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 OF *AMICI CURIAE* BETTER GOVERNMENT ASSOCIATION, CITIZEN ADVOCACY CENTER, DKT LIBERTY PROJECT, NATIONAL INSTITUTE FOR URBAN ENTREPRENEURSHIP, AND OFFICE OF THE COMMUNITY LAWYER IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

The Better Government Association, Citizen Advocacy Center, DKT Liberty Project, National Institute for Urban Entrepreneurship, and the Office of the Community Lawyer submit this brief as *amici curiae*[1] pursuant to Rule 37.3 of the Rules of the Supreme Court, to provide this Court with the views of community groups and their constituents, who often are the victims of takings for "economic development."

The Better Government Association was founded in 1923 by citizens concerned at a local level with growing threats to the electoral process, the principles of good government, and their liberty. Eighty years later, the BGA remains a non-profit, non-partisan organization committed to the same principles that mobilized its founders: that a public office is a public trust; that anything that diminishes that trust, such as waste, fraud and corruption, ultimately undermines the public's confidence in government; and that such actions cost legitimate programs scarce resources and lead to decisions based upon private gain rather than public good. The BGA views condemnation for "economic development" as one such action.

The Citizen Advocacy Center is a non-profit, non-partisan community legal organization dedicated to strengthening American democracy in the 21st century. In particular, it aids those who organize grassroots community efforts, protecting their right to participate in the democratic process. Property ownership has been a hallmark of

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[1] Pursuant to Rule 37.3, counsel for *amici curiae* state that all parties have given written consent to the filing of this brief. Copies of the consent letters are on file with the Clerk. Further, pursuant to Rule 37.6, counsel for *amici curiae* also state that no counsel for a party authored this brief in whole or in part and that no person or entity, other than the *amici curiae*, its members or its counsel, made a monetary contribution to the preparation or submission of this brief.

American democracy since the Framers penned the Constitution. Use of eminent domain in the name of "economic development" is not only antithetical to CAC's vision, but it is also often accomplished outside the political process and without the input of the citizenry.

The DKT Liberty Project was founded to promote civil liberties–among them property ownership–against the encroachment of governmental authorities. This non-profit organization advocates vigilance over regulation of all kinds, but especially regulation that threatens the reservation of power to the citizenry underlying our constitutional system. The DKT Liberty Project opposes the exercise of eminent domain for "economic development" as an abuse of power which contracts the liberty reserved to the people.

The National Institute for Urban Entrepreneurship is a Washington, D.C., based nonprofit, nonpartisan corporation that develops and implements legal and entrepreneurship programs that support the growth of viable, sustainable businesses by Blacks, Latinos and other entrepreneurs of color. Further, it strives to be a national catalyst for a culture of entrepreneurship, innovation and private sector economic growth in urban communities. Both the destruction of urban small business and the targeting of minority neighborhoods evident in "economic development" takings are antithetical to NIUE's mission.

The Office of the Community Lawyer is a non-profit citizen advocacy project, founded to provide free non-partisan legal services to concerned citizens at a community and state level on issues of public significance, to litigate on behalf of citizens to sustain access to justice, and to teach citizens the skills they need to advocate effectively on their own behalf in dealing with their government. The Office of the Community Lawyer also monitors local governmental activities to ensure the accountability of government

officials, and to deter those officials from acting unlawfully or in a manner contrary to the general interests of the community. The Office of the Community Lawyer views the condemnation of private property for "economic development" as a use of government power that is contrary to the general interests of the community, and an exercise of governmental authority that often is immune from citizen advocacy, given that it targets individual landowners who often do not have the resources to contest the taking and thus safeguard their property.

Collectively, *amici* stand for the preservation of private property ownership in America. In this case, the private corporation that wields the City of New London's eminent domain power seeks to condemn petitioners' property in a working-class waterfront community for the development of an office park. The purpose of the taking is "economic development."[2] We believe that takings such as these are unfaithful to the Constitutional roots of private property ownership in America. This Court should restore meaning to the words "public use" in the Fifth Amendment of the Constitution, and stop this unconstitutional practice.

SUMMARY OF ARGUMENT

In creating our nation, the Founding Fathers sought to ensure protection of the citizenry's right to own property, something that the English sovereign had refused to do. Among the measures taken to protect these rights was the Fifth Amendment's limitation on takings of private property for "public use" alone. This Court has long appreciated the importance of that limitation, making the Takings Clause the first provision of the Bill of Rights to be applied to the states through the operation of the Fourteenth Amendment.

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[2] *See*, *Kelo v. City of New London*, 843 A.2d 500, 507-09 (Conn. 2004), *cert granted*, 125 S. Ct. 27 (2004).

Modern social science has confirmed that the sanctity of property ownership is well justified, uncovering a host of hidden negative effects accompanying takings of private property on the health of the community, small businesses, and individuals.

Recently, however, local authorities have attacked the right of property ownership by engaging in widespread takings for the "public benefit" of "economic development." In contrast to the words of the Framers, i.e., "public use," authorities justify these takings by reference to speculative, often illusory, indirect public benefits of higher tax revenues and more jobs. These anticipated benefits, however, often are never realized, and almost always are counterbalanced by the hidden costs to the community associated with such takings. In addition, "economic development" is so broad a justification that it invites the wealthy and powerful to appropriate the eminent domain power for their own advantage and can be called upon to authorize takings of almost any land at any time, from anyone, inviting abuse by local authorities.

Courts often uphold these takings because they read this Court's precedent as writing the Public Use limitation out of the Takings Clause of the Fifth Amendment. Such an interpretation is incorrect on the face of that precedent, *i.e.*, *Berman v. Parker*, 348 U.S. 26 (1954), and *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984). Those decisions address extreme facts and do not authorize takings for economic development alone, despite the unduly broad reading given them by local authorities and some courts. Furthermore, eliminating the Public Use limitation is directly contrary to the intent of the Framers. As such, this Court must revitalize the Public Use limitation by holding that economic development alone is not a "public use" under the Fifth Amendment.

ARGUMENT

I. Condemning Authorities Have Engaged In Widespread Abuse Of Their Powers In The Name Of Economic Development.

In practice, the "Public Use" limitation of the Fifth Amendment's Takings Clause has all but disappeared. City councils and local agencies now strip citizens and their small businesses of valuable non-blighted properties that these citizens have worked hard to purchase and maintain in neighborhoods not suffering from blight, and often give those properties to wealthy, politically-connected private businesses to tear down for private uses that will enhance those businesses' private profits. Often, those same businesses select the property they want and even finance the condemnation. *See, e.g., Southwestern Ill. Dev. Auth. v. Nat'l City Envtl. LLC*, 768 N.E.2d 1, 4 (Ill. 2002), *rev'g on reh'g*, 2001 Ill. LEXIS 478 (Ill. 2001), *cert. denied*, 537 U.S. 880 (2002) (hereinafter *SWIDA*). The supposed public use justification for such takings is that they will create "economic development," benefiting the community at large. These benefits, however, are speculative at best, and subvert the function of the free market. Worse yet, they fall far short of counterbalancing the harm done to the fundamental American right of property ownership, to the well being of individual property owners, and to the solvency of small businesses. These "economic development" takings are the most insidious abuse of eminent domain power, and they are happening everywhere.

An enormous research effort to ascertain the magnitude of takings from private citizens to give to other private parties over a five year span, from January 1, 1998 to December 31, 2002 indicates that 10,282 filed or threatened condemnations occurred in 41 states during that period. *See* Dana Berliner, *Public Power, Private Gain: A Five Year,*

State-By-State Report Examining the Abuse of Eminent Domain 2 (2004). Researchers scoured newspapers, published and unpublished court opinions, and court filings for any mention of such takings or threats of such takings. They compared their research for the state of Connecticut, the only state that records such figures officially, against the official state records. State records indicated that 543 redevelopment condemnations were ordered in that five year period, although researchers found press reports describing only 31 of them. *Id.* Therefore, in Connecticut, the press covered little more than 5% of the total. If this ratio of takings discovered by the research effort to the actual number of takings that occurred is consistent across the nation, then more than 180,000 threatened or filed takings occurred during that brief time span–nearly 100 per day.

What is more, many state agencies and local governments have observed no limits on using eminent domain to obtain private property for private businesses off-market. For example, the Empire State Development Corporation has agreed to condemn an entire Times Square city block in Manhattan for the New York Times, displacing dozens of businesses, hundreds of homes and a dormitory. The Times will be paying only $62 per square foot, compared to $130 per square foot for comparable properties, and taxpayers may spend $29 million in acquisition costs that exceed an $84.94 million rent concession.[3] Further, the Times has asked the city for $400 million in tax free Liberty Bonds, which were created to rebuild New York after September 11, 2001, to finance the project.[4] In Las Vegas, Nevada, the Las Vegas Redevelopment Agency demolished a thriving city block,

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[3] David W. Dunlap, *Blight to Some Is Home to Others; Concern Over Displacement by a New Times Building*, N.Y. Times, Oct. 25, 2001, at D1.

[4] Charles V. Bagli, *Developer Wants 9/11 Bonds for Times's Project in Midtown*, N.Y. Times, July 17, 2003, at B1.

including one older widow's building containing several small businesses, for a parking lot desired by a consortium of casinos.[5] After seven years of litigation, including recusals by many judges who took campaign contributions from casinos,[6] the Nevada Supreme Court reversed the trial court, which had found that the taking violated the Public Use limitation of the Fifth Amendment, and upheld the taking.[7] The Riviera Beach, Florida, City Council voted unanimously to spend $1.25 billion taxpayer dollars on a development plan that requires condemnation of 300 businesses and 1,700 homes housing about 5,100 people.[8] The city intends to sell the land to private yachting, shipping, and tourism interests.[9] Riviera Beach is one of the last bastions of affordable waterfront housing in Florida and home to a unique culture of Bahamian conch fishing families.[10] Wyandotte County, Missouri, condemned the homes of 150 families on 1,200 acres and transferred it to a private company that built the

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[5] Michael Squires, *Few Gains Seen From Land Fight*, Las Vegas Review-Journal, Aug. 15, 2004, at 1B.

[6] *See, e.g.*, *Steve Wynn Cases Reach Nevada Supreme Court*, AP Wire, June 10, 2000 (noting five judges had recused themselves from the case). *See also, City of Las Vegas Downtown Redevelopment Agency v. Eighth Judicial Dist. Court*, 5 P.3d 1059, 1060 (Nev. 2000) (hereinafter *Eighth Judicial*).

[7] *City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 76 P.3d 1 (Nev. 2003), *cert denied*, 124 S. Ct. 1603 (2004). Although the Redevelopment Agency asserted that the property was blighted, the trial court held that there was no blight on or near the block, a fact also noted by a dissenting justice of the Nevada Supreme Court. *Id.* at 48 (Leavitt, J., dissenting).

[8] Scott McCabe, *Residents Vow to Fight Riviera Plan*, The Palm Beach Post, Dec. 17, 2001.

[9] Thomas R. Collins, *Many Businesses Feeling Put Out By Riviera Plans*, The Palm Beach Post, Jan. 6, 2003, at 1A.

[10] Jim Di Paola, *The Path to Progress*, CityLink Online (Broward County, Fla.), Jan. 30, 2002.

Kansas International Speedway.[11] The Supreme Court of Kansas upheld the taking.[12] These examples of condemnations for so-called "economic development" represent only a tiny fraction of the thousands of economic development takings that occur all over America every year.

These condemnations make a mockery of the Fifth Amendment's Takings Clause. Yet so fundamental is this right that it was the very first of all the rights identified in the Bill of Rights to be incorporated against the states through the operation of the Fourteenth Amendment. *See Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897); *see also Dolan v. City of Tigard*, 512 U.S. 374, 383-84 (1994). In applying the Fifth Amendment to the states, this Court wrote, "No court . . . would hesitate to adjudge void any statute declaring that 'the homestead now owned by A. should no longer be his, but should henceforth be the property of B.'" *Chicago, Burlington & Quincy R.R. Co.*, 166 U.S. at 237 (Harlan, J.) (quoting *Citizens' Savings & Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 665, 663 (1874) (Miller, J.)).

One hundred thirty years later, many local authorities are doing just that: taking private property from one private owner and giving it to another, as if there were no "Public Use" limitation in the Takings Clause of the Fifth Amendment. This case provides this Court with the opportunity to restore the Fifth Amendment to its original form, as incorporated as to the states in the period immediately after the Civil War.

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[11] John T. Dauner & Steve Nicely, *Speedway Wins High Court Test; Ruling Approves Condemnation Powers, 125 Percent Valuation*, The Kan. City Star, July 11, 1998, at A1.

[12] *See State ex rel. Tomasic v. Unified Government*, 962 P.2d 543 (Kan. 1998).

II. As Were The Framers, Community Groups Are Particularly Concerned About Eminent Domain, Given Its Potential For Abuse And The Impact That It Has On Individuals, Small Businesses, and Communities.

A. The Framers Included The Takings Clause In The Bill of Rights To Protect Property Owners From The Depredations Of Overreaching Local Authorities.

It is fitting that the Takings Clause was the first right ever applied to the states through the operation of the Fourteenth Amendment because of the vital importance accorded property ownership by the Framers. Arthur Lee of Virginia wrote, on the eve of the Revolution, "The right of property is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty." Arthur Lee, *An Appeal to the Justice and Interests of the People of Great Britain, in the Present Dispute with America* 14 (4th ed. 1775).

Indeed, the Founding Fathers took up arms against an English system in which the rich and powerful could get whatever they wanted through the sovereign. As they drafted the Constitution, the Framers realized that they must protect against such abuses in our own new government. Alexander Hamilton wrote: "One great objt. of Govt. is personal protection and the security of Property." 1 *Records of the Federal Convention of 1787* 302 (Max Farrand, rev. ed. 1966). He recognized that the Constitution itself was the embodiment of the belief in that object of government, extolling the Constitution as the guarantor of "additional security . . . to liberty, and to property." The Federalist No. 85, at 481-82 (Alexander Hamilton) (Issac Kramnick ed., 1987).

B. Social Science Demonstrates The Importance Of Property Ownership By Illuminating The Negative Effects That Deprivations Of Property Visit Upon Individuals And Communities.

Modern social science confirms the belief of the Framers regarding the importance of property ownership in protecting the liberty and general welfare of individuals. In their rush to attract wealthy corporations with offers of below-market real estate for development, local authorities often fail to realize that by using the eminent domain power for large scale development projects they often wipe out neighborhoods with the stroke of a pen. These takings are not for a "public use"; they are instead for "economic development," which, in theory, provides the public with indirect benefits, like higher tax revenues. But the Fifth Amendment does not authorize takings for some vague "public benefit," and modern studies confirm the wisdom of the Framers in having narrowly constrained the power to condemn private property.

These studies show that such uses of the condemnation power inflict several hidden costs upon the public weal. First, a most disturbing hidden cost of eminent domain use is the destruction of the community itself, of the functioning social system. Herbert J. Gans, *The Urban Villagers: Group and Class in the Life of Italian-Americans* 362 (2d ed. 1982) (hereinafter Gans, *The Urban Villagers*). Eminent domain scatters church congregations, grade school classes, and extended family units to the four winds. For example, when Detroit leveled an entire neighborhood to make room for a General Motors plant, supposedly enhancing the greater good through economic development, it also destroyed sixteen churches, a 278 bed hospital, and several schools. Armand Cohen, *Poletown, Detroit: A Case Study in "Public Use" and Reindustrialization* 4 (1982).

