Appellate Division–Second Department Docket No. 2008-07064

Court of Appeals
of the
State of New York

DANIEL GOLDSTEIN, PETER WILLIAMS ENTERPRISES, INC., 535 CARLTON AVE. REALTY CORP., PACIFIC CARLTON DEVELOPMENT CORP., THE GELIN GROUP, LLC, CHADDERTON'S BAR AND GRILL INC., d/b/a FREDDY'S BAR AND BACKROOM, MARIA GONZALEZ, JACKIE GONZALEZ, YESENIA GONZALEZ and DAVID SHEETS,

Petitioners-Appellants,

– against –

NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION,

Respondent-Respondent.

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE

Jeff Rowes
Dana Berliner*
Robert J. McNamara*
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, VA 22203
Tel: (703) 682-9320
Fax: (703) 682-9321

* Motions for admission *pro hac vice* to be filed.

Dated September 03, 2009

Appellate Division–Second Department Docket No. 2008-07064

Court of Appeals
of the
State of New York

DANIEL GOLDSTEIN, PETER WILLIAMS ENTERPRISES, INC., 535 CARLTON AVE. REALTY CORP., PACIFIC CARLTON DEVELOPMENT CORP., THE GELIN GROUP, LLC, CHADDERTON'S BAR AND GRILL INC., d/b/a FREDDY'S BAR AND BACKROOM, MARIA GONZALEZ, JACKIE GONZALEZ, YESENIA GONZALEZ and DAVID SHEETS,

Petitioners-Appellants,

– against –

NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION,

Respondent-Respondent.

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE

Jeff Rowes
Dana Berliner*
Robert J. McNamara*
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, VA 22203
Tel: (703) 682-9320
Fax: (703) 682-9321

* Motions for admission *pro hac vice* to be filed.

Dated September 03, 2009

Disclosure Statement Pursuant to Rule 500.1(f)

Amicus curiae the Institute for Justice, 901 N. Glebe Rd, Suite 900, Arlington, VA 22203, is a nonprofit corporation with no parents, subsidiaries or affiliates.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Other Publications

Interest of *Amicus*

Amicus curiae the Institute for Justice (IJ) is the nation's leading defender of property rights and the leading legal advocate against the abuse of eminent domain. IJ represented the property owners in *Kelo v. City of New London*, 545 U.S. 469 (2005). IJ also appears frequently as *amicus curiae* in cases nationwide concerning state and federal constitutional "public use" requirements. To date, IJ has submitted *amicus* briefs in cases concerning "public use" issues to the highest courts of California, Connecticut, Illinois, Indiana, Massachusetts, Michigan, Mississippi, Missouri, Nevada, New Jersey, Oklahoma, Pennsylvania, Rhode Island, and Washington, as well as the Supreme Court of the United States and the United States Courts of Appeals for the Second, Fifth, and Ninth Circuits. IJ files this brief to provide this Court with information about legal developments in states outside of New York and to inform the court about recent scholarly research into the use and effects of eminent domain abuse.

Introduction

At its heart, this case is about the role of the courts in preventing the abuse of the power of eminent domain. In the wake of the Supreme Court's decision in *Kelo v. City of New London*, state court after state court has reasserted that there remains a meaningful role for the judiciary in the eminent domain process—in, for example, evaluating blight designations or preventing pretextual takings. Because of the importance of protecting property owners' rights, and because eminent domain can be (and has been) readily abused when left unchecked, this Court should follow suit and reaffirm that state courts play an important role in reviewing eminent domain determinations in New York.

Facts

Amicus defers to Petitioners' statement of the facts. Br. for Pet'rs-Appellants at 4-34.

Argument

There are two competing visions of the judicial role at the heart of this case. One, the one that animated the opinion below, mirrors the approach of federal courts in dictating nearly complete deference to

eminent domain determinations. The other, the one adopted by most state courts, holds that courts have an important role in preventing pretextual or unnecessary takings through eminent domain.

It is particularly important for this Court to reaffirm that the New York Constitution protects property owners from unjustified condemnations because of the enormous potential for abuse inherent in the eminent domain power. As repeated studies have shown, eminent domain for private development disproportionately harms racial minorities and poor people, and is often unnecessarily invoked merely for the benefit of private parties. Basic principles of justice require the courts of this state to protect citizens from the abuse of eminent domain for private gain.

