No. 11-1507

# In The Supreme Court of the United States

TOWNSHIP OF MOUNT HOLLY, NEW JERSEY, et al.,

*Petitioners,*

v.

MT. HOLLY GARDENS CITIZENS IN ACTION, INC., et al.,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF NO PARTY


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## INTEREST OF *AMICUS CURIAE*[1]

The Institute for Justice ("IJ") is the nation's leading defender of property rights and the leading legal advocate against the abuse of eminent domain. IJ represented the property owners in *Kelo v. City of New London*, 545 U.S. 469 (2005), where this Court concluded that it is constitutional under the Fifth Amendment's Public Use Clause to take private property and give it to another private party purely to increase tax revenues and to promote job growth. In addition to *Kelo*, IJ has litigated many other cases nationwide concerning economic development and the Public Use Clause, and analogous clauses in various state constitutions, including those of California, Florida, Minnesota, Mississippi, New Jersey, and Ohio. IJ also appears frequently as *amicus curiae* in federal and state cases concerning "public use" requirements. Further, through its "Hands Off My Home" campaign, IJ has spearheaded legislative reform to protect property owners and their communities from the type of eminent domain abuse that this Court declined to prevent in *Kelo*. Many states changed their laws, but some, including New Jersey, did not. Finally, complementing all of this work, IJ sponsors research on

[1] Counsels of record have consented to the filing of this brief. Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than *Amicus Curiae* Institute for Justice, its members, and its counsel made a monetary contribution to the preparation or submission of this brief.

the use and effects of eminent domain. IJ files this brief to present this research, as well as research by others, and to remind this Court of its error in *Kelo* and the tragic consequences that unfold when this Court abdicates its duty to enforce the Constitution. The brief demonstrates that eminent domain abuse will continue until *Kelo* is revisited.

## SUMMARY OF ARGUMENT

This should not be a Fair Housing Act case. It should be a constitutional challenge under the Fifth Amendment's Public Use Clause to the Township of Mount Holly's ("Township") abuse of its eminent domain powers. And it could have been if it were not for this Court's failure to protect property rights, including the property rights of less wealthy people. Because of this Court's decisions, local governments such as the Township can "cleanse" neighborhoods of certain categories of people in the vain hope that wealthier classes will move in. This is a problem of this Court's own making. It will continue until this Court revisits its interpretation of the Public Use Clause.

*Amicus* submits this brief to document extensive social science research demonstrating the disproportionate impact of eminent domain on those least able to fight city hall. Among this body of work is a study that analyzed 184 areas targeted by eminent domain for private development and concluded that they

disproportionately constituted poor and minority neighborhoods. The bulldozing of the Respondents' Gardens neighborhood is a classic example.

It is only through overruling *Kelo* that the targeting of poor and minority neighborhoods with eminent domain will stop. Having allowed local governments to bulldoze neighborhoods in the unproven hope that higher-priced properties might be built on top of their ruins, it should be no surprise that those governments are using that power to its fullest. By reversing these errors and putting real scrutiny into the Public Use Clause, property owners such as Respondents could fight these speculative land grabs and win.

*Amicus* understands that the Fair Housing Act ("FHA") covers many different types of issues, and the use of eminent domain by municipalities is but one, fairly uncommon, application. *Amicus* does not suggest that the inevitable impact of eminent domain upon minorities and the poor should dictate the outcome of this case under the FHA – either for FHA cases about eminent domain or other FHA cases. To the contrary, the purpose of this brief is to urge the Court to reexamine its rulings on eminent domain when a suitable case arises and to refrain from praising the supposed public purpose of the project at issue – a public purpose that *Amicus* believes is wholly absent.

## ARGUMENT

What has happened in this case is a classic example of what *Amicus* calls eminent domain abuse. It concerns a modest minority neighborhood, the Gardens. Before the Township began demolishing it, the neighborhood was a tight-knit community of families, some having lived there since the 1970s. *See* Christina Walsh, *NJ Town Revives Eminent Domain Abuse of 1950s*, Huffington Post (Dec. 30, 2010 2:51 PM), http://www.huffingtonpost.com/christina-walsh/nj-town-revives-eminent-d_b_802804.html. Many residents were elderly widows who had not made a mortgage payment in decades. By purchasing one of the neighborhood's simple row houses these families had been able to own a piece of the American Dream.