Dr. Mindy Thompson Fullilove has termed the experience of those who are victims of large-scale condemnation projects both at the community-wide and individual levels "root shock." Mindy Thompson Fullilove, *Root Shock: How Tearing Up City Neighborhoods Hurts America, and What We Can Do About It* 11-17 (2004) (hereinafter Fullilove, *Root Shock*). She writes: "The elegance of the neighborhood–each person in his social and geographic slot–is destroyed, and even if the neighborhood is rebuilt exactly as it was, it won't work. The restored geography is not enough to repair the many injuries to the mazeway." *Id.* at 14. Jane Jacobs makes a similar point in her seminal piece on urban renewal, describing the unique quality of every neighborhood as a "sidewalk ballet," where persons and buildings each play a unique part in the lives of all persons in the neighborhood. Jane Jacobs, *Death and Life of Great American Cities* 50-51 (1961). Removal of one part has an effect on all others who participate in the dance, but removal of the entire stage leaves people unable to interact properly with their surroundings–they lose their social place in the world. Fullilove, *Root Shock* 19-20.

The fact is that individual citizens hold a deep personal attachment to their neighborhoods, and the destruction of those neighborhoods leads to the second hidden cost of eminent domain–the crippling psychological effect on the individuals who made their homes and lives in the condemned communities. One of the first studies of the psychological effects of forced relocation found that 46 percent of women and 38 percent of men from one community experienced "a fairly severe grief reaction or worse." Gans, *The Urban Villagers* 379. A study of those displaced from the old Southwest neighborhood of Washington, D.C., found that former residents felt a deep sense of loss a year later, and 25% had not made a single friend after being forced from the neighborhood. Bernard J.

Frieden & Lynne B. Sagalyn, *Downtown, Inc.: How America Rebuilds Cities* 34 (1989) (hereinafter Frieden & Sagalyn, *Downtown, Inc.*). Dr. Fullilove describes the psychological effects on the individual as follows:

> Root shock, at the level of the individual, is a profound emotional upheaval that destroys the working model of the world that had existed in the individual's head. Root shock undermines trust, increases anxiety about letting loved ones out of one's sight, destabilizes relationships, destroys social, emotional, and financial resources, and increases risk for every kind of stress-related disease, from depression to heart attack.

Fullilove, *Root Shock* 14.

C. Economic Benefits Often Do Not Materialize And Do Not Outweigh The Economic Costs Of Eminent Domain.

Worse yet, the purported economic benefit often is not realized by communities that engage in takings of property for private parties. Two facts often lead to so-called "economic development" takings providing only negligible benefit, if any. First, state and local agencies often fail to account for the negative economic impact the taking will have on the community; and second, the corporation or developer given the property for its private profit often fails to deliver on its promises.

First, the local authorities do not weigh the significant cost to the economy of takings against the alleged benefits. In fact, the proposed benefit itself often is not analyzed. *See, e.g., Southwestern Ill. Dev. Auth. v. Nat'l City Envtl. LLC*, 710 N.E.2d 896 (Ill. App. 1999), *aff'd*, 768 N.E.2d 1 (Ill. 2002) (hereinafter *SWIDA*) (no study of economic impact of race track parking lot expansion undertaken). The economic cost of takings can be measured by the cost to displaced

individuals, the loss of small businesses, and the destruction of communities. Relocation almost always causes economic difficulties for individuals, particularly because a taking for economic development will always lead to less housing or less affordable housing in the area, resulting in higher rent. In one study, 86 percent of those that relocated were paying more rent, with the median rent almost doubling. Gans, *The Urban Villagers* 380; *see also* Scott Greer, *Urban Renewal and American Cities: The Dilemma of Democratic Intervention* 3 (1965) ("[a]ll ten studies . . . indicate substantial increases in housing costs").

In addition, local businesses are often sacrificed to make way for larger, often regional or national concerns, and their demises are part of the economic cost of takings. During urban renewal efforts in the mid-twentieth century, 39,000 businesses were evicted through 1963 and 100,000 through 1971. More than a third of those businesses subsequently failed–a rate much higher than the normal business failure rate. Frieden & Sagalyn, *Downtown, Inc.* 35. Local businesses tied to neighborhood customers proved particularly vulnerable. *Id.* These failures reduce tax revenue and jobs, directly offsetting the proposed benefits of the larger benefited business. Recent studies of big box stores like Wal-Mart, often the beneficiary of eminent domain takings, demonstrate this.[13] A study of the economic impact of Wal-Mart in Mississippi concludes that "[t]he net increases are minimal as the new big-box stores merely capture sales from existing business in the area." Anthony Bianco & Wendy Zellner, *Is Wal-Mart Too Powerful?*, Bus. Week, Oct. 6, 2003. Iowa State University economics professor Kenneth E. Stone, co-author of the study,

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[13] *See, e.g.*, Alex Daniels, *Eminent Domain for Stores Draws Ire; Wal-Mart Benefits from Land Seizures*, Ark. Democrat-Gazette, Oct. 18, 2003, at 37.

comments, "I see it pretty much as a zero-sum game." *Id.* Significantly, local business owners are more likely to keep profits in the community and reinvest there, whereas national chains are owned by persons outside the community or even by stockholders spread across the country. Such entities are less likely to reinvest as much locally.

Furthermore, economists are beginning to realize that there is an economic cost to the destruction of communities themselves. R. Scott Fosler writes: "Social institutions are also increasingly seen as being economically important. For example, the role of the family and of other community influences in preparing students for school and productive employment is now recognized as having major economic significance." R. Scott Fosler, *Does Economic Theory Capture the Effects of New and Traditional State Policies on Economic Development, in Competition Among States and Local Governments: Efficiency and Equity in American Federalism* 249 (Daphne A. Kenyon and John Kincaid, eds., 1991).

These costs combined often outweigh any benefit that the economic development project provides in the end. A study of the Los Altos redevelopment area in California found that the destruction of profitable, non-subsidized small businesses and subsequent delivery of land and subsidy to larger businesses produced a loss. Furthermore, the study also found that the loss was likely to occur in other communities that undertook similar redevelopment efforts. Colette Marie McLaughlin, *Suburban Commercial Redevelopment in Los Altos: A Case Study of Unsustainable Development* 2, 4 (1998).

The net loss is sometimes caused by the failure of the new private property owner to live up to the promises it made to induce the taking. The Poletown taking in Detroit is a perfect example of a taking in which the costs paid by the

city, small businesses, and individuals clearly were not outweighed by the actual economic benefit realized. To pave the way for a new General Motors plant, Detroit destroyed 1400 residential structures–homes–and 600 businesses and paid more than $200 million to prepare the site to GM's specifications. Marie Michael, *Detroit at 300: New Seeds of Hope for a Troubled City*, Dollars & Sense, July 2001. In return, General Motors paid $8 million to acquire the property and promised the city that it would create more than 6000 jobs. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 467 (Mich. 1981) (Ryan, J., dissenting). But General Motors finally opened its plant two years late, seven years after the condemnations, and created roughly half of the promised number of jobs. Ilya Somin, *Poletown Decision Did Not Create Desired Benefits*, Detroit News, Aug. 8, 2004 at 13A. Although the city did not keep formal statistics by which to measure the success or failure of the project, the city likely lost more jobs than it gained by destroying the neighborhood. *Accord id.*

Small wonder, then, that the Michigan Supreme Court this year overruled its landmark decision approving the taking, *Poletown*, 304 N.W.2d at 455, in an even more significant (and better-reasoned) decision limiting the authority to conduct takings. In *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), the Michigan Supreme Court held that Wayne County, Michigan's effort to condemn nineteen parcels of land for transfer to private developers who would construct a 1,300 acre business and technology park was "wholly inconsistent with the common understanding of 'public use' at the time our [state] Constitution was ratified." *Id.* at 769-70. Striking this taking, the Court called *Poletown* a "radical and unabashed departure from the entirety of [the] Court's [] eminent domain jurisprudence." *Id.* at 785.

D. Allowing Eminent Domain For "Economic Development" Encourages The Wealthy And Powerful To Arrogate That Power To Themselves.

As Professor Cass Sunstein observed, some of the most important clauses in the Constitution, including the Takings Clause, are all directed toward preventing "a single underlying evil: the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want." Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1689 (1984). By their very nature, "economic development" takings promote that evil.

Private corporations and developers often use their political connections and substantial resources to take advantage of "economic development" takings, allowing them to procure land for significantly less than its market value. They even go so far as to send lobbyists to cities to gain access to "free" property. Timothy Sandefur, *This Land Is Not Your Land*, Nat'l Rev., Aug. 23, 2004. They are there to "convinc[e] the state to use its power to displace residents from their homes and businesses." Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 Tex. Rev. L. & Pol. 49, 51 (1998) (hereinafter Kochan, *"Public Use"*). Unfortunately, small landowners who lack the political power and resources of large companies are powerless to stop them because allowing takings for "economic development" totally eviscerates the Public Use limitation on the Takings Clause and allows those with more power to use eminent domain to their own economic advantage. *Id.* at 52.

Examples of this abuse abound. In *Pappas*, the casinos that ended up with the elderly widow's property wield tremendous political clout in Las Vegas. There, the Agency

was able to obtain a questionable turnover order, without serving proper notice on the widow, from a judge who was an investor in one of the casinos in the consortium seeking her property, and whose son had been given a job at one of the casinos' golf courses during litigation. Sheila Kaplan & Zoe Davidson, *The Buying of the Bench*, The Nation, Jan. 26, 1998, at 11. So generous were those casinos with political contributions that after that first judge was forced to recuse himself, there was a "chain reaction of subsequent recusals" from judges who had taken casinos' contributions. *Eighth Judicial*, 5 P.3d at 1060. The Nevada Supreme Court actually had to mandamus a judge who had received contributions to hear the case. *Id.* Ultimately, a different judge, who had not taken casino contributions, conducted the trial, but the Nevada Supreme Court later reversed his findings of unconstitutionality and upheld the taking, citing *Berman v. Parker*, 348 U.S. 26 (1954), and *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984). *See Pappas*, 76 P.3d 1 at 10-12, 17.

In *SWIDA*, the condemning agency actually put its eminent domain power up for sale, circulating a "Quick-Take Application Packet" advertising that, for a sliding scale fee, the agency would condemn land at the request of "private developers" for their "private uses." *SWIDA*, 2001 Ill. LEXIS 478, at *51 (Kilbride, J., dissenting). Taking advantage of that offer, an international raceway corporation sought to take property from the small business next door to expand parking at its racetrack without incurring the cost of building a multilevel parking facility on its own property. *SWIDA*, 710 N.E.2d at 903. The raceway corporation treated agency officials to free race tickets and hosted them at its Hospitality Suite at the track. Steve Eder, *Land Seizure for Raceway Makes Top 10 Worst List; Eminent Domain Use Is Criticized*, St. Louis Post-Dispatch, Mar. 8, 2002, at C1. The trial court approved the taking, but ultimately a divided

Illinois Supreme Court struck it down. *SWIDA*, 768 N.E.2d at 11. The dissenting justices contended that *Berman* and *Midkiff* authorized such a taking. *Id.* at 17-23 (Freeman, J., dissenting).

E. Allowing Eminent Domain For "Economic Development" Victimizes Racial Minorities And The Underprivileged.

Eminent domain has a disturbing history of having been used to eliminate minority neighborhoods. Even when used to take land for a proper public use, this racial targeting occurred. In Frieden & Sagalyn, *Downtown, Inc.*, retired Federal District Judge Miles Lord recalled of his supervision of the Minneapolis highway project as attorney general of Minnesota in the 1950s:

> We went through the black section between Minneapolis and St. Paul about four blocks wide and we took out the home of every black man in that city. And woman and child. In both those cities, practically. It ain't there anymore, is it? Nice neat black neighborhood, you know, with their churches and all and we gave them about $6,000 a house and turned them loose onto society.

Id. at 28-29.

In other cases, the motivation was not so obvious, but the disparate impact was. Ninety percent of the 10,000 families displaced in Baltimore were black and Los Angeles crushed one Mexican neighborhood under the weight of five freeways. *Id.* at 29. From 1949 to 1963, 63 percent of those displaced for urban renewal were nonwhite. *Id.* at 28; *see also* Gans, *The Urban Villagers* 363 (eighty percent of urban renewal efforts directed at non-white minority groups). Dr. Fullilove estimates that 1,600 black neighborhoods were destroyed by urban renewal. Fullilove, *Root Shock* 17. Litigation has even been filed alleging that cities and towns

target specific areas where minorities live to force them out of the community and bring in residents the local government considers more desirable. *See, e.g.*, Charles Toutant, *Alleging Race-Based Condemnation*, N.J.L.J., Aug. 2, 2004.

If eminent domain also could be used to effectuate "economic development," the opportunity for this kind of abuse would increase exponentially. An economic development standard would be so broad that it would become illusory. Condemning authorities would be able to take anyone's property at any time because they always could hypothesize a use for property that could be economically superior to a current use, especially if no real proof of the superiority is necessary. Thus, approving "economic development" takings would make eminent domain a ready tool to remove unwanted minority groups from the community.

Eminent domain also allows local authorities to target low-income families. Indeed, bulldozing their properties requires the state to pay the least amount of compensation. Gans cites a study which concluded that "[a]t a cost of more than three billion dollars, the Urban Renewal Agency has succeeded in materially reducing the supply of low-cost housing in America." Gans, *The Urban Villagers* 380. In fact, as of June 30, 1967, urban renewal had destroyed 400,000 housing units and built only 10,760 low-rent units to replace them. Fullilove, *Root Shock* 59.

Furthermore, despite the obligation to do so, local government officials failed to compensate adequately those who were displaced. Only about half of those evicted between 1949 and 1963 received any payment to help them relocate, only one-half of one percent of the government outlays for urban renewal. Frieden & Sagalyn, *Downtown, Inc.* 33. "In effect, a low-income population has subsidized the clearance of its neighborhood and the apartments of its

high-income successors both by its own losses and by its share of the federal and local tax monies used to clear the site." Gans, *The Urban Villagers* 363. In 1968, Economist Anthony Downs found that evicted families paid between $157 and $230 million in uncompensated costs of urban renewal. Frieden & Sagalyn, *Downtown, Inc.* 36.

Visiting these costs upon the victims of condemnation is particularly unfair because often these people are forced to relocate from the communities that are bulldozed. In such cases, these victims are not even able to share in any indirect benefit that may be received by the public from the private development that caused the condemnation.

The use of eminent domain to oust those without power to defend themselves, including minorities and the poor, in favor of the wealthy and powerful, is exactly the abuse the Framers created the Constitution to prevent. The breadth of the economic development rationale allows the state to take virtually anyone's property at any time. This Court cannot permit such a thinly-veiled opportunity for discrimination to continue masquerading as a Fifth Amendment "public use."

III. State Courts Are Split Despite The Inadequacy Of Economic Development As A Public Use.

Despite all of this, some state courts nonetheless allow "economic development" to justify takings. These courts effectively vitiate the Public Use limitation explicit in the text of the Fifth Amendment, relying (incorrectly) on this Court's decisions in *Berman v. Parker*, 348 U.S. 26 (1954) and *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984).

Several state supreme courts have held that "economic development" is a constitutionally sufficient Public Use for a condemnation since *Midkiff*, including the Connecticut Supreme Court in the case below. *See, e.g., Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004), *cert. granted*, 125

S. Ct. 27 (2004); *see also General Bldg. Contractors, LLC v. Bd. of Shawnee County Comm'rs*, 66 P.3d 873 (Kan. 2003); *Vitucci v. New York City Sch. Const. Auth.*, 289 A.2d 479 (N.Y. 2001); *Jamestown v. Leevers*, 552 N.W.2d 365 (N.D. 1996); *Duluth v. State*, 390 N.W.2d 757 (Minn. 1986); *cf. Pappas*, 76 P.3d at 17. These courts predictably rely on the extremely deferential standard seemingly set forth in *Berman* and *Midkiff* when analyzing the issue under the federal constitution. *See, e.g., Kelo*, 843 A.2d at 525-28. It is thus this Court's obligation to revitalize the Public Use doctrine to place a check on state governments who are far too willing to destroy property ownership in derogation of the Fifth Amendment.

