No. 04-108

IN THE

Supreme Court of the United States

SUSETTE KELO, ET AL.,
Petitioners,

v.

CITY OF NEW LONDON, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Connecticut

BRIEF OF *AMICUS CURIAE* KING RANCH INC. IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF *AMICUS CURIAE* [1]

King Ranch, Inc. is the owner of a large tract of land in South Texas with unique cultural, historical, and environmental importance. King Ranch is larger than the entire state of Rhode Island. It is spread across 825,000 acres, and covers almost 1,300 square miles. A significant portion of the ranch

[1] Pursuant to Supreme Court Rule 37.6, counsel for a party did not author this brief in whole or in part. No person or entity, other than amicus curiae, it members, or its counsel, made a monetary contribution specifically for preparation or submission of this brief. Counsel of record for the parties has consented to the filing of all amicus briefs in this case, and those letters of consent are on file with the Clerk.

property has been in continuous family ownership for over 150 years and has been designated a National Historical Landmark. The ranch property contains habitat suitable for many threatened and endangered species in the region, including ocelot and aplomado falcon. In the past, King Ranch has had portions of its property taken for public use through the exercise of the government's eminent domain power. King Ranch anticipates that state and local governmental entities may seek to acquire additional portions of the ranch in the future through the exercise of eminent domain.

The Texas Legislature has recently enacted legislation to begin an ambitious project, known as the Trans-Texas Corridor, for constructing new highways, railways, pipelines, etc. across the state of Texas. TEX. TRANSP. CODE § 227.001, *et seq.* At this time, it is uncertain where, if ever, the Trans-Texas Corridor will be built. There are numerous outstanding questions, including whether there will be sufficient funding to support that project, as well as the scope of the final project. Nevertheless, the Texas Legislature authorized acquisition of options to purchase property "for possible use as part of the Trans-Texas Corridor even if it has not been finally decided that the Trans-Texas Corridor will be located on that property." TEX. TRANSP. CODE § 227.041(a). The Legislature also authorized acquisitions of options to purchase property "along alternative potential routes for the Trans-Texas Corridor even if only one of those potential routes will be selected as the final route." *Id.*

As a responsible steward of the land, King Ranch believes that the governmental power of eminent domain should not be exercised for purposes other than public necessity. The government should not be allowed to acquire property or options to purchase property (which would limit the owner's ability to use its property for its own purposes) unless and until the government can show its present need for that property, and that its use of the property will be for a public

purpose, not a private one. King Ranch submits this brief in support of the Petitioners, urging reversal of the Connecticut Supreme Court's decision in this case, and requesting that this Court adopt a definition of "public use" under the Taking Clause of the United States Constitution, that will ensure that private property is not condemned by the government for private, speculative, hypothetical, or uncertain uses.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

"[E]minent domain is one of the most intrusive powers of government. It requires that individual owners relinquish their property without their consent."[2] As early as 1789, this Court explained that state legislatures could not "violate ... the right of private property" without committing "a political heresy." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388-89 (1798) (Chase, J.). Justice Chase wrote that it would be "against all reason and justice" to presume that the people intended to give the state governments the power to enact "a law that takes property from A. and gives it to B." *Id.* at 388. The "public use" limitation on the state's eminent domain power was intended to protect private property against such a "public heresy." That rule has been recognized for two hundred years. The Connecticut Supreme Court's decision should be reversed because it violates the rights of private property by transferring that property to another based entirely upon the hope of future economic gain.

Following this Court's decisions in *Berman v. Parker*, 348 U.S. 26 (1954) and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984), courts, including the Connecticut Supreme Court, have struggled with the scope of the state's eminent domain powers. Admittedly, this Court has endorsed

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[2] James W. Ely, Jr., *Can the "Despotic Power" Be Tamed?*, 17 PROB. & PROP. 31, 31 (Dec. 2003).

a broad view of the eminent domain power, equating the "public use" limitation with the government's expansive police power: "The 'public use' requirement is thus coterminous with the scope of the sovereign's police powers." *Midkiff*, 467 U.S. at 240. *See also National Railroad Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407, 422 (1992) ("We have held that the public use requirement of the Takings Clause is coterminous with the regulatory power . . ."). But even if the Court accepts that the ability to take property for a "public use" is coterminous with the police power,[3] that power does not include the ability to take private property for use for private purposes. Moreover, it does not include the right to take private property for uncertain, theoretical, or speculative economic gain. To hold otherwise would require this Court to excise the words "public use" from the Constitution. The only reason that the "public use" requirement and the state police power may be considered coterminous is that the "public use" requirement is a check on the police power that defines its outer limits.