But the Township had a different dream for them, one where row houses turned into ritzy townhomes that the long-time residents could not afford. To accomplish this, it turned to New Jersey's redevelopment laws, under which it commissioned its own study that concluded the neighborhood "'offered a significant *opportunity* for redevelopment.'" *Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mt. Holly*, 658 F.3d 375, 379 (3d Cir. 2011) (emphasis added). With this "opportunity" to take poor people's property and give it to someone else receiving an official seal of approval, the Township implemented a series of redevelopment plans through which it would demolish the neighborhood's existing homes, remove its residents, and build upscale housing on the remains. *Id.* The Township selected a developer to carry

out the plans, a private company that would profit from acquiring the residents' land. *Id.* And all of this was made possible through the threat of eminent domain, giving property owners the choice of selling or facing condemnation proceedings. *See id.* at 386 (noting Township's use of eminent domain). The Township then bulldozed much of the community with the supposed promise that after redevelopment, and after new, wealthier people moved in, the area would be better. Better, that is, for people other than the current residents, who will have lost their homes, their community, their social networks, and their dignity.

Similar travesties have occurred repeatedly across the country, particularly in poor and minority neighborhoods. These injustices are a direct consequence of this Court's choice not to enforce the Public Use Clause,[2] most recently in *Kelo*. *Kelo* did two things that have made it easier for cities to, intentionally or unintentionally, target minorities and the poor with eminent domain. First, *Kelo* ruled that takings for economic development – taking A's home and giving it to B because B's development of the land may increase tax revenue – do not violate the Public Use Clause. *Kelo*, 545 U.S. at 484. Second, *Kelo* ruled that courts cannot question whether a development plan actually will result in the promised economic development. As long as the plan is not "'irrational,'"

[2] The Public Use Clause of the Fifth Amendment states "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

courts must accept at face value the government's assertions that a plan will result in economic development. *Id.* at 488 (quoting *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 242-43 (1984)).

*Kelo*, decided in 2005 during the early stages of this litigation, took away any chance Respondents had to use the Public Use Clause to defend themselves. With an explicit constitutional protection lost, all the residents of the Gardens had left were claims such as the one the Third Circuit concluded is allowed under the FHA. *Mt. Holly Gardens Citizens in Action, Inc.*, 658 F.3d at 381. Thus, *Kelo* and its predecessors forced the Respondents into the litigation strategy they have pursued ever since.

This is not speculation. One of the Respondents, Citizens in Action, was a joint *amicus* in *Kelo*, along with the National Association for the Advancement of Colored People, American Association of Retired Persons, and other civil rights groups, to a brief in support of the New London homeowners. *See* Amicus Br. of National Association for the Advancement of Colored People, *et al.*, *Kelo v. City of New London*, 545 U.S. 469 (2005) (NAACP *Kelo* Brief). In that brief, the *amici* detailed how eminent domain disproportionately victimizes marginalized groups and discussed the land-grab at the heart of this case, then advancing in Mount Holly. *Id.* at 10-11. Nevertheless, the brief did not persuade this Court's majority, and the people of the Gardens were left with no opportunity to raise a public use claim.

But Respondent's *Kelo* brief did not go unheard. Justices O'Connor and Thomas both authored impassioned dissents warning the majority that abdicating judicial enforcement of the Public Use Clause had led and would lead to abuses concentrated among the poor and minorities. *See Kelo*, 545 U.S. at 505 (O'Connor, J., dissenting); *id.* at 521-22 (Thomas, J., dissenting).

This brief demonstrates that Justices O'Connor and Thomas were right. *Amicus* will begin in Part I by discussing the social science data demonstrating how the burdens of eminent domain have been, and continue to be, primarily borne by racial and ethnic minorities and the economically disadvantaged. This includes an analysis of how eminent domain has profound and long-run effects on the physical and psychological well-being of those uprooted. Then, in Part II, *Amicus* will demonstrate how eminent domain's disproportionate impact is an entirely predictable consequence of this Court's abdication of judicial enforcement of the Public Use Clause. Having given the government the power to bulldoze neighborhoods for the sake of speculative private development, it should be no surprise that the government's social experiments are performed on citizens least able to fight back. In Part III, *Amicus* will present the frequently overlooked fact that, all too often, the purported benefits of eminent domain fail to materialize. Entire neighborhoods are leveled, and the promised luxury condos and upscale retail stores never come to be. Nowhere is this more stark than in New London, Connecticut, itself. A full eight years after *Kelo*,

where the proud neighborhood of Fort Trumbull once stood now lie vacant weed-infested lots housing no one but feral cats and migratory birds. Because of this Court's ruling in *Kelo*, the Gardens is suffering a similar fate. *See Mt. Holly Gardens Citizens in Action, Inc.*, 658 F.3d at 380 (detailing the leveling of row homes while replacing them with nothing). Finally, in Part IV *Amicus* will briefly present a solution to these problems: judicial enforcement of the Public Use Clause.