I. This Court Should Follow Other States in Rejecting Complete Deference in the Context of Eminent Domain.

The decision below was based on the lower court's perception that New York requires extraordinary judicial deference to eminent domain determinations—but this is false. This Court has never held that the New York State Constitution requires the sort of supine deference shown by the court below, and this case provides an ideal opportunity to clarify the independent meaning of New York's takings clause.

In reaffirming the role of the courts in reviewing the government's exercise of eminent domain, this Court has ample guidance. In the wake of the Supreme Court's controversial 2005 decision in *Kelo v. City of New London*, the highest courts of several states have—in cases much like this one—played the role courts are meant to play in a system of divided government. They have impartially examined evidence and rejected implausible claims and pretexts in order to protect their citizens from abusive or pretextual takings. These opinions, as well as cases from within New York, point to a clear path by which this Court can properly fulfill its role in the eminent domain process.

A. This Court should clarify that courts play a meaningful role in reviewing the use of eminent domain.

In handing down its decision in *Kelo*, the Supreme Court made clear that states remained free to "impose 'public use' requirements that are stricter than the federal baseline" as a matter of state constitutional law. *Kelo v. City of New London*, 545 U.S. 469, 489 (2005). With a striking degree of unanimity, state courts have taken up that invitation, reasserting their important role in reviewing assertions of "public use" for takings of private property. *See, e.g., City of Norwood v. Horney*,

853 N.E.2d 1115, 1136 (Ohio 2006) (holding that Ohio Constitution provided more protection for property owners than the federal Takings Clause); *Bd. of County Comm'rs v. Lowery*, 136 P.3d 639, 651 (Okla. 2006) (holding that the Constitution of Oklahoma "provides private property protection to Oklahoma citizens beyond that which is afforded them by the Fifth Amendment to the U.S. Constitution").

In the wake of *Kelo*, state high courts have overwhelmingly ruled in favor of property owners. *See, e.g., County of Hawai'i v. C&J Coupe Family Ltd. P'ship*, 198 P.3d 615 (Haw. 2008); *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447 (N.J. 2007); *Middletown Twp. v. Lands of Stone*, 595 Pa. 607 (2007); *Centene Plaza Redev. Corp. v. Mint Props.*, 225 S.W.3d 431 (Mo. 2007); *Sapero v. Mayor of Baltimore,* 920 A.2d 1061 (Md. 2007); *R.I. Econ. Dev. Corp. v. The Parking Company*, 892 A.2d 87 (R.I. 2006); *City of Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006); *Bd. of County Comm'rs v. Lowery*, 136 P.3d 639 (Okla. 2006). Indeed, not a single state high court to date has relied on *Kelo* to uphold a taking.

Particularly where, as here, government takes private property "for transfer to another individual or to a private entity rather than for

use by the state itself, the judicial review of the taking is paramount." *City of Norwood*, 853 N.E.2d at 1139. Speaking broadly, state courts have policed private-to-private transfers through two mechanisms: by scrutinizing (and invalidating) pretextual takings, and by imposing substantive limits on the purposes for which property may be taken. Taking either mechanism seriously here would require invalidating the opinion below.

1. Courts routinely forbid pretextual takings.

The court below gave remarkably short shrift to the contention that the project at issue in this case is simply a pretext for conferring benefits on private developer Forest City Ratner, apparently holding that a taking cannot be pretextual as long as there is *any* purported public benefit associated with the taking. *See Goldstein v. New York State Urban Dev. Corp.*, 2009 Slip Op 3903, 9 (2d Dep't 2009) (holding that the taking is not pretextual because there was no evidence that the project's purported public benefits were entirely "illusory"). This rule—that the only pretextual takings are those with literally no *conceivable* public benefit—seems at odds with the very notion of pretextual takings: there is always, in every pretext case, an asserted public

purpose, which serves as a pretext for the would-be condemnor's true, illegitimate purpose. The lower court's rule is grossly out of step with the practice of other state courts (and even federal courts), and this Court should make clear that New York courts, like courts everywhere else, have a duty to seriously examine the context of takings in order to prevent "public use" from serving as a pretext for private gain. *Cf. Kelo*, 545 U.S. at 491-92 (Kennedy, J., concurring).

It is especially important to look at questions of pretext where, as here, the purported public use dovetails with the preexisting commitments and plans of private parties. *See* Br. for Pet'rs-Appellants at 4-19 (describing the genesis of the project). Just last year, the Supreme Court of Hawaii held that a trial court was required to consider whether a condemnation to construct a public road (a quintessential public use) was pretextual where a private developer had contracted with the condemning authority for the power to designate the path of the road and areas subject to condemnation, and had exercised that power for the benefit of a subdivision built by that same developer. *County of Hawai'i v. C&J Coupe Family Ltd. P'ship*, 198 P.3d 615, 646-47 (Haw. 2008).

Similarly, in 2006, the Supreme Court of Rhode Island prevented the Rhode Island Economic Development Corporation from condemning a temporary easement over a parking facility, even though the easement would actually be owned by the public entity. *R.I. Econ. Dev. Corp. v. The Parking Co.*, 892 A.2d 87, 93 (R.I. 2006). Notwithstanding that the parking facility was to be used for airport parking (a public use), the court correctly found that the condemnation of the easement was merely a pretextual attempt to avoid paying a previously agreed-upon price for the eventual purchase of the facility. *Id.* at 107; s*ee also Bd. of County Comm'rs v. Lowery*, 136 P.3d 639, 649-52 (Okla. 2006) (finding no public use where privately owned power plant contracted with condemning authority to acquire easements over third-parties' properties in exchange for building water pipeline).

The Supreme Court of Pennsylvania reached a similar conclusion in *Middletown Township v. Lands of Stone*, 595 Pa. 607 (2007). In that case, the Township sought to condemn a piece of farmland that had been subdivided into four parcels. *Id.* at 610. The township had statutory authority to condemn property for recreational purposes, and it asserted that it was condemning the farmland for recreational

purposes. The Pennsylvania Supreme Court, however, recognized that eminent domain necessarily involves the destruction of private rights and must therefore be carefully reviewed. It rejected the claim of recreational use as pretextual, holding that, for a taking to be legal, "the **true** purpose must primarily benefit the public." *Id.* at 617 (bold in original). Notwithstanding the township's assertions, the court reasoned that the true purpose of the condemnation was to prevent one of the parcels from being sold to a developer. This conclusion was based on the court's review of the *context* surrounding the condemnation, through pre-condemnation statements, deposition testimony, and the fact that the Township actually intended to allow one owner to continue farming his land after the taking (which was "clearly a private venture and not a public purpose permitted by law"). *Id.* at 614-17.

This meaningful scrutiny of the context surrounding takings in order to prevent pretextual takings is not merely confined to post-*Kelo* litigation. Indeed, in *Kelo* itself, the United States Supreme Court pointed approvingly to a similar case from the Central District of California, noting that courts have cast a "skeptical eye" on condemnations in suspicious circumstances. *Kelo*, 545 U.S. at 487

n.17.[1] In that case, *99 Cents Only Stores v. Lancaster Redevelopment Agency*, the district court barred the condemnation of a 99 Cents Only store, holding that the condemnation was a pretextual outgrowth of preexisting negotiations between a private party (in that case, a Costco) and the condemning authority. 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001), *appeal dismissed as moot*, 60 Fed. App'x 123 (9th Cir. 2003). *See also Sw. Ill. Dev. Auth. v. Nat'l City Envtl., LLC*, 768 N.E.2d 1, 10 (Ill. 2002) (holding that condemnation was not for public use where condemning authority had preexisting contract to condemn whatever land "may be desired" by racetrack owner); *Patel v. S. Cal. Water Co.*, 119 Cal. Rptr. 2d 119, 120 (Cal. Ct. App. 2002) (finding no public use where water company had condemned easement in order to lease easement at a profit to private company); *Tolksdorf v. Griffith*, 626 N.W.2d 163, 168 (Mich. 2001) (public purpose must be not only present but "predominant interest advanced by taking of property") *Denver W. Metro. Dist. v. Geudner*, 786 P.2d 434, 436-37 (Colo. App. 1989) (finding pretext where asserted public use was flood control but actual purpose was to enable sale of government property at a profit); *Redev. Auth. v.*

[1] *See also County of Hawai'i*, 198 P.3d at 642 n.31 (noting historical prohibition on pretextual takings).

Owners, 274 A.2d 244, 250 (Pa. Commw. Ct. 1971) (rejecting condemnation where land was taken for purpose of fulfilling preexisting commitment to different private owner); *City of Dayton v. Keys*, 252 N.E.2d 655, 660-61 (Ohio Ct. Com. Pl. 1969) (finding bad faith where property was condemned to satisfy contractual obligation to private developer).

History gives courts ample reason to doubt glib governmental assertions of future benefit: Recent history is littered with the wreckage of failed redevelopment projects in which governments destroyed neighborhoods in pursuit of goals that proved entirely imaginary. The most famous example is perhaps *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455 (Mich. 1981) *overruled by County of Wayne v. Hathcock*, 684 N.W.2d 765, 782 (Mich. 2004), in which the Michigan Supreme Court approved the destruction of a neighborhood of more than 4,000 people in pursuit of a project that quite possibly destroyed more jobs than it created (and, for years, generated literally zero benefits). *See* Ilya Somin, *Overcoming Poletown:* County of Wayne v. Hathcock, *Economic Development Takings, and the Future of Public Use,* 2004 Mich. St. L. Rev. 1005, 1012-19 (explaining why observers at

the time should have expected—and did expect—the project to fall far short of the government's implausible promises). The unexamined promises that motivated the project at issue in the *Kelo* case have fared no better—and, indeed, have done even worse. Four years after the decision was announced (and two years after the last buildings in the area were razed), the local paper reported that "[t]he empty lots once occupied by yards, porches and office buildings [were] turning into a meadow of wildflowers, milkweed and tall grasses, and the birds [were] moving in." Judy Benson, *Fort Trumbull Neighborhood Is for the Birds*, The Day (New London, Conn.), July 7, 2009. These are not isolated instances. *See* Institute for Justice, *Redevelopment Wrecks: 20 Failed Projects Involving Eminent Domain Abuse* (2006) (detailing other failed projects built around eminent domain). The message is clear: When courts fail to fulfill their ordinary and important role in the eminent domain process and instead approve the use of eminent domain based only on vague promises of possible, hypothetical future benefits, they open the door to allow local governments to engage in what amounts to real-estate speculation. And this speculation comes at huge cost not just to the public fisc, but to the residents and small business who see

their neighborhood destroyed. Particularly where, as here, the developer has conceded that the purported public benefits will not be constructed for years, if ever (see Br. of Pet'rs-Appellants at 14), courts have a duty to examine the true underlying purpose of a taking.

Simply put, courts everywhere—federal and state, pre-*Kelo* and post-*Kelo*—look to the context in which condemnations take place (not just at the asserted public use or benefit) in order to identify pretextual takings. According to the court below, New York courts no longer have any business doing that. This Court should take this opportunity to reaffirm that context matters, and that local authorities will not be permitted to exercise public power for private gain merely because they can conjure up a fig leaf of "public use."

2. Courts impose substantive limits on eminent domain.

In addition to examining takings for pretext—where there is an asserted, but unpersuasive or not predominant, public purpose—state courts also limit the definition of public use itself. *See, e.g., Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447 (N.J. 2007); *City of Norwood*, 853 N.E.2d 1136 (rejecting economic development as a permissible public use); *see also Benson v. South Dakota*, 710 N.W.2d

131, 146 (S.D. 2006) (stating that state constitution permits takings only for actual "use by the public").

In evaluating the case before this Court, useful guidance can be found in the New Jersey Supreme Court's recent unanimous decision in *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447 (2007). *Gallenthin*'s analysis is useful here because New Jersey (along with New York) is one of only a handful of states with a state constitutional provision explicitly providing (and defining) blight or slum clearance as a purpose justifying the use of eminent domain. *Compare* N.J. Const. art. VIII, § III, para. 1 *with* N.Y. Const. art. XVIII, §§ 1, 9.[2] As the New Jersey Supreme Court made clear, the fact that the people of the state had adopted a particular clause allowing condemnation for certain purposes meant they had "entrusted certain

[2] While the New Jersey Constitution's provision is *similar* to the New York Constitution's, *amicus* does not intend to suggest they are identical. Each provision uses materially different language, and each provision was adopted at a different point in the respective state's constitutional history, as a response to different concerns. The New Jersey provision declares that remediating "blighted areas shall be a public purpose and public use," whereas the New York provision authorizes the use of eminent domain to remediate "substandard and insanitary areas," otherwise known as "slums." *See* Br. for Pet'rs-Appellants at 61-65 (discussing the truly brutal and life-threatening "slum" conditions at which New York's provision was aimed). *Compare Gallenthin*, 924 A.2d at 457-58 (discussing the "impetus" for New Jersey's provision in the context of blighted areas destroying surrounding property values). While *Gallenthin* provides useful guidance, it is important to remember that, based on these differences, the New York's slum-clearance provision is substantially more restrictive than New Jersey's.

powers to the Legislature, and *the courts* are responsible for ensuring that the terms of that trust are honored and enforced." *Gallenthin*, 924 A.2d at 456 (emphasis added).

In *Gallenthin*, the Borough of Paulsboro sought to designate a largely undeveloped parcel of land as "in need of redevelopment," which would make the land subject to condemnation. *Id.* at 449. The Borough of Paulsboro, much like Respondent in this case, sought to convince the court that any property that was not fully developed or could be put to a better use should be considered blighted and eligible for condemnation at the government's discretion. The court, making clear that the scope of government's power to declare and condemn "blight" was a judicial question, explicitly rejected a definition of "blight" that would extend to property that was merely "not fully productive." *Id.* at 456, 460. Instead, the court held that blight, at its heart, required evidence of the property's "deterioration or stagnation that has a decadent effect on surrounding property." *Id.* at 460. A determination of blight based on the fact that property could be put to a *better* use was meaningless—instead, the power to condemn blighted property was limited to its intended purpose: allowing government to take property that was

actually causing harm to the properties around it. *Id.* *See also City of Norwood*, 853 N.E.2d 1115, 1145 ("A fundamental determination that must be made before permitting the appropriation of a slum, blighted, or deteriorated property for redevelopment is that the property, because of its existing state of disrepair or dangerousness, poses a threat to the public's health, safety, or general welfare.").

This Court should follow the lead of the Supreme Court of New Jersey. If determinations of "blight" can be based (as they were here) on assertions that property is not as fully developed as it might be, then (as the *Gallenthin* court recognized) almost any property in the state could be condemned for redevelopment. This Court "need not examine every shade of gray coloring a concept as elusive as 'blight' to conclude that the term's meaning cannot extend as far as" Respondent in this case contends. *Id.* A finding of blight premised on underutilization or the presence of weeds in a yard is not a finding of *blight*—that is, not a finding that property is causing harm to surrounding properties—it is simply a finding that the government does not like what a property owner is doing a particular piece of property. And that distaste (as the

New Jersey Supreme Court recognized) cannot be enough to invoke the power of eminent domain.

B. Recent New York cases illustrate the importance of meaningful review.

Two recent cases provide a vivid contrast between what New York's law would look like if this Court chose to embrace the deferential pose of most federal courts and the ease with which courts could apply a meaningful level of scrutiny to takings decisions.

The first case, *Didden v. Village of Port Chester*, shows exactly what *Kelo* looks like as applied by federal courts in New York, because *Didden* involved only a Fifth Amendment challenge to a taking. The facts as alleged in *Didden* were straightforward:[3] The property owners had reached an agreement with a national drugstore chain to build a CVS on a piece of land they owned—a piece of land that the Village's preferred developer wanted to have in order to build a Walgreens. *Didden v. Vill. of Port Chester*, 173 Fed. App'x 931, 932-33 (2d Cir. 2006). Summoned to a meeting with the Village's preferred developer

[3] *Didden* was decided on a motion to dismiss, which means that (while the Village of Port Chester presumably would dispute some of the facts as alleged) the federal courts were required to accept these allegations as true and construed them in the light most favorable to the plaintiff. *Taylor v. Vt. Dep't of Educ.*, 313 F.3d 768, 776 (2d Cir. 2002).

in November of 2003, the property owners were presented with an ultimatum: they could give the developer $800,000 cash (or a 50% interest in their CVS), or their property would be condemned. They refused, and their property was condemned the *next day*. Amazingly, the Second Circuit found that this demand (and the condemnation of the property in response to their rejection of the demand) did not even give rise to a constitutional question: Because the Village had previously made a determination that redevelopment was a "public purpose," any future taking—even a taking that was clearly for a private purpose like punishing a property owner who refused to pay off a local developer—would be a *per se* public use. *Id.* at 933.

Contrast the federal courts' unwillingness to even consider evidence of flat-out extortion with the reasonable and meaningful review conducted by the Second Department in *Matter of 49 WB, LLC v. Village of Haverstraw*, 44 A.D.3d 226 (N.Y. App. Div. 2007). In *49 WB*, the Village sought to condemn property for the ostensible public purpose of providing affordable housing. *Id.* at 241. The Second Department noted, however, that the actual plan the Village had adopted would result in the destruction of more affordable housing (and

planned affordable housing) than it would generate in *new* affordable housing, and it accordingly rejected the asserted public use as prextextual. *Id.* at 242. *Cf.* Br. of Pet'rs-Appellants at 15 (noting that the ESDC's own study acknowledged that the project could eliminate 2,929 at-risk households in pursuit of the "ever-dwindling possibility that it might create 2,250 affordable units")

There is, simply put, a middle ground, as evidenced by courts from both within and outside New York State. Nothing in this Court's precedents require the sort of supine deference to asserted public purposes that the lower court evinced. Indeed, even in what appeared to be a discussion of the *federal* Constitution, this Court has recognized limits on the eminent domain power. *See Yonkers Cmty. Dev. Agency v. Morris*, 37 N.Y.2d 478, 485 (N.Y. 1975). *Cf. City of Norwood*, 853 N.E.2d at 1138 ("[O]ur precedent does not demand rote deference to legislative findings in eminent-domain proceedings, but rather, it preserves the courts' traditional role as guardian of constitutional rights and limits.").

Judicial review of eminent domain does not mean stripping state and local governments of all authority or making development

impossible. It does mean, however, meaningful examination of public use claims, the context in which these claims are made, and the evidence supporting them. The court below failed to engage in that kind of meaningful review, and this Court should accordingly reverse its decision, reaffirming the longstanding role of New York courts in preventing the abuse of eminent domain.

II. Justice and Fundamental Fairness Require This Court To Apply Meaningful Scrutiny to the Use of Eminent Domain.

It is well-established that provisions of the State constitution can be interpreted with an eye toward "a judicial perception of sound policy, justice and fundamental fairness." *People v. Weaver*, 2009 NY Slip Op 3762, 14 (N.Y. 2009) (internal quotation marks and citation omitted). Concerns of policy, justice, and fairness require this Court to take into account the striking danger of abuse presented by the unchecked exercise of eminent domain. The use of eminent domain for private development frequently results in disproportionate harm to poor or vulnerable communities, all while enriching private parties and often for no discernible public benefit at all. These facts—which have been demonstrated statistically, historically, and anecdotally—provide ample reason for this Court to reaffirm the protections against the abuse of

eminent domain that the New York State Constitution affords the state's citizens.

It has been four years since Justice O'Connor closed her dissent in *Kelo* with an ominous warning: "Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms." *Kelo*, 545 U.S. at 505 (O'Connor, J., dissenting). The ensuing years have proven Justice O'Connor tragically prescient.

In the year following the *Kelo* decision, state and local governments condemned or threatened to condemn at least 5,783 properties in order to transfer those properties to other private owners. Dana Berliner, *Opening the Floodgates: Eminent Domain in a Post-Kelo World* 1 (2006).[4] This marked a *doubling* of the rate at which eminent domain was invoked for private-to-private transfers prior to *Kelo*. *Id.* at 2. The explanation for the phenomenon seems simple: assured that they would be free from robust federal judicial review,

[4] All publications cited in this Part were published by Amicus, but are the work of the individual authors identified. All publications are additionally available online at www.ij.org/publications.

well-connected local developers successfully pressured local governments to take property from the less well-connected and hand it over for development.

Justice O'Connor was also correct that the impact of these private-to-private transfers is far from random. A statistical study of 184 areas targeted for eminent domain for private development had striking results: people who lose their property in these private-to-private transfers are disproportionately likely to be racial minorities; disproportionately likely to be poor; and disproportionately likely to be poorly educated. Dick M. Carpenter II, PhD and John K. Ross, *Victimizing the Vulnerable: The Demographics of Eminent Domain Abuse* 1-2 (2007) (forthcoming as Dick M. Carpenter & John K Ross, *Testing O'Connor and Thomas: Does the use of eminent domain target poor and minority communities?* 46 J. Urban Stud. ___ (Oct. 2009)). In other words, it is overwhelmingly true that using eminent domain to transfer land to private developers directly hurts poor and vulnerable communities—and serves to enrich the already wealthy. Similarly, a study by Dr. Mindy Fullilove revealed that, between 1949 and 1973, African Americans were *five times* more likely to be displaced through

eminent domain than they should have been given their proportionate share of the population in affected areas. Mindy Fullilove, MD, *Eminent Domain and African Americans: What Is the Price of the Commons?* 2 (2007) (citing Mindy Thompson Fullilove, *Root Shock: How Tearing Up City Neighborhoods Hurts America, and What We Can Do about It* (One World/Ballantine 2004)).

To make matters worse, these populations are often victimized for no good reason. Even in those cases often cited by proponents of eminent domain as examples of the good redevelopment can do, the value of eminent domain is at best questionable. For example, William J. Stern, the chief executive of the New York State Urban Development Corporation during the redevelopment of Times Square, recently published a study arguing that not only was eminent domain not needed in Times Square, the use of eminent domain actually "delayed the development, added tremendous cost, and was unfair and inefficient." William J. Stern, *The Truth about Times Square* 20 (2009).

Government entities in New York have been particularly egregious abusers of eminent domain in recent years. Repeatedly, government officials have forced homeowners and small businesses out

of their property in aid of corporate titans—leveraging public power for the benefit of organizations like CostCo, the New York Stock Exchange, and developers of luxury condominiums. *See* Dana Berliner, *Opening the Floodgates* 80-85 (2006); Dana Berliner, *Public Power, Private Gain* 144-54 (2004). *See also* Institute for Justice, *Building Empires, Destroying Homes: Eminent Domain Abuse in New York* (forthcoming Oct. 2009).

The use of eminent domain to take property from one private owner and transfer it to another is rife with unintended consequences, potential abuse, and tremendous costs. It is absolutely imperative that this Court reaffirm that the New York State Constitution provides the state's citizens with meaningful protection against the abuse of this tremendous power.

CONCLUSION

The lower court's opinion tries to take New York's courts out of the business of seriously reviewing eminent domain determinations. Letting this decision stand would not only leave New York's courts significantly out of step with the courts of other states, it would leave New York's citizens (particularly its poor citizens and those who are

members of racial minorities) helpless in the face of a government power that is all too often abused. This Court should reaffirm the important role of the courts in evaluating claims of public use and reverse the decision of the court below.

By: _____

Jeff Rowes
Dana Berliner*
Robert J. McNamara*
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, VA 22203
Tel: (703) 682-9320
Fax: (703) 682-9321

* Motions for admission *pro hac vice* to be filed.

Appellate Division–Second Department Docket No. 2008-07064

Court of Appeals
of the
State of New York

DANIEL GOLDSTEIN, PETER WILLIAMS ENTERPRISES, INC., 535 CARLTON AVE. REALTY CORP., PACIFIC CARLTON DEVELOPMENT CORP., THE GELIN GROUP, LLC, CHADDERTON'S BAR AND GRILL INC. d/b/a FREDDY'S BAR AND BACKROOM, MARIA GONZALEZ, JACKIE GONZALEZ, YESENIA GONZALEZ and DAVID SHEETS,

Petitioners-Appellants,

– against –

NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION,

Respondent-Respondent.

AFFIDAVIT OF SERVICE

City of Arlington :
: SS
State of Virginia :

Jeff Rowes, of full age, being duly sworn according to law upon his oath deposes and says:

1. I am an attorney in the employ of the Institute for Justice. My business address is 901 N. Glebe Road, Suite 900, Arlington, VA 22203.

2. On September 3, 2009, I served a copy of the following:

   - Notice and Motion For Leave To File Brief Amicus Curiae on Behalf of Petitioners-Appellants and
   - Brief of *Amicus Curiae* Institute for Justice

   via overnight mail, addressed as follows:

Philip E. Karmel, Esq.
Bryan Cave LLP
1290 Avenue of the Americas
New York, NY 10104-0101

Matthew D. Brinckerhoff, Esq.
Emery Celli Brinckerhoff & Abady LLP
75 Rockefeller Plaza, 20th Floor
New York, NY 10019-6908

Jennifer Levy
South Brooklyn Legal Services
105 Court Street
Brooklyn, NY 11201

Jeff Rowes

Subscribed and sworn to before me this 3rd day of September, 2009.

Notary Public, State of Virginia #360303

County/City of Arlington
Commonwealth/State of Virginia
The foregoing instrument was subscribed and sworn before me this 3rd day of September 2009, by
(name of person seeking acknowledgment)
Notary Public
My commission expires: 7/31/2013

KYNDRA R. GRIFFIN
COMMONWEALTH
VIRGINIA
NOTARY PUBLIC