When defining the "public use" limitation on the scope of the government's eminent domain authority, this Court should recognize the continued role of the judiciary in protecting private property against excessive encroachment by the government. *See Midkiff*, 467 U.S. at 240 ("There is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use. . ."). The judiciary's role should require the court to ask, at a minimum, two interrelated questions: (1) whether the government has articulated a legitimate public purpose to justify use of its eminent domain power, that is, a use that is not primarily for the benefit of private persons; and (2) whether the govern-

[3] King Ranch believes that scope of the Takings Clause should be more limited, to recognize that the ability to take property for a "public use" was intended to be a limitation upon the government's police and regulatory powers.

ment has shown a present intent to use or a present need to take the particular property in question in furtherance of that public purpose. This test would require the government to articulate its specific purpose in seeking to condemn property and to show that the taking of a particular piece of property is actually part of the plan to achieve that public purpose.[4] Thus, this test would avoid the needless taking of private property for a speculative, hypothetical, private, or otherwise improper purpose. When this standard is applied in the present case, this Court should conclude that the decision of the Connecticut Supreme Court must be reversed.

ARGUMENT

In this brief, King Ranch will briefly trace the history of the police power to show that the "public use" requirement should be recognized as a limit on the state police power that, among other things, prevents the taking of private property from one person to use for the benefit of another private person. Recognizing the "public use" exception as a limit on the government's authority, this Court should easily conclude that the condemnation of property in this case is not for a "public use." At a minimum, this Court should reverse the Connecticut Supreme Court's decision allowing the condemnation of Parcel 4A because the government does not have a current plan to "use" that parcel in support of its claimed public purpose.

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[4] Vanderbilt law professor and historian, James W. Ely, Jr., has written: "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?*, 17 PROB. & PROP. 31, 31 (Dec. 2003).

I. THOUGH THE SCOPE OF THE STATE POLICE POWER HAS CHANGED OVER TIME, THAT POWER CANNOT TRUMP THE CONSTITUTION'S "PUBLIC USE" LIMITATION ON THE ABILITY TO TAKE PROPERTY.

The "public use" requirement of the Takings Clause and the state's police power have been compared for decades. But it was not until *Berman v. Parker*, 348 U.S. 26 (1954) that those two terms were held to be coterminous. Previously, this Court, through the writings of Justice Holmes, recognized that the "public use" requirement and the state police power, while related, are not the same. *See Block v. Hirsh*, 256 U.S. 135, 156 (1921) (". . . there comes a time when the police power ceases and leaves only that of eminent domain . . ."); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("When this seemingly absolute protection [the public use requirement] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States."). Since the 1930s, this Court has interpreted the police power expansively up to the limits allowed by the Constitution. The police power and the "public use" requirement may be described as coterminous, though, only because the "public use" requirement is one of constitutional dimensions beyond which the police power may not expand.

This Court first recognized a limitation on the government's ability to transfer ownership of private property to another in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 387-88 (1798) (opinion of Chase, J.). Justice Chase explained that it would be "against all reason and justice" to presume that the people intended to give the state governments certain powers, among them the power to enact "a law that takes property from A. and gives it to B." *Id.* at 388. The state legislatures could not

"violate . . . the right of private property" without committing "a political heresy." *Id.* at 388-89. Similarly, Justice Iredell opined that the courts must be able to restrain the legislative branch to its "marked and settled boundaries." *Id.* at 399.

Soon thereafter, the Court began to explain the scope of state sovereignty. Chief Justice Marshall referred to "the acknowledged power of a State to regulate its police, its domestic trade, and to govern its own citizens." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 208 (1824). This power was an "immense mass of Legislation, which embraces every thing within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves." *Id.* at 203. Chief Justice Marshall later called this regulatory power the "police power," and noted that it permitted the state legislatures to order "the removal or destruction of infectious or unsound articles," such as gunpowder. *Brown v. State of Maryland*, 25 U.S. (12 Wheat.) 419, 443-44 (1827).

This Court then expanded the police power beyond the mere prevention of harm. Justice Barbour explained that the "internal police" power was "not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends." *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102, 139 (1837). And in *The License Cases*, 46 U.S. (5 How.) 504, 583 (1847), Chief Justice Taney expressed the view that the police powers "are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions." Throughout this expansion, though, this Court did not waiver from Justice Chase's holding: "The right of eminent domain nowhere justifies taking property for a private purpose." *Olcott v. The Supervisors*, 83 U.S. 678, 694 (1872).

The mid to late 1800's marked a period of flux for the police power. Following Chief Justice Shaw's opinion in *Commonwealth v. Alger*, 61 Mass. 53 (1851), scholars began describing a more limited role for the police power.[5] In 1866, Thomas Cooley contended that "the police of a State" was intended to "prevent a conflict of rights" between citizens, as well as to preserve public order and prevent offenses against the state.[6] In 1873, future Justice Oliver Wendell Holmes, Jr. explained that "acts which can only be justified on the ground that they are police regulations, must be so clearly necessary to the safety, comfort, or well-being of society, or so imperatively required by public necessity, that they must be taken to be impliedly excepted from the words of the constitutional prohibition."[7] In 1886, Professor Christopher Tiedeman emphasized that the police power rested on "such a restraint as will prevent the infliction of injury upon others in the enjoyment" of private rights.[8] This Court also strug-

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[5] Chief Justice Shaw concluded that the police power permitted regulation of things that "tend to injurious consequences," even those that are "not . . . wrong in themselves, or necessarily injurious and punishable as such at common law," because of the practical need for "a definite, known, and authoritative rule which all can understand and obey." *Alger*, 61 Mass. at 96.

[6] Thomas M. Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (Boston, Little, Brown & Co. 1866), *quoted in* Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 479 (2004).

[7] 2 James Kent, COMMENTARIES ON AMERICAN LAW 340 n.2 (12th ed. O.W. Holmes Jr., ed., 1873), *quoted in* Glenn H. Reynolds & David B. Kopel, *The Evolving Police Power: Some Observations For A New Century*, 27 HASTINGS CONST. L. Q. 511, 516 (2000).

[8] Christopher G. Tiedeman, A TREATISE ON THE LIMITATIONS OF THE POLICE POWER IN THE UNITED STATES CONSIDERED FROM BOTH A CIVIL AND CRIMINAL STANDPOINT (St. Louis, F.H. Thomas Law Book Co. 1886), *quoted in* Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 485 (2004).

gled to find the proper scope of the police power. *Compare Barbier v. Connolly*, 113 U.S. 27, 31 (1884) (articulating a broad definition of police power) *with Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887) (adopting a narrower view). In *Mugler*, the Court explained that "it does not at all follow that every statute enacted ostensibly for the promotion of these ends [the public morals, health or safety] is to be accepted as a legitimate exertion of the police powers of the state." *Id.* The courts had the duty to adjudge whether a statute passed under the police power has a "real or substantial relation" to the claimed benefit, and whether it is "a palpable invasion of rights secured by the fundamental law." *Id.* Thus, this new line of thinking regarding the scope of the police powers did not change prior understandings that the police power did not authorize a state to exercise its eminent domain authority in excess of the "public use" limitation imposed by the Constitution.

By 1894, the Court settled upon the broader definition of the police power, that included everything "essential to the public safety, health, and morals," which were "necessary" for the protection of those interests, and which "require" interference by the government. *Lawton v.* Steele, 152 U.S. 133, 136-37 (1894). During the *Lochner* era, the Court briefly retreated to a more restrictive view of the governmental power. *Lochner v. New York*, 198 U.S. 45, 54 (1905). But, by 1934, the Court rejected *Lochner* and embraced its former cases holding that the police power includes "the power to promote the general welfare." *Nebbia v. New York*, 291 U.S. 502, 523-25 (1934). During this time period, though, the Court did not waiver from its view recognizing the important principle that private property may not be taken for the benefit of a private purpose. *See Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 80 (1937).

In 1954, this Court decided the landmark case of *Berman v. Parker*, 348 U.S. 26 (1954). The Court explained that the

police power *included* public safety, morals and health, but was not *delimited* by those concepts. *Id.* at 32. Indeed, though the issue before the Court was a noxious and dangerous slum, the Court explained that the police power would even extend to mere beautification projects. *Id.* at 33. The Court then explained that the power of eminent domain was merely a means to the police power's ends, ignoring the distinctions drawn in prior cases between the police power and the power of eminent domain. *Id. Berman* is the case in which this Court blurred the "public use" requirement articulated in the Constitution with the "public purpose" requirement more traditionally associated with police power jurisprudence.

Since *Berman*, this Court has reaffirmed the scope of the "police power" as: "the time-tested conceptional limit of public encroachment upon private interests," which can be more or less equated with "reasonableness." *Goldblatt v. Town of Hempstead, New York*, 369 U.S. 590, 594-95 (1962). A later case explained that the limit on the police power was "justice and fairness." *Penn Central Transp. Co. v. New York*, 438 U.S. 104, 124 (1978). In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1022-26 (1992), this Court rejected the argument that the police power must be based on a finding of "harm." Notably, though, the Court continued to recognize that private property may not be taken to serve another's private purposes. *See Midkiff*, 467 U.S. at 241.

The history of the police power, as it relates to the government's eminent domain power, teaches two important lessons. First, the police power has been defined over time by the judiciary. The judiciary should not be able to define that power in a way that trumps the express language of the Constitution that limits the taking of private property to circumstances involving a legitimate "public use." Second, regardless of the scope of the police power, that power cannot authorize the government to transfer private property from

one private person to another, absent some guarantee that the property will be used for the public benefit. This Court cannot affirm the Connecticut Supreme Court's decision without rejecting these two settled principles.

Here, the government condemned property for the purpose of creating new jobs and hopefully generating new taxes. In other words, the government decided to take property from one person, who was not engaged in any conduct harmful to the community, and decided to give it to another whom the government felt would make better use of the property. The articulated benefits to the public flow incidentally, if at all, from the property recipient's use of the property for its own pecuniary gain. If this justification for a taking is sufficient to constitute a "public use," it will be difficult, if not impossible, to prevent other obviously impermissible takings. For example, the same justification could be asserted for the taking of a mom and pop store to replace it with a Wal-Mart, given its greater size and ability to generate revenues, and thus more taxes. Or, this justification could arguably support the taking of a beach-front home to transfer the property to the developer of condos or apartments, on the basis that more dwellings will result in more residents in the community and, thus, more tax revenues. Indeed, when the legislature is left alone to decide what use of a given property serves the public interest, there is no meaningful check on the majority's ability to take property from A and give it to B.

King Ranch urges the Court to adopt a standard for the "public use" requirement that provides meaningful protection to private property owners.

II. THE "PUBLIC USE" LIMITATION ON THE GOVERNMENT'S EMINENT DOMAIN POWER SHOULD BE INTERPRETED TO REQUIRE A PRESENT INTENT OR NEED TO USE THE PROPERTY BEING CONDEMNED.

Property owners are entitled to assurance that they will not be needlessly displaced from their property. Even under *Berman* and *Midkiff*, there is a role for the judiciary to evaluate whether a taking of property is for a public use. *See Midkiff*, 467 U.S. at 240. The first assurance provided is that private property may not be taken for a private purpose. *See id.* at 241; *Calder*, 3 U.S. at 388. In other words, the government must have a legitimate public purpose in mind when it decides to act. But the plain language of the Takings Clause requires more protection—it requires a "public *use*." U.S. CONST. Amend. V. Thus, the plain language of the Takings Clause also anticipates an inquiry into whether the government actually has a present intent to use or need to take the particular property in question in furtherance of that public purpose. *See* 2A NICHOLS ON EMINENT DOMAIN § 7.01[9] (3d ed. 2004) ("When property is taken for a public use by eminent domain, the proper exercise of the power is predicated upon the promise that within a reasonable period of time it will be devoted to the public use for which it was taken."). King Ranch anticipates that the parties and other amici will adequately address whether the taking of property for "economic development" is a legitimate public purpose. Accordingly, King Ranch will devote the remainder of its brief to explain why this Court should require the government entity taking property to articulate specifically how the particular property will be used to further the asserted public purpose. Absent a specific plan for the use of property, there can be no meaningful judicial review of the taking of that property.