Not all state courts, however, hold that economic development is an adequate justification for a taking. Since *Midkiff*, several have rejected economic development as a public use that would support the taking of private property from one private party and the delivery of that property to another private party. *See County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004); *Georgia Dept. of Transp. v. Jasper County*, 586 S.E.2d 853 (S.C. 2003); *SWIDA*, 768 N.E.2d 1 (Ill. 2002); *City of Bozeman v. Vaniman*, 898 P.2d 1208 (Mont. 1995); *Merrill v. City of Manchester*, 499 A.2d 216 (N.H. 1985). Before *Midkiff*, a number of other state supreme courts had rejected economic development takings. *See In re Petition of Seattle*, 638 P.2d 549 (Wash. 1981) ("retailing" of shopping mall project not a public use); *City of Little Rock v. Raines*, 411 S.W.2d 486 (Ark. 1967) ("industrial development" not a public use); *Opinion of the Justices*, 131 A.2d 904 (Me. 1957) (takings for "industrial development" not a public purpose).

These opinions often emphasize that allowing takings for economic development could allow the government to take anyone's property at any time. The Illinois Supreme Court

pointed out that allowing takings simply because they will contribute to the tax base of the community could justify virtually any taking because "incidentally, every lawful business does this." *SWIDA*, 768 N.E.2d at 9. It recognized the potential for abuse that such a rationale represents. In addition, these courts also reject the notion that profits for the business benefiting from the taking is good for the public at large. In *Hathcock*, the Michigan Supreme Court wrote, "To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain." 684 N.W.2d at 786. *See also SWIDA*, 768 N.E.2d at 10-11; *accord Daniels v. Area Plan Comm'n*, 306 F.3d 445, 465-66 (7th Cir. 2002); *Amendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (en banc).

This Court must resolve this conflict in favor of the courts that reject the notion that economic development alone can constitute a public use. Those courts have correctly concluded that such takings are antithetical to the fundamental right to property that the Framers cherished and enshrined in the Fifth Amendment. This Court must restore the federal constitutional grounds upon which to deny such takings by holding that they violate the Fifth Amendment's Takings Clause.

IV. *Berman* And *Midkiff* Are Driven By Extreme Facts And Do Not Authorize Takings As A Means Of Achieving Ordinary Economic Development.

State courts rely heavily on *Berman* and *Midkiff* when they uphold takings in the name of economic development. This reliance is unjustified. *Berman* and *Midkiff* addressed singular sets of facts and do not support the use of eminent domain to achieve ordinary economic development.

In *Berman*, the taking involved a neighborhood in Washington, D.C., in which conditions were documented to be utterly inconsistent with human health and safety, and thus intolerable: almost two-thirds of dwellings were "beyond repair"; well over half "had outside toilets"; and over 80% "lacked central heating." *Berman*, 348 U.S. at 30. In addition, the general death rate was 50% greater there than in the rest of the District of Columbia, with deaths from tuberculosis and syphilis occurring at an even greater rate. *Schneider v. District of Columbia*, 117 F. Supp. 705, 709 (D.D.C. 1953), *modified and aff'd sub nom.*, *Berman v. Parker*, 348 U.S. 26 (1954). But in a larger sense, *Berman* was an attempt to address the near-insurmountable problem of substandard housing in our nation's capital. Without eminent domain, proper plumbing, heating and safe buildings would not have been possible.

Similarly, *Midkiff* arose under unique facts. It addressed Hawaii's efforts to break up a "land oligopoly traceable to [its] monarchs" "much as the settlers of the original 13 Colonies did" by transferring land from the very few citizens who owned it to other private individuals so they could participate in the fundamental right of property ownership. *Midkiff*, 467 U.S. at 241-42 & n.5. *Midkiff*, like *Berman*, addressed a problem which could not be solved without the taking of property. Land was overvalued, with almost all of the private property in the state held by only 72 individuals. *Id.* at 231. At its heart, *Midkiff* is a case where the state acted as Robin Hood. It took land from the few to give the opportunity to own property to the many who could not compete with those former feudal landowners. It is a supreme irony that courts now look to *Midkiff* as a justification for taking small parcels of property from the many and giving them to the wealthy few.

Both *Berman* and *Midkiff* responded to extreme circumstances that normal market forces could never correct. The D.C. slumlords of the 1940s and 1950s had no incentive to improve their buildings and neighborhoods because people living there had no ability to better their condition. Further, the feudal lords in Hawaii would never sell land because increasing supply would lower the value of land as a whole.

Neither case suggests that where, as here, normal market forces can be used to spur economic development, the government should intercede and take property on behalf of a private party. If the corporations that are the beneficiaries of takings need land badly enough, they should have to pay a free market price for it themselves, rather than paying a below market value subsidized by taxpayers and those ousted from their homes and businesses. After all, the profits made on the new site accrue directly to those corporations, with at best only indirect benefit to the public at large.

What is more, the costs levied on property owners were justified by the public uses at issue in those cases. *Berman* was directed at improving the health and welfare of the individuals who were victims of the slumlords who would not or could not invest the money to improve those unsanitary urban slums. In that sense, *Berman* visited much of the cost of that taking on property owners who had otherwise refused to pay the ordinary costs incident to owning and maintaining property.

In *Midkiff*, those who lived on the land were given the right to purchase, rather than lease, the land they already lived on. 467 U.S. at 233. The hidden cost, then, was much lower than in most takings because communities were not destroyed, but rather remained intact and individuals were not ousted from their homes. They benefited from the taking because they were allowed to participate in a quintessentially American institution–property ownership.

Thus, *Berman* and *Midkiff* do not abandon the "Public Use" limitation to the Fifth Amendment. Indeed, a more recent case from this Court demonstrates the continued vitality of the Takings Clause. In *Dolan v. City of Tigard*, this Court said: "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation . . . ." 512 U.S. at 392. Nor is there reason why the Public Use limitation should be relegated to the status of a relic.

V. The Fifth Amendment's Takings Clause Obligates This Court To Revitalize The Public Use Limitation By Holding That Economic Development Alone Is Not A Public Use.

Although *Berman* and *Midkiff* call for a "narrow" scope of judicial review, they do not eliminate judicial review entirely. Indeed, *Midkiff* specifically states: "There is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power." 467 U.S. at 240. Yet the deference given to legislatures in the very same opinions has prompted state courts and scholars to conclude that *Berman* and *Midkiff* wrote the words "public use" out of the Fifth Amendment. *See, e.g.*, Kochan, "*Public Use*" at 74 (the public use limitation is a "meaningless standard of review").

Reading this clause out of the Constitution violates fundamental principles of constitutional law. When the first ten Amendments to the Constitution were ratified by the states as they were proposed by the First Congress in 1791, they became essential forces to guide and shape American society. The Fifth Amendment, with its promise that "nor shall private property be taken for public use, without just compensation," created protection for citizens from their

government that is essential to the American way of life. U.S. Const. amend. V. Absent a formal constitutional amendment, this promise may not be broken or excised, but rather must be fulfilled.

> As men whose intentions require no concealment, generally employ words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they said.

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 188 (1824).

The Framers included a "public use" limitation on takings in the Fifth Amendment, and that limitation must be given meaning. It long served as a bulwark against tyranny by the sovereign. *See* Joseph L. Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 57-60 (1964). Absent the "public use" limitation, eminent domain could be used to deprive one citizen of his home and business simply to benefit another at the whim of a sovereign, contrary to the intent of the Framers. As the elder Justice Harlan wrote more than a century ago: "[A] government, by whatever name it was called, under which the property of citizens was at the absolute disposition and unlimited control of any depository of power, was, after all, but a despotism." *Chicago, Burlington & Quincy R.R. Co.*, 166 U.S. at 237. For this reason, Justice Harlan agreed that no court would "hesitate to adjudge void" any government action declaring that "the homestead now owned by A should no longer be his, but should henceforth be the property of B." *Id.* (quoting *Citizens Savings & Loan Ass'n*, 87 U.S. (20 Wall.) at 663).

Yet as recent experience has established, takings in the name of economic development allow exactly that. Local officials decide, often at the prompting of some major

corporation, that the corporation could make a more profitable use of property owned by homeowners or small businesses. Rather than allow the free market to do its work, these local authorities strip rightful local owners of the property, often destroying communities at the same time, and then hand the properties over, usually at below-market rates, to wealthy businesses. Such actions are contrary to the most strongly held values of American society:

> If property ownership is to remain what our forefathers intended it to be, if it is to remain a part of the liberty we cherish, the economic by-products of a private capitalist's ability to develop land cannot justify a surrender of ownership to eminent domain. If a government agency can decide property ownership solely upon its view of who would put that property to more productive or attractive use, the inalienable right to own and enjoy property to the exclusion of others will pass to a privileged few who constitute society's elite. The rich may not inherit the earth, but they most assuredly will inherit the means to acquire any part of it they desire.

SWIDA, 710 N.E.2d at 906 (Kuehn, J., specially concurring).

CONCLUSION

The Fifth Amendment prohibits the government from taking property owned by private citizens to situations where the property will be put to "public use." U.S. Const. amend. V. It says nothing to authorize takings for the "public benefit." As usual, the Framers' choice of words reflects wisdom. Read fairly, rather than stretched past the breaking point, "public use" provides an objective and readily ascertainable standard. The "benefit" of economic development takings, in contrast, is subject to considerable debate in any case, and often is undermined by the many hidden costs of takings. In addition, whether any benefit will

pass to the public hinges on the performance of private businesses.

Taking property from a private citizen to promote the economic redevelopment of a community may sound like a good idea, but it is an evil – and all the more insidious because it seems that so many people will benefit from just a few peoples' loss. The problem is that not just one person loses – *everyone loses* because everyone's ownership rights are diminished. This concept, in fact, has been tried elsewhere in the world and has failed abysmally: "the theory of the Communists may be summed up in the single sentence: abolition of private property." Karl Marx & Friedrich Engels, *The Communist Manifesto* (1848), *reprinted in 50 Great Books of the Western World* 425 (Robert Maynard Hutchins ed. 1952).

More than a quarter century before Marx was born, our Founding Fathers created a government founded upon private property ownership and required that no "private property be taken for public use, without just compensation." U.S. Const. amend. V. To this day, that government thrives, and the people of this nation have never seen fit to modify the Fifth Amendment. Until they do, this Court must give force to that amendment as it is written, including the "Public Use" limitation of the Takings Clause. We ask this Court to give life to this provision, rather than sounding its death knell, for "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

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December 3, 2004