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 Writ of Certiorari to the Supreme Court of Connecticut

BRIEF AMICUS CURIAE OF THE PROPERTY RIGHTS FOUNDATION OF AMERICA, INC. IN SUPPORT OF PETITIONERS

H. CHRISTOPHER BARTOLOMUCCI
Counsel of Record
JONATHAN L. ABRAM
JEFFREY D. PARISER
MICHAEL D. MCGILL
DAVID J. MICHNAL
TODD R. OVERMAN
ANDREW T. REES
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 04-108

SUSETTE KELO, ET AL.,

Petitioners,

v.

CITY OF NEW LONDON, ET AL.,

Respondents.

On Writ of Certiorari to the Supreme Court of Connecticut

BRIEF AMICUS CURIAE OF THE PROPERTY RIGHTS FOUNDATION OF AMERICA, INC. IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF AMICUS CURIAE

The Property Rights Foundation of America, Inc. ("PRFA"), is a nonprofit organization based in New York State and dedicated to providing information and education and promoting understanding about the fundamental constitutional rights of America's citizens, especially the right to own and use private property. PRFA is a volunteer, grassroots organization committed to assisting citizens, policymakers, and those in the media concerned with protecting the rights of property owners against governmental abuse.

PRFA has been recognized for its public events, publications, and outreach programs. PRFA sponsors the Annual New York Conference on Private Property Rights, where

experts from across the country speak on topics of prime importance to property rights advocates and policymakers. In addition, since 1994, PRFA has published *Positions on Property*, which initially cataloged and exposed the multitude of land use regulations and controls in New York State. Finally, PRFA helps other grassroots organizations seeking advice or assistance by connecting them to PRFA's National Advisory Board and other experts.

PRFA has a particular interest in *Kelo* v. *City of New London*, 843 A.2d 500 (Conn. 2004), because this case raises a constitutional question of fundamental importance—namely, what limits does the Constitution impose when government decides to take property from one private party and transfer it to another private party for the stated purpose of stimulating economic development? As the sad facts of this case show, residents of the Fort Trumbull area of the City of New London stand to lose cherished family homes for the sake of projected job creation and tax revenues. PRFA believes that the City's condemnation actions are a misuse of its eminent domain power, particularly since the Fort Trumbull area is in no sense a slum or blighted area.

Unfortunately, and of great concern to PRFA, the affected residents of Fort Trumbull are not alone. Across the Nation, local governments are taking private property to permit its development by private entities as an exercise of the authority to take property for public use. *See, e.g.*, *County of Wayne* v. *Hathcock,* 684 N.W.2d 765, 769-770 (Mich. 2004) (involving Wayne County's plan to condemn 19 parcels of land and transfer them to private parties for the construction of a business and technology park) (overruling *Poletown Neighborhood Council* v. *City of Detroit*, 304 N.W.2d 455 (Mich. 1981) (per curiam)). Although just compensation must be paid when property is taken, there is no compensating for "intangible losses, such as severance of personal attachments to one's domicile and neighborhood and the destruction of an organic community of a most unique and irreplaceable character." *Poletown*, 304 N.W.2d at 481 (Ryan, J., dissenting).

This case presents an opportunity for this Court to clarify the limits of government's ability to use the eminent domain power to transfer private property from the hands of one party to the hands of another, and to ensure that, when state and local governments take private property for the purpose of economic development, such a taking is in fact for a valid public use.

PRFA filed a brief *amicus curiae* supporting petitioners at the certiorari stage of this case. The instant brief is filed with the written consent of all parties pursuant to this Court's Rule 37.3(a); the requisite consent letters have been filed with the Clerk.[1]

SUMMARY OF ARGUMENT

I. The transfer by the government of private property from person A to person B for the latter's private benefit is unconstitutional. The taking of property at issue in this case, if it does not directly violate this "no A to B" principle, comes uncomfortably close to doing so. Respondents propose to take property from its current owners—property that no one contends is not being put to traditionally-appropriate or economically-productive use—and give that property to a for-profit private developer. No direct or immediate public benefit would be realized by the proposed transfer from A to B. Instead, respondents contend that the economic benefits of developing the property will trickle down to the public at large.

The asserted power of the government to transfer property between private parties for the purpose of economic development is not supported by the so-called Mill Acts or this Court's decision in *Head* v. *Amoskeag Manufacturing Co.*, 113 U.S. 9 (1885). The earliest Mill Acts permitted the

[1] Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than the Property Rights Foundation of America, Inc., its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

owners of water-powered mills to flood the property of neighboring landowners to permit the operation of grist mills. Grist mills served an important public purpose in an agrarian society and were required to be open for use by the public. Early Mill Act condemnations of property thus were for public use since grist mills essentially functioned as public utilities. Later on, General Mill Acts authorized the taking of property for the operation of manufacturing mills, which were not open to the public but were operated for the private benefit of their owners.

Head involved a General Mill Act. This Court recognized in *Head* that the question whether a General Mill Act takes property for private use is "important and far reaching" but declined to answer the question. Instead, the Court upheld the General Mill Act before it on the ground that the statute was a permissible regulation of riparian owners' common interest in a stream of water adjacent to their lands. Thus, *Head* did not hold that it is permissible to take the private property of A and give it to B for the purpose of private economic activity by B.

II. This Court's precedents do not support the taking of property for generalized economic development. Unlike this case, *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229 (1984), and *Berman* v. *Parker*, 348 U.S. 26 (1954), involved takings in furtherance of a state's traditional police powers. And neither *Midkiff* nor *Berman* contemplated that the public use doctrine would be extended to allow mere "economic development" as the basis for condemning private property. In contrast to the attenuated and speculative public benefits on which the proposed taking here relies, in both *Midkiff* and *Berman* the public benefit was direct and immediate.

This case is unlike any other in which this Court has upheld the exercise of eminent domain authority by a private corporation as a taking for public use. None of this Court's cases supports the transfer of privately-owned land to a corporate entity for the "public use" of generalized economic development.

ARGUMENT

I. THIS COURT'S CASES AND THE HISTORY OF THE PUBLIC USE REQUIREMENT CAST DOUBT UPON GOVERNMENT'S ABILITY TO TRANSFER PROPERTY FROM ONE PRIVATE PARTY TO ANOTHER FOR THE PURPOSE OF ECONOMIC DEVELOPMENT.

History is on petitioners' side in this case, for two reasons. First, for more than two centuries, this Court has made clear that government may not take private property from person A and give it to person B for B's private use. Second, the historical Mill Acts do not support the proposition that property may be transferred from one private party to another for the purpose of economic development.

A. Private Property May Not Be Taken From A And Given To B For B's Private Benefit.

This Court's cases, and members of this Court, have always condemned the taking of property from one private party for the benefit of another private party. These cases describe the transfer of private property from A to B for the latter's private benefit as both unjust and unconstitutional.

In *Vanhorne's Lessee* v. *Dorrance*, 2 U.S. 304 (C.C.D. Pa. 1795), Justice Paterson declared unconstitutional a Pennsylvania statute that attempted to resolve a dispute over the ownership of land by vesting settlers from Connecticut with title and providing compensation to the competing Pennsylvania claimants. In so doing, Justice Paterson (who had been a member of the constitutional convention) specifically considered "whether the Legislature had authority to make an act, divesting one citizen of his freehold and vesting it in another, even with compensation." *Id.* at 310.

While acknowledging that "the despotic power, as it is aptly called by some writers, of taking private property, when state necessity requires, exists in every government," Justice Paterson opined that it is "difficult to form a case in which the necessity of a state can be of such a nature, as to author-

ize or excuse the seizing of landed property belonging to one citizen, and giving it to another citizen." *Id.* at 310-311. *See also id.* at 318 ("When the Legislature * * * attempt to take the property of one man, which he fairly acquired, and the general law of the land protects, in order to give it to another, even upon complete indemnification, it will naturally be considered as an extraordinary act of legislation").

Three years after *Vanhorne's Lessee*, Justice Chase wrote in his now-famous opinion in *Calder* v. *Bull*, 3 U.S. 386 (1798), that "[i]t is against all reason and justice, for a people to entrust a Legislature with" the power to enact "a law that takes *property* from A. and gives it to B," and therefore the legislature cannot be presumed to have such a power. *Id.* at 388 (opinion of Chase, J.) (emphasis in original).

Three decades after Justice's Chase discussion of the "no A to B" principle, Justice Story was able to declare in *Wilkinson* v. *Leland*, 27 U.S. 627 (1829), that

> We know of no case, in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state in the union. On the contrary, it has been constantly resisted as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced. [*Id.* at 658.[2]]

In *Missouri Pacific Railway Co.* v. *State of Nebraska*, 164 U.S. 403 (1896), this Court held that a state court order requiring a railroad corporation to permit petitioners, an association of farmers, to build a storage elevator upon the railroad's property adjacent to its track "was, in essence and

[2] *See also Citizen's Sav. & Loan Ass'n* v. *Topeka*, 87 U.S. 655, 663 (1874) (no court "would hesitate to declare void a statute * * * which should enact that the homestead now owned by A. should no longer be his, but should henceforth be the property of B."); *Wilson* v. *New*, 243 U.S. 332, 370 (1917) (Day, J., dissenting) (calling "the taking of the property of A and giving it to B by legislative fiat" as "that method which has always been deemed to be the plainest illustration of arbitrary action").

effect, a taking of private property of the railroad corporation for the private use of the petitioners." *Id.* at 417. This Court explained that "[t]he taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States." *Id.*

Similarly, a state railway commission order directing a railroad to construct an underground pass so that cattle belonging to the owner of adjacent land could pass under the railroad's tracks was held by this Court to "deprive plaintiff of property for the private use and benefit of defendant." *Chicago, St. P., M. & O. Ry Co.* v. *Holmberg*, 282 U.S. 162, 167 (1930).

Although the principle that government cannot take one person's property and give it away for a private benefit was not always understood to derive from the Fifth Amendment,[3] it is now well established that the public use requirement of the Takings Clause prohibits such private-use takings. *See, e.g., Olcott* v. *The Supervisors*, 83 U.S. 678, 694 (1872) ("The right of eminent domain nowhere justifies taking property for a private use."); *Thompson* v. *Consolidated Gas Utils. Corp.*, 300 U.S. 55, 80 (1937) ("[T]his Court has many times warned that one person's private property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid."); *Hawaii Hous. Auth.* v. *Midkiff*, 467 U.S. 229, 245 (1984) ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void."). *See also Brown* v. *Legal Found. of Washington*, 538 U.S.

[3] *See, e.g., Madisonville Traction Co.* v. *Saint Bernard Mining Co.*, 196 U.S. 239, 251-252 (1905) ("It is fundamental in American jurisprudence that private property cannot be taken by the Government, National or state, except for purposes which are of a public character, although such taking be accompanied by compensation to the owner. That principle, this court has said, grows out of the essential nature of all free governments.").

216, 231-232 (2003) ("[T]he text of the Fifth Amendment imposes two conditions on the exercise of [taking] authority: the taking must be for a 'public use' and 'just compensation' must be paid to the owner."). In cases involving takings under state law, the Due Process Clause of the Fourteenth Amendment affords a property owner identical protection. *See Fallbrook Irrigation Dist.* v. *Bradley*, 164 U.S. 112, 158 (1896) ("the citizen is deprived of his property without due process of law, if it be taken by or under state authority for any other than a public use").

If the proposed taking of property at issue in this case does not directly violate the principle that property cannot be transferred from A to B for B's private benefit, it comes uncomfortably close to doing so. Here, the City of New London proposes to take property from its current owners—property that no one contends is not being put to traditionally-appropriate or economically-productive use—and give that property—essentially free of charge—to a for-profit private developer. No direct or immediate public benefit would be realized by the proposed transfer from A to B. Instead, the City contends that the economic benefits of developing the property will trickle down to the public at large. *Cf. County of Wayne* v. *Hathcock*, 684 N.W.2d at 796 (Weaver, J., concurring in part and dissenting in part) (concluding on similar facts that "[t]his case is indeed a very straightforward example of government taking one person's property for the sole benefit of another.").

In the decision below, the Connecticut Supreme Court held that the taking of property for the purpose of economic development is a taking for public use so long as "the development plan primarily was *intended* to benefit the public interest, rather than private entities." *Kelo*, 843 A.2d at 543 (emphasis added). The court also indicated that the trial court had properly "[a]ssum[ed] * * * to be correct" the City's economic development projections. *Id.* at 542. Under the approach taken by the court below, any economic development taking would seem to pass the public use test. If the government's *intent* to benefit the public through economic development is enough to support a taking, and if a reviewing court should *assume* that the benefits of development projected by the public will, in fact, come to pass, it is hard to see what remains of the public use requirement in the context of takings for the purpose of economic development.

B. The Mill Acts Do Not Support A Governmental Power To Transfer Private Property From A To B For The Purpose Of Economic Development.

It will no doubt be argued in this case that the asserted governmental power to transfer property between private parties for the purpose of economic development is supported by the so-called Mill Acts and this Court's decision in *Head* v. *Amoskeag Manufacturing Co.*, 113 U.S. 9 (1885). Indeed, in the proceedings below, the trial court and the Connecticut Supreme Court relied heavily upon *Olmstead* v. *Camp*, 33 Conn. 532 (1866), a case involving a Mill Act. *See Kelo*, 843 A.2d at 520, 522-523, 535; *see also id.* at 593-594 (Zarella, J., concurring in part and dissenting in part) ("The court in *Olmstead* also advocated an interpretation of public use that could include private economic development").

The Mill Acts were statutes enacted by a number of American colonies and states beginning in 1667 and into the late 1800's. Although different Mill Acts varied in their particulars, in general these laws permitted riparian landowners to appropriate or make use of adjacent private land, for the purpose of operating water-powered mills. Thus, a miller who needed to dam a river in order to power his mill could flood his neighbor's land, so long as the miller paid compensation to the affected property owner. Under some Mill Acts, actual eminent domain authority was delegated to the mill owner; ownership of the flooded land would be transferred to the miller. Under other Mill Acts, the miller would pay damages to the owner of the flooded property but would not take title to the land.[4]

---

[4] *See* Morton J. Horwitz, *The Transformation in the Conception of Property in American Law, 1780-1860*, 40 U. Chi. L. Rev. 248, 270-278 (1973); Lawrence Berger, *The Public Use Requirement in*

In *Head*, this Court observed that

> General mill acts exist in a great majority of the States of the Union. Such acts, authorizing lands to be taken or flowed *in invitum*, for the erection and maintenance of mills, existed in Virginia, Maryland, Delaware, and North Carolina, as well as in Massachusetts, New Hampshire, and Rhode Island, before the Declaration of Independence. [113 U.S. at 16.]

See also id. at 17 n.2 (listing Mill Acts enacted by 29 states through 1884).

At first glance, the Mill Acts seemed to permit the transfer of property from one person to another for the purpose of private economic development—in violation of the "no A to B" principle. Closer inspection, however, reveals that such a view of the Mill Acts is misguided.

In analyzing the Mill Acts, it is important to recognize that there were two types of Mill Acts. The earliest Mill Acts were enacted with an eye toward the operation of grist mills, which were regulated in terms of public access and price. *See Head*, 113 U.S. at 18 ("The principle objects, no doubt, of the earlier acts were grist-mills"); Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain 172 (1985) (grist mill "proprietors were required to process the grain of all comers on a nondiscriminatory basis"); Berger, *supra* note 4, at 206 ("In the earliest days the mills

Eminent Domain, 57 Or. L. Rev. 203, 206-207 (1978); Nathan Alexander Sales, Note, *Classical Republicanism and the Fifth Amendment's "Public Use" Requirement*, 49 Duke L.J. 339, 369-371 (1999). For discussion of certain specific state Mill Acts, see John F. Hart, *The Maryland Mill Act, 1669-1766: Economic Policy and the Confiscatory Redistribution of Private Property*, 39 Am. J. Legal Hist. 1 (1995); John F. Hart, *Property Rights, Costs, and Welfare: Delaware Water Mill Legislation, 1719-1859*, 27 J. Legal Stud. 455 (1998); Erik C. Martini, *Wisconsin's Milldam Act: Drawing New Lessons From an Old Law*, 1998 Wis. L. Rev. 1305.

were grist mills generally required to be open to the public for the grinding of corn.").[5]

The takings of property authorized by early Mill Acts to permit the operation of publicly-accessible and state-regulated grist mills—mills that essentially functioned as public utilities—clearly were for public use. *See Head*, 113 U.S. at 18-19 ("[I]t has been generally admitted, even by those courts which have entertained the most restricted view of the legislative power, that a grist-mill which grinds for all comers, at tolls fixed by law, is for a public use."); *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 273 (1932) ("It long has been recognized that mills for the grinding of grain or performing similar services for all comers are devoted to a public use and subject to public control").[6]

The second kind of Mill Act—the General Mill Act—authorized the taking of property for the operation of, not grist mills, but mills used in manufacturing. *See Head*, 113 U.S. at 19 ("In Massachusetts, * * * the mill acts have been extended to mills for any manufacturing purpose."); *Midkiff* v. *Tom*, 702 F.2d 788, 794 (9th Cir. 1983) ("General mill acts allow any owner of land upon a nonnavigable stream to build and maintain mills for manufacturing."), *rev'd*, 467 U.S. 229 (1984). Unlike grist mills, manufacturing mills were not required to be open to the public but were operated for the private benefit of their owners. *See* Berger, *supra* note 4, at

[5] For example, the owners of "Public Mills" in North Carolina were required to "grind Wheat and Indian Corn for all such Persons as shall require the same." N.C. Mill Act art. V, *reprinted in* 1 The Earliest Printed Laws of North Carolina, 1669-1751, at 18-19 (John D. Cushing ed., 1977). North Carolina also imposed maximum rates that could be charged for milling services. *See id.* at 19. Other states had similar provisions. *See Sales*, *supra* note 4, at 373 & nn.164-166.

[6] In the 18th and early 19th centuries, the flow of water was the primary source of mechanical power in America—not overtaken until the 1860's by the steam engine—and thus was indispensable to the milling of grain in a predominantly agrarian society. The early Mill Acts therefore served a necessary public purpose—the harnessing of a very limited source of power to process food.

206 ("[I]n the nineteenth century, the dams were used to supply power for saw, paper, and cotton mills as well as other manufacturing enterprises. In these latter cases, the mills were often for the sole use and benefit of their owners."); Horwitz, *supra* note 4, at 276.

Accordingly, a number of state cases considering the public use question turned on whether the particular mill at issue was a public mill. In *Tyler* v. *Beacher*, 44 Vt. 648, 1871 WL 5994 (1871), the Vermont Supreme Court held that a proposed taking by the owner of a grist mill "would not be for public use," explaining that "there is no law to compel him or his heirs or assigns to grind for the public, or any part of the public, for any fixed toll or compensation, nor for any compensation unless they choose to do it." *Id.* The *Tyler* court added that

> Decisions from Virginia, North Carolina, Kentucky, Tennessee, and Georgia, are sometimes cited in support of the right to take property in this manner for mills. But in all these States the mills were made public mills, by being required by law to grind for all in due turn for regulated tolls, and in some of them the mills were made public by more explicit provisions. [*Id.*]

In *Harding* v. *Goodlett*, 11 Tenn. 41, 1832 WL 1095 (Tenn. Err. & App. 1832), the property at issue was to be taken to permit the building of a grist mill, a saw mill, and a paper mill. The court concluded that when "land is condemned for the purpose of building a grist mill" it "is emphatically a public use for which it is required, and to which it is appropriated." 1832 WL 1095, at *7. The court explained that "[t]he grist-mill is a public mill. The miller is a public servant. He is allowed a compensation for grinding. His duties as a miller are prescribed, and penalties are imposed for a violation of any of those duties; * * *." *Id.* But the saw mill and paper mill were another matter. As to them, the *Harding* court concluded that "[t]he saw-mill and paper-mill have no public character; the erection of these

mills would be wholly for the private use of these petitioners." *Id.*[7]

General Mill Acts are more problematic from a public use perspective than those early statutes involving grist mills because manufacturing mills were not open to the public and were operated principally for private benefit. This Court addressed a challenge to a General Mill Act in *Head*.[8]

Head involved New Hampshire's General Mill Act. Head argued that the statute was unconstitutional because it "contemplated the taking of his property for private use, in violation of the Fourteenth Amendment to the Constitution of the United States." 113 U.S. at 12. Although this Court upheld New Hampshire's law, the Court did so without answering the question whether the statute took property for private use. The Court stated that

> The question whether the erection and maintenance of mills for manufacturing purposes under a general mill act, of which any owner of land upon a stream not navigable may avail himself at will, can be upheld as a taking, by delegation of the right of eminent domain, of private property for public use, in the constitutional sense, *is so important and far reaching, that it does not become this court to express an opinion upon it*, when not required for the determination of the rights of the parties before it. [*Id.* at 20-21 (emphasis added).]

---

[7] *See also Ryerson* v. *Brown*, 35 Mich. 333, 1877 WL 7142, at *3 (1877) (Cooley, C.J.) ("There is nothing in the present legislation to indicate that the power obtained under it is to be employed directly for the public use. Any sort of manufacture may be set up under it, and the proprietor is not obligated in any manner to carry it on for the benefit of the locality or the state at large.").

[8] It should be noted that General Mill Acts shed little light on the meaning of the public use language in the Takings Clause. Unlike the early Mill Acts, General Mill Acts were not in existence when the Fifth Amendment was ratified. *See* Sales, *supra* note 4, at 375 ("[N]ineteenth-century mills, of course, are of little value in explaining the founding generation's views.").

Instead of answering this "important and far reaching" question, the *Head* Court concluded that New Hampshire's General Mill Act was a permissible regulation of the common interest shared by riparian owners in the stream adjacent to their lands. As the Court stated:

> We prefer to rest the decision of this case upon the ground that such a statute, considered as regulating the manner in which the rights of proprietors of lands adjacent to a stream may be asserted and enjoyed, with a due regard to the interests of all, and to the public good is within the constitutional power of the legislature. When property, in which several persons have a common interest, cannot be fully and beneficially enjoyed in its existing condition, the law often provides a way in which they may compel one another to submit to measures necessary to secure its beneficial enjoyment, making equitable compensation to any whose control of or interest in the property is thereby modified. [*Id.* at 21.]

Thus, the Court in *Head* did not hold that it is constitutionally permissible to take the private property of A and give it to B for the purpose of operating a private-benefit mill. *See* Steven M. Crafton, *Taking the Oakland Raiders: A Theoretical Reconsideration of the Concepts of Public Use and Just Compensation*, 32 Emory L.J. 857, 875 (1983) (under *Head*, "the Mill Acts did not take private property from A and directly transfer it to B, but only reallocated existing public rights and awarded damages to those owners detrimentally affected by such reallocation.") (internal quotation marks omitted). Because the case at bar does not involve regulation of "the manner in which the rights of proprietors of lands adjacent to a stream may be asserted and enjoyed," *Head*, 113 U.S. at 21, *Head* is of no help to respondents. *See* Lynda J. Oswald, *The Role of the "Harm/Benefit" and "Average Reciprocity of Advantage" Rules in a Comprehensive Takings Analysis*, 50 Vand. L. Rev. 1447, 1494 (1997) ("The *Head* Court viewed such [general] mill acts not as a tool by which private property was confiscated for use by other private actors, but rather as a means for regulating the rights of riparian owners").

II. THIS COURT'S PRECEDENTS DO NOT SUPPORT THE APPLICATION OF THE PUBLIC USE DOCTRINE TO A TAKING FOR GENERALIZED ECONOMIC DEVELOPMENT.

The court below expressly relied on this Court's decisions in *Hawaii Housing Authority* v. *Midkiff*, *supra*, and *Berman* v. *Parker*, 348 U.S. 26 (1954), in support of its conclusion that "economic development projects * * * that have the public economic benefits of creating new jobs, increasing tax and other revenues, and contributing to urban revitalization, satisfy the public use clauses of the state and federal constitutions." *Kelo,* 843 A.2d at 520. But neither *Midkiff* nor *Berman* contemplated that the public use doctrine would be extended to allow mere "economic development" as the basis for condemning private property. And, in contrast to the attenuated and speculative public benefits on which the proposed taking here relies, in both *Midkiff* and *Berman* the public benefit was direct and immediate.

Both *Midkiff* and *Berman* involved takings based on classic exertions of the state's police power. In *Midkiff*, the Hawaii legislature enacted land reforms to address an oligopoly of landownership under which 72 private landowners controlled nearly all of the privately-owned land on the islands. *See Midkiff*, 467 U.S. at 232 (noting legislative finding that the state and federal governments owned almost 49% of the state's land and that "another 47% was in the hands of only 72 private landowners"). The oligopoly had evolved from a feudal land tenure system in which one chief controlled all of the land and had been the subject of "largely unsuccessful" reform attempts since the early 1800's. *Id.* Based on these conditions, the Hawaii legislature "concluded that concentrated land ownership was responsible for skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare." *Id.* In order to address the problems created by the oligopoly, the Hawaii

legislature enacted the Land Reform Act of 1967. *See id.* at 233.

Under the Act, tenants leasing single-family residential lots within developmental tracts of at least five acres could request that the Hawaii Housing Authority ("HHA") condemn the property on which they lived. *See id.* Once a statutorily-set number of tenants on a particular tract sought condemnation, the HHA held public hearings to determine whether condemnation would "effectuate the public purposes of the Act." *Id.* (quoting Haw. Rev. Stat. § 516-22). If so, the HHA would acquire the land, and then sell it to the former lessees. *See id.* at 234. Although HHA was statutorily authorized to lend the lessees up to 90% of the purchase price, in practice "funds to satisfy the condemnation awards [were] supplied entirely by lessees." *Id.*

This Court upheld Hawaii's Land Reform Act. The Court explained, first, that the public use requirement is "coterminous with the scope of a sovereign's police powers." *Id.* at 240. The Court then went on to explain that Hawaii had done no more than exercise those powers "to reduce the perceived social and economic evils of a land oligopoly traceable to their monarchs." *Id.* at 241-242. This Court stated:

> The land oligopoly has, according to the Hawaii Legislature, created artificial deterrents to the normal functioning of the State's residential land market and forced thousands of individual homeowners to lease, rather than buy, the land underneath their homes. *Regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers.* We cannot disapprove of Hawaii's exercise of this power. [*Id.* at 242 (citations omitted) (emphasis added).[9]]

[9] The *Midkiff* Court also said that it would not "substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.' " *Midkiff*, 467 U.S. at 241 (quoting *United States* v. *Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 680 (1896)). But the Court in *Gettysburg* also indicated that when the takings power is "delegated to a private corporation," "the presumption that the intended use for which the corporation proposes to take the land is public is not so strong as where the government intends to use the land itself." 160 U.S. at 680. *See also Milheim* v. *Moffat Tunnel Improvement Dist.*, 262 U.S. 710, 717 (1923) ("The nature of a use, whether public or private, is ultimately a judicial question."); *City of Cincinnati* v. *Vester*, 281 U.S. 439, 446 (1930) ("[T]he [public versus private use] question remains a judicial one which this Court must decide in performing its duty of enforcing the provisions of the Federal Constitution.").

Berman similarly involved a condemnation in furtherance of the state's traditional police powers. There, Congress had enacted the District of Columbia Redevelopment Act of 1945 to create a "comprehensive and coordinated planning" scheme to address urban blight conditions in Washington, D.C. *Berman*, 348 U.S. at 29 (quoting § 2 of the Act). The National Capital Planning Commission created by the Act conducted surveys showing that in "Project Area B" in southwest Washington, D.C., "64.3% of the dwellings were beyond repair, 18.4% needed major repairs, only 17.3% were satisfactory; 57.8% of the dwellings had outside toilets, 60.3% had no baths, 29.3% lacked electricity, 82.2% had no wash basins or laundry tubs, [and] 83.8% lacked central heating." *Id.* at 30. The Planning Commission accordingly sought to condemn Area B and to develop housing, of which at least one-third would be low-rent housing. *See id.* at 30-31.

This Court upheld the taking on the ground that the taking involved "what traditionally has been known as the police power." *Id.* at 32. The Court explained that "[p]ublic safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs." *Id.* Under these circumstances, the condemnation was for a permissible public use because it was "merely the means to the end" of addressing the social problems that were within the scope of the state's police powers to address. *Id.* at 33.

Unlike the takings in *Midkiff* and *Berman*, the condemnation here does not involve a classic exercise of the state's police power. *See Barnes* v. *Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) ("The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals"). To be sure, states routinely enact legislation designed to improve economic conditions, and their general authority to do so cannot be doubted. But the question here is whether the proposed taking of petitioners' property would be a taking for "public use."

The City of New London proposes to foster economic development by ensuring that a private developer, Corcoran Jennison, is able to acquire land in order to build facilities to be used by a private corporation, Pfizer, Inc. Like any building project, the project here would create construction jobs, but surely that alone cannot be a sufficient basis for a public use; if it were, *any* condemnation could be justified so long as it contemplated new construction. Likewise, new jobs and increased tax revenues, such as those expected to result here, follow *any* corporate relocation to a new area. This Court has never held that the mere promise of a business relocation alone justifies a taking.[10]

Even if economic development alone could, under some circumstances, be sufficient to achieve the requisite public benefit that must flow from a public use, it does not do so here. Indeed, there is no guarantee that any public benefit will materialize here at all, because it ultimately is dependent upon the efforts of a private party, not the government. If either the developer or Pfizer do not succeed in their ventures, no public benefit will be realized. Moreover, the public benefits, if any, will necessarily be indirect; the hoped-for public benefit depends on a "trickle down" of jobs and tax revenues. *Cf. County of Wayne* v. *Hathcock*, 684

[10] The promise of increased jobs and tax revenues alone cannot be enough to justify a condemnation. If that were so, then any business would be subject to the constant threat of condemnation that could result if a competitor promised even a slight increase in jobs and tax revenues.

N.W.2d at 784 ("The public benefit arising from the Pinnacle Project is an epiphenomenon of the eventual property owners' collective attempts at profit maximization. No formal mechanisms exist to ensure that the businesses that would occupy what are now defendants' properties will continue to contribute to the health of the local economy.").

The public benefits at issue here—which are not only speculative but are also attenuated in time from the taking of property—are in stark contrast to the public benefits resulting from the takings in *Midkiff* and *Berman*. In *Midkiff*, the dissolution of the land oligopoly was accomplished by the act of transferring the property, regardless of its proposed future use. Likewise, in *Berman*, the removal of blight was accomplished when the government transferred possession of the blighted area. In this case, the public benefit—assuming any is ultimately achieved—will not be realized until *after* the land is transferred to the developer and construction begins. The primary beneficiary of the taking would thus appear to be the developer, not the public. *Cf. Daniels* v. *Area Plan Comm'n*, 306 F.3d 445 (7th Cir. 2002).[11]

This case is unlike any other in which this Court has upheld the exercise of eminent domain authority by a private corporation as a taking for public use. This is not a case in which a corporation is taking property: "to construct bridges for the accommodation of interstate commerce by land," *Luxton* v. *North River Bridge Co.*, 153 U.S. 525, 530 (1894); for an aerial bucket line "dedicated to carrying for whatever portion

[11] In *Daniels*, the Area Plan Commission of Allen County, Indiana, sought to facilitate commercial development within a residential subdivision by vacating a restrictive covenant (a constitutionally-protected property interest) that limited the subdivision to residential use and then rezoning certain lots to allow such development. The Seventh Circuit held that the required public purpose was lacking. The court stated that "it is apparent that the public benefit of the vacation and rezoning action will not materialize absent any promised commercial development of the Lots" and thus the developer is "the primary beneficiary of the vacation of the restrictive covenant, and not Allen County." 306 F.3d at 462.

of the public may desire to use it," *Strickley* v. *Highland Boy Gold Mining Co.*, 200 U.S. 527, 532 (1906); to extend a railroad spur to be "operated under the obligations of public service," *Union Lime Co.* v. *Chicago & N.W. Ry. Co.*, 233 U.S. 211, 221 (1914); "to manufacture, supply, and sell to the public, power produced by water," *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.*, 240 U.S. 30, 32 (1916); "to build and operate a street and interurban railway," *Hendersonville Light & Power Co.* v. *Blue Ridge Interurban Ry. Co.*, 243 U.S. 563, 569 (1917); or to extend a railroad side track "at the service of all who have occasion to use it," *Chicago & N.W. Ry. Co.* v. *Ochs*, 249 U.S. 416, 419 (1919).[12] No case of this Court supports the transfer of privately-owned land to a corporate entity for the "public use" of generalized economic development.

[12] *Cf. also National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 503 U.S. 407, 422 (1992) (ICC order requiring conveyance of railroad track to Amtrak did not violate the Fifth Amendment's public use requirement because "the condemnation will serve a public purpose by facilitating Amtrak's rail service"—which is open to the public); *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 (1982) (state law requiring a landlord to permit a cable television company to install cable facilities upon the landlord's property effected a taking for which just compensation was required; this Court had "no reason to question" the lower court's determination that the law served the "legitimate public purpose" of rapid and widespread deployment of a means of public communication and community education).

CONCLUSION

For the foregoing reasons, and those in petitioners' brief, the judgment of the Supreme Court of Connecticut should be reversed.

Respectfully submitted,

H. CHRISTOPHER BARTOLOMUCCI
Counsel of Record
JONATHAN L. ABRAM
JEFFREY D. PARISER
MICHAEL D. MCGILL
DAVID J. MICHNAL
TODD R. OVERMAN
ANDREW T. REES
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

Counsel for Amicus Curiae

DECEMBER 2004