First, this Court has repeatedly reiterated that the police power/eminent domain power are only permitted where interference is *necessary* or *required*. "To justify the state in thus interposing its authority in behalf of the public, it must appear . . . that the interest of the public generally, as distinguished from those of a particular class, require such interference." *Lawton*, 152 U.S. at 137; *see also Goldblatt*, 369 U.S. at 594-95 (quoting this language). "[T]he state may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests." *Lawton*, 152 U.S. at 136. With no present, specific plan to use the property, the state cannot honestly determine that the condemnation is "necessary," "required" or "demanded." In such a case, the state is merely speculating with other peoples' property.

Second, this unprecedented situation should be considered by analogy to this Court's decisions in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Those cases concerned a taking, in that the government refused to grant a building permit until the landowner conveyed title to a part of the property. *Nollan*, 483 U.S. at 828; *Dolan*, 512 U.S. at 379-80. In *Nollan*, this Court explained that stated government purpose was legitimate, but that there nevertheless had to be an "essential nexus" between that purpose and the taking. *Nollan*, 483 U.S. at 837. No "essential nexus" existed between the purpose (the public's impeded view of the beach) and the taking (an easement for people to walk from one beach to another). *Id.* In *Dolan*, this Court explained that even where such a nexus existed, the amount of the dedication had to be "roughly proportional" to the governmental interest. *Dolan*, 512 U.S. at 391. Of course, those cases dealt with a type of regulatory taking under the police power, whereas this case presents a physical seizure of property

under the Takings Clause. But that only means the principles in *Nollan* and *Dolan* should be *more* strenuously enforced, not less. If the state has no firm purpose for the property (not even concrete plans for future expansion), then the taking of that property has no "nexus" with the original purpose of the development. Additionally, there would be no way to measure the "rough proportionality" of the taking where the specific purpose for the land remains unknown. This Court should look to the common-sense constitutional guidelines set forth in *Nollan* and *Dolan*, and find that the Fifth and Fourteenth Amendments do not permit the taking of property for speculative purposes.

Finally, this Court's decision in *Cincinnati v. Vester*, 281 U.S. 439 (1930) supports the addition of a requirement that the state assert a present plan or need to use the property. In *Vester*, the Court recognized that the local government needed "to specify definitely the purpose of the appropriation." *Id.* at 447. *See id.* at 448 ("To define is to limit. . ."). Otherwise, the Court found that any articulation of a public purpose for a taking would justify the condemnation of excess land that was "wholly unrelated to the immediate improvement." *Id.* This Court declined to render meaningless the "public use" limitation on the exercise of eminent domain. *Id.* at 447-48. Recently, the Seventh Circuit recognized the continued validity of *Vester* when it refused to allow a local governmental entity to condemn private property based upon speculation about the future public benefits that could be achieved through the use of that property.[9] *Daniels v. The Area Planning Commission*, 306 F.3d

[9] In *Morley v. Jackson Redevelopment Auth.*, 632 So.2d 1284, 1290 (Miss. 1994), the Mississippi Supreme Court questioned whether *Vester* is still good law in light of more recent decisions from the Court. Nevertheless, recognizing the wisdom of this Court's decision in *Vester*, the Mississippi Supreme Court adopted *Vester* as the appropriate manner to view a takings claim under Mississippi law. *Id.* To the extent that the Mississippi Supreme Court is correct regarding its assessment of *Vester* as

445, 464-66 (7th Cir. 2002). When the condemning authority cannot specify how particular property will be used, there is no assurance that the private property is being taken for a "public use" as required by the Constitution.

The common theme running through this Court's decisions upholding the exercise of the eminent domain power is that the governmental entity exercising that authority must articulate a current, non-speculative, non-hypothetical need or intent to use the property being condemned. *See, e.g., Brown v. Legal Found. of Washington*, 538 U.S. 216, 231-32 (2003) (use of interest earned on IOLTA accounts to fund legal services for the poor); *National Railroad Passenger Corp.*, 503 U.S. 407 (1992) (acquisition of a railway that was being poorly maintained which negatively impacted Amtrak service); *Midkiff*, 467 U.S. at 241-42 (use of condemnation to redistribute property to minimize effects of land oligopoly in Hawaii); *Berman*, 348 U.S. at 32-36 (taking of property to remedy problems with urban blight); *Old Dominion Land Co. v. United States*, 269 U.S. 55 (1925) (condemnation of interests in land previously leased by the government on an emergency basis to protect the government's interest in improvements built on the land); *United States v. Gettysburg Ry. Co.*, 160 U.S. 668, 681-83 (1896) (acquisition of historic battlefield to protect it from imminent harm due to construction of railway across that field). This case presents an attempt to stretch the Constitution beyond its prior boundaries.

Admittedly, this Court has held that a governmental entity may condemn land to address anticipated needs for the future. *Rindge Co. v. Los Angeles County*, 262 U.S. 700, 707 (1923). But, even in those circumstances, this Court has evaluated the proposed acquisition of land in relation to the present plans to

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a matter of federal law, King Ranch submits that the principles articulated in that decision should be elevated to the law of the land.

use and develop the property. *Id.* (evaluating the proposed condemnation of land to build a highway in anticipation of the future growth of Los Angeles). Notably, though, this Court's decisions have not upheld the condemnation of land when the government has no specified need or intent to use the land, *Vester*, 281 U.S. at 447-48, or where the government's need or intent to use the land is speculative, uncertain, or hypothetical.

This Court has explained that courts should not be placed in the position of second-guessing legislative judgments about the boundaries or scopes of integrated public projects, or about the need for acquiring each piece of property within an integrated project. *See Berman*, 348 U.S. at 35. Before any deference should be afforded to government decisions to acquire property, however, the government should be required to articulate its plan showing where the particular property fits within the plan. Otherwise, there is no check upon the government's ability to acquire property. Simply put, the government cannot show a "public use" if it cannot articulate a "use" of any kind.

An example illustrates why this restraint is necessary. Imagine that Congress wants to address a problem with urban blight in Southeast Washington D.C. After receiving its mandate to act, the local government begins to condemn *non-blighted* property that is in Southeast D.C., and is not in the blighted area nor is it within the area being redeveloped. In other words, unlike the property at issue in *Berman,* the property in this example is *not* located in the blighted neighborhood. If the government is required to explain how the property is part of its plan to address urban blight, the fact that the property is not needed for the stated government purpose is readily apparent, and the attempt to condemn the property would fail. However, if the government decision to condemn this property is given the deference stated in *Berman*, without an inquiry into the actual use of that

property, the government would be able to take the property without a showing that the property would be employed for the public use. In other words, the government may be able to take that additional property even if the government was engaging in land speculation or in other types of pretextual acquisitions.

Similarly, imagine if the government decides to construct a new highway, which, in the abstract, appears to be an obvious public purpose. If the government's articulation of such a broad purpose were sufficient to trigger the deferential review described in *Berman*, then the government could acquire any property it desires in the name of the highway plan, regardless whether that property is properly related to the highway project, or even whether the government knows what route the highway will take. Thus, the government could take multiple parcels of property, and even multiple alternative routes, even though it ultimately will only use one. This could result in a massive interference with private property rights, even though the need for the highway project is far more limited. If, on the other hand, the government is required to articulate its plan showing how property would be used, a government seeking to construct a highway would need to show its intended route before it could acquire property. That showing would prevent the unwarranted interference with property rights that are not actually associated with the highway project.

As the present case shows, it is not unrealistic to think that a government would seek to acquire property now on the belief that it may find a use for that property in the future. Private property rights should not be subject to the government's whim, nor should a state government be permitted to use the power of eminent domain for land speculation. If a proposed use of property is speculative, hypothetical or uncertain (such as the acquisitions of parcel 4A in this case), the government's ability to condemn that property should be

deferred until there is a present need or certainty about the plan to use the parcels in question for the public purpose. Deferral of the right to condemn property until there is a present and certain plan for that property has several benefits, including (1) protecting private property holders from being needlessly displaced from their property, and (2) allowing the marketplace to determine what is the best use of that property when government is uncertain.

CONCLUSION

For the foregoing reasons, the judgment of the Connecticut Supreme Court should be reversed. This Court should adopt an interpretation of the "public use" requirement of the Takings Clause that restores meaning to the provision as a limitation on the government's eminent domain power.

Respectfully submitted,

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