*Amicus* realizes that this Court does not have before it the question of whether the Township's actions violate the Public Use Clause or whether the Court should revisit precedents such as *Kelo*. *Amicus* is not addressing the FHA or whether it incorporates an action for disparate impact. But this Court should understand that eminent domain – in general – has a disparate impact on the poor and minorities. *Amicus* believes enforcement of the Public Use Clause should address this problem. As long as constitutional barriers do not stand in the way, local governments will inevitably target poor and minority neighborhoods, both because they are natural targets for schemes that aim to improve a city's tax base and because the residents in those communities are less politically connected, have fewer resources, and thus are less able to fight, both in city councils and in the courts.

In this case, all *Amicus* asks is that however the Court rules it not justify the Township's actions by endorsing eminent domain for private development as a public good. It is not. It is a tool used to make a

mockery of the rights of people trying to participate in the American Dream. This case should be resolved based upon the text and intent of the FHA alone and not airy notions of the scope of the government's power. Whether or not it violated the FHA, what the Township has done to Respondents has been despicable, immoral, and, if this Court or any Justices wish to comment further, unconstitutional.

## I. The Burdens of Eminent Domain for Private Development Have Been and Continue to Be Borne Primarily by Racial and Ethnic Minorities and the Economically Disadvantaged.

In her dissent in *Kelo*, Justice O'Connor warned that "the fallout from this decision will not be random. . . . [T]he government now has license to transfer property from those with fewer resources to those with more." *Kelo*, 545 U.S. at 505 (O'Connor, J., dissenting). The pain of such transfers, added Justice Thomas, extends beyond the loss of property to include the indignity of being uprooted from one's home, and *Kelo* "guarantees that these losses will fall disproportionately on poor communities." *Id.* at 521 (Thomas, J., dissenting).

The uprooting of the residents of the Gardens is only one example bearing out the predictions of Justices O'Connor and Thomas. Recent scholarship demonstrates that the victims of eminent domain for private development are predominantly racial and

ethnic minorities and the economically disadvantaged. The history of urban renewal suggests that this should come as no surprise. Scholarship on eminent domain takings past and present also illuminates their devastating impact on the financial, physical and psychological well-being of the displaced.

### A. As in Mount Holly, modern uses of eminent domain for private development prey on minorities and the economically disadvantaged.

Research published in *Urban Studies*, one of the leading scholarly journals on urban affairs, tested the predictions of Justices O'Connor and Thomas by examining 184 areas targeted by eminent domain for private development. Dick M. Carpenter and John K. Ross, *Testing O'Connor and Thomas: Does the Use of Eminent Domain Target Poor and Minority Communities?,* 46 Urb. Stud. 2447, 2453 (2009) (*Testing O'Connor and Thomas*). The areas fell in cities ranging in size from just under 3,000 people to the nation's largest city, New York City, and came from 25 states and the District of Columbia, covering every geographic region of the country. The researchers compared the demographic make-up of those within targeted areas to those in surrounding communities.

The research concluded that, as in Mount Holly, neighborhoods facing the prospect of eminent domain were poorer and had a greater concentration of minorities than the rest of the city. Residents of targeted

areas also had less education and were more likely to rent their homes. The differences were stark and statistically significant. Minority residents accounted for 58 percent of targeted areas, but just 45 percent of surrounding communities. *Id.* at 2455. The median income of targeted areas was only $18,936 – $4,000 less than surrounding communities – and one-quarter were living at or below the poverty level, versus 16 percent in nearby areas. *Id.* In targeted neighborhoods, 34 percent of residents did not complete high school, compared to 24 percent in surrounding areas; those in the community at-large were also more likely to hold a college or higher-level degree. *Id.* Finally, 58 percent of residents of targeted areas rented their homes, versus 45 percent in nearby areas. *Id.*

