, any question is

[1] Due to space limitations, Petitioners can only list some of the projects moving forward in the wake of the Court's decision.

removed, and we should expect to see things proceeding in a timely fashion." Lorraine Mirabella, *High court upholds eminent domain; Acquisitions fueled a rebirth; city reaction*, Baltimore Sun, June 24, 2005.

- **Boston, Massachusetts**

  Two days after the *Kelo* decision, Boston City Council President Michael Flaherty called on the mayor of Boston to seize South Boston waterfront property from unwilling sellers for a private development project. "Eminent domain is one tool that the city can use," Flaherty said. Lucas Wall and Lisa Wangsness, *Flaherty asks mayor to spur rapid Fan Pier development*, Boston Globe, June 26, 2005.

- **Boynton Beach, Florida**

  Under the threat of eminent domain, the 50-year-old Alex Sims Barber Shop is selling to the City of Boynton Beach to make way for new residences and storefronts. Guarn Sims called the *Kelo* ruling "the nail in the coffin" that ended his hope of saving the business. Howard Goodman, *Redevelopment cuts out Boynton barbershop*, South Florida Sun-Sentinel, June 28, 2005.

- **Cleveland, Ohio**

  Developer Scott Wolstein has planned a $225 million residential and retail development in the Flats district. Wolstein has most of the property he needs, but is pleased that *Kelo* cleared the way for the City to acquire land from any unwilling sellers. "[W]e think this makes it clear that there won't be any legal impediments," he said. Leila Atassi, *Ruling's impact could be felt soon in local suburbs*, Plain Dealer, June 24, 2005.

- **Dania, Florida**

  Dania Beach City Manager Ivan Pato "expressed joy" over the ruling in *Kelo*. Shannon O'Boye, *Businesses, homes can be taken for private projects, Supreme Court rules*, South Florida Sun-Sentinel, June 24, 2005. Dania plans to buy a

block of properties for a private development project, and Pato said the city will use eminent domain to oust unwilling sellers. *Id*.

- **Hollywood, Fort Lauderdale and Miramar, Florida**

  Broward County officials on June 28 approved plans for new condo and retail development in these three cities. Hollywood residents in the targeted area fear their homes may now be taken for economic development following the *Kelo* decision. Jerry Berrios, *Three cities get green light for raft of new homes*, Miami Herald, June 29, 2005.

- **Lake Zurich, Illinois**

  Five property owners facing condemnation for private development had asked Lake Zurich officials to hold off until the *Kelo* decision. City officials are now moving to condemn. Liam Ford, *Ruling on property rights makes owners vulnerable*, Chicago Tribune, June 24, 2005.

- **Lodi, New Jersey**

  Save Our Homes, a coalition of 200 residents in a Lodi trailer park targeted by the City for private retail development and a senior-living community, goes to court on July 18 to try to prevent a private developer from taking their homes. Lodi Mayor Gary Paparozzi called the *Kelo* ruling a "shot in the arm" for the town. John Brennan, *Top court favors eminent domain; Ruling may ease way for developers in N.J.*, The Record (Bergen County, NJ), June 24, 2005.

- **Long Branch, New Jersey**

  Long Branch officials are poised to use eminent domain to take the oceanfront homes of residents, including a number of senior citizens, who stand in the way of new luxury condominiums. Carol Gorga Williams, *Homeowners cheer backlash to ruling*; *eminent domain curbs pushed*, Asbury Park Press, July 10, 2005.

- **Memphis, Tennessee**

  The Riverfront Development Corp. is planning a massive, 5-mile development effort, including the use of eminent domain to claim a four-block section from the current owners for a mixed-use development. "[*Kelo*] definitely gives the city more tools in its tool box for dealing with the legal issues surrounding that piece of property," RDC president Benny Lendermon said. Tom Charlier, *Riverfront up for grabs? – Supreme Court ruling may allow Memphis to take land for project*, The Commercial Appeal, June 24, 2005.

- **Newark, New Jersey**

  Newark officials want to raze 14 downtown acres in the Mulberry Street area to build 2,000 upscale condo units and retail space. The municipal council voted against the plan in 2003, but then reversed its decision eight months later following reelection campaigns in which developers donated thousands of dollars. Officials told the Associated Press that the Mulberry Street project could have been killed if the U.S. Supreme Court had sided with the homeowners in *Kelo*. Matt Apuzzo, *After court ruling, it's cities vs. homeowners in fight over land rights*, Associated Press, June 24, 2005.

- **Oakland, California**

  A week after this Court's ruling in *Kelo*, Oakland city officials used eminent domain to evict John Revelli from the downtown tire shop his family has owned since 1949. Revelli and a neighboring business owner had refused to sell their property to make way for a new housing development. Said Revelli of his fight with the City: "We thought we'd win, but the Supreme Court took away my last chance." Jim Herron Zamora, *City forces out 2 downtown businesses; Action follows high court ruling on eminent domain*, The San Francisco Chronicle, July 2, 2005.

- **Ridgefield, Connecticut**

  The city of Ridgefield is proceeding with a plan to take 154 acres of vacant land through eminent domain. The current property owner plans to build apartments on the land, while the city wants to use it for corporate office space. The case is currently before a federal judge, where the property owner has asked for an injunction to halt the eminent domain proceedings. Ridgefield officials directly cite the *Kelo* decision in support of their actions. First Selectman Rudy Marconi says that "it is now clear that if Ridgefield is victorious in federal court, which we feel we will be, then we can proceed with an eminent domain taking of the property." *Ridgefield Looking To Use Eminent Domain But Developer Would Be Loser, Not Homeowners*, Associated Press, July 11, 2005.

- **Ventnor City, New Jersey**

  Mayor Tim Kreischer wants to demolish 126 buildings – mom-and-pop shops, $200,000 homes, and apartments – to erect luxury condos, high-end specialty stores, and a parking garage. Ventnor has already won one lawsuit and is in the middle of another, and the Supreme Court's *Kelo* ruling only bolsters his confidence. "People don't like to hear it," Kreischer said, "but bringing people with more money into the area will hopefully bring more money to store owners and reduce everyone's taxes." Monica Yant Kinney, *Wise Ruling? Don't Bet the House on It*, The Philadelphia Inquirer, June 30, 2005.

- **Warwick, Rhode Island**

  In 2000, the developer hired by the City to redevelop the Station District was unable to acquire the land he needed through negotiations with property owners. Now, after the Supreme Court's *Kelo* ruling, Warwick Station Redevelopment Agency chairman Michael Grande says: "The only obstacle to private development of hotels, condos, office space, and retail is the price of the dirt." According to Grande, the Court's ruling

"just shores it all up." Tony DePaul, *High court ruling could help Station District effort*, The Providence Journal, June 27, 2005.

- **Washington, D.C.**

  Eminent domain is now being used to redevelop the 1940s-era Skyland Shopping Center in Southeast D.C. City officials recently asked the D.C. Superior Court to let them take private property from business owners who refuse to sell for newer shops. Supporters of the redevelopment project were buoyed by the recent *Kelo* decision. Debbi Wilgoren, *D.C. Court Is Urged To Force Property Sale*, The Washington Post, July 12, 2005.

Unless this Court rehears the *Kelo* case, this trend will continue. It is not enough for this Court to claim that these situations can be dealt with on a case-by-case basis "if and when they arise." *See Kelo*, slip op. at 17. As demonstrated here, the abuses have already begun. Moreover, many of these cases will never make it to court because property owners will simply be unable to afford the legal and other costs associated with challenging an eminent domain action on public use grounds. As was pointed out in oral argument in this case, in Connecticut (as in many other states), property owners must pay their own litigation costs in eminent domain. *See* Transcript of Oral Argument held on February 22, 2005 at 45-46. For less wealthy individuals and businesses, the cost of litigation will very quickly exceed the value of the property, which is why nearly all appellate public use cases in the state courts involve challenges by larger business owners. Homeowner and small business cases, when they are brought at all, typically involve rare pro bono or public interest litigation. As a result, eminent domain for economic development purposes directed at poorer individuals, minorities, and the politically powerless will rarely make it to the courts for evaluation on a case-by-case basis and those individuals and groups will in large part bear the brunt of these takings. Petitioners respectfully ask this Court to rehear this case so it may prohibit the use of eminent domain for private

economic development or, at a minimum, provide greater protections to property owners.

II. Given The Passage Of Time And The Cautionary Words Of This Court With Regard To Economic Development Condemnations, This Court Should At The Very Least Vacate The Judgment Below And Remand To The Trial Court For Further Proceedings.

In upholding the use of eminent domain for economic development purposes, this Court, in its majority opinion, cautioned that a "one-to-one transfer of property, executed outside the confines of an integrated development plan . . . would certainly raise a suspicion that a private purpose was afoot. . . . " *Kelo*, slip op. at 16. Similarly, Justice Kennedy in his concurring opinion, wrote that "transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause." *Kelo v. New London*, slip op. at 1 (June 23, 2005) (Kennedy, J., concurring). Justice Kennedy also declared that when condemnations have public benefits that are "so trivial or implausible," they too may raise increased suspicions on the part of a reviewing court concerning an impermissible private purpose. *Id*. at 4 (Kennedy, J., concurring).

Yet this Court, in reviewing the instant condemnations, upheld them because the specific private beneficiaries were not known at the time of the trial. *Kelo v. New London*, No. 04-108, slip op. at 2, 4 (June 23, 2005). It would be a grave miscarriage of justice to announce a new standard for examination of public use claims in economic development cases and to simultaneously deprive Petitioners who stand to lose their homes of the opportunity to present their case due simply to the timing of the announcement of those plans. At the time of the trial, the barest of details were available about the specifics of the private parties and the terms under which they were to receive the property from Respondents. No development agreement was even signed at the time of the trial and the details of it were largely unknown. Now, almost four years have passed since the

time of the trial, and more information is available, including a signed development agreement with a specific private party that details the relationship between government bodies and a private party. At the very least, Petitioners should have the opportunity to challenge whether there is a private purpose afoot in these agreements or whether the agreements confer benefits on particular private interests with only "incidental" or "trivial" public benefits.

Moreover, it is not enough to merely claim that the condemnations in this case were done pursuant to a development plan so any concern about private purposes and incidental public benefits are laid to rest. *See Kelo*, slip op. at 16; *id.* at 4 (Kennedy, J., concurring). Indeed, in attempting to distinguish the instant case from other cases that might constitute a violation of the Fifth Amendment's public use requirement, the majority opinion cites *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), as a case that might not pass muster because it constituted a one-to-one transfer of property "outside the confines of an integrated development plan." *Kelo*, slip op. at 16. However, contrary to the majority's assertion, and as the district court in *99 Cents* recognized, the City of Lancaster *did* have a development plan for the area. *See 99 Cents*, 237 F. Supp. 2d at 1125 ("In 1983 . . . Lancaster enacted an ordinance establishing the Amargosa Redevelopment Project Area and adopted a Redevelopment Plan . . . "). Nevertheless, the court did not stop its analysis by simply asserting that the taking was done pursuant to a plan. The court instead looked at the specific transfer of property and found that it was unconstitutional under the public use clause of the Fifth Amendment. Likewise, in this case, there is a one-to-one transfer of property from homeowners to the developer. Accordingly, this Court should permit Petitioners in the trial court to submit evidence concerning this one-to-one transfer of property given the passage of time and the greater knowledge at hand of the public and private benefits at issue.

To do otherwise would be to permit governments to avoid constitutional review by adopting a development plan, condemning properties up front, and then afterward

engaging in purely private one-on-one condemnations with enormous benefits going to private parties and only trivial benefits going to the public. Because the property was already condemned, property owners would lose their right to challenge the takings.

This Court regularly vacates and remands in cases where it announces or clarifies a constitutional standard, such as it now has for economic development condemnations, and while there is still uncertainty about how all of the facts below relate to the new standard. For example, when this Court found that all federal racial classifications should be subjected to strict scrutiny in *Adarand Constructors v. Pena*, 515 U.S. 200, 239 (1995), the order stated that "the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion." This Court set forth factors to be considered that were different from those that the lower courts had applied. *Id*. at 237-38. The case was therefore vacated and remanded for further litigation as necessary.[2]

Likewise, given the new standards set forth by this Court in the instant matter and the need to apply those standards to the facts as they exist today rather than the scant facts available four years ago, Petitioners respectfully request that this Court vacate the judgment of the Connecticut Supreme Court and remand the case to the trial court for proceedings consistent with the standards established by this Court.

CONCLUSION

For the foregoing reasons, Petitioners respectfully ask this Court to grant their petition for rehearing.

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[2] Similarly, in a case about the Voting Rights Act and minority representation, this Court took the case to clarify the standard of when a plan was "retrogressive," laying out a more complete list of facts than those that had been considered by the lower court. *Georgia v. Ashcroft*, 539 U.S. 461 (2003). This Court then remanded the case to the lower court for further factual findings consistent with the factors set forth in the opinion. *Id*. at 491.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Undersigned counsel certifies that this Petition for Rehearing is presented in good faith and not for the purposes of delay.

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