A follow-up study examined 11 communities in the New York metro area threatened by eminent domain for private development and found similar results. Dick Carpenter & John K. Ross, *Robin Hood in Reverse*, City Journal Online (Jan. 15, 2010), http://www.city-journal.org/2010/eon0115dcjr.html. Some differences were even more pronounced. For example, 92 percent of residents in New York and Long Island communities targeted by eminent domain were minority, compared to 57 percent in surrounding areas, and the median income in targeted communities was more than $8,000 lower. *Id.*

The burdens of eminent domain do not just fall disproportionately on the disadvantaged; they consistently fall on communities that are among the most disadvantaged in their towns and cities. As Justices

O'Connor and Thomas warned, contemporary use of eminent domain for private development preys on those with the fewest resources to mount a successful defense of their homes.

### B. Historically, racial and ethnic minorities and the economically disadvantaged have been the targets of eminent domain for private development.

The historical record of the era of urban renewal[3] makes clear that the targeting of poorer and predominantly minority communities for removal through eminent domain is nothing new. It is widely recognized and well-documented that racial and ethnic minorities and poor neighborhoods bore the brunt of urban renewal and that eminent domain was critical to renewal efforts: "Indeed, the displacement of African-Americans and urban renewal projects were so intertwined that 'urban renewal' was often referred to as 'Negro removal.'" NAACP *Kelo* Brief 7 (citing 12 *Thompson on Real Property* 194, 98.02(e) (David A. Thomas ed., 1994) (quoting James Baldwin)).

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[3] The federal urban renewal program started with the passage of the Housing Act of 1949 and continued in various forms through the mid-1970s. *See* Bernard J. Frieden & Lynne B. Sagalyn, *Downtown, Inc.: How America Rebuilds Cities* (1989); Alvin Mushkatel & Khalil Nakhleh, *Eminent Domain: Land-Use Planning and the Powerless in the United States and Israel*, 26 Soc. Probs. 147 (1978).

According to one government report, from 1949 to 1963, federal urban renewal programs displaced nearly 177,000 families, 66,000 individuals, and 39,000 businesses. U.S. Advisory Commission on Intergovernmental Relations, A-26, *Relocation: Unequal treatment of people and businesses displaced by government* 25 (1965), *available at* http://digital.library.unt.edu/ark:/67531/metadc1407/m1/38/?q=relocated. Fifty-five percent of displaced families qualified for public housing, and of families whose race was known, nearly two-thirds – 63 percent – were non-white. *Id. See also* Alvin Mushkatel & Khalil Nakhleh, *Eminent Domain: Land-Use Planning and the Powerless in the United States and Israel*, 26 Soc. Probs. 147, 150 (1978) (*Mushkatel & Nakhleh*) (criticizing the U.S. Advisory Commission report for underestimating the percentage of African Americans affected by urban renewal (citing Chester Hartman, *The Housing of Relocated Families*, 30 J. of the Am. Inst. of Planners 266 (1964))). Numerous scholars have shown that victims of urban renewal were most often low-income. *Testing O'Connor and Thomas* 2449-50 (citing multiple studies).

In cities such as Washington, D.C., Baltimore, San Francisco, Chicago, and New York, African Americans were the primary victims of eminent domain. Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 Yale L. & Pol'y Rev. 1 (2003) (*Pritchett*); Bernard J. Frieden & Lynne B. Sagalyn, *Downtown, Inc.: How America Rebuilds Cities* 30 (1989) (*Frieden*

*& Sagalyn*); *Testing O'Connor and Thomas* 2449. The urban renewal district in southwest D.C. at issue in *Berman v. Parker*, 348 U.S. 26 (1954), was 97.5 percent "Negroes" and over its 20 years displaced 20,000 black residents. *Pritchett* at 41. Of the 10,000 families displaced by renewal and highway projects in Baltimore, 90 percent were African American. *Frieden & Sagalyn* 29. Elsewhere, other disfavored minorities were targeted. In Los Angeles, Latino communities fell victim to the bulldozers, while in Boston it was Italian Americans. Thomas S. Hines, *Housing, Baseball, and Creeping Socialism: The Battle of Chavez Ravine, Los Angeles, 1949-1959*, 8 J. of Urb. Hist. 123 (1982); Herbert J. Gans, *The Urban Villagers: Group and Class in the Life of Italian-Americans* 323-46 (2d ed. 1982) (*Gans*). Not long after the demise of urban renewal, the infamous Poletown project in Detroit destroyed an ethnically diverse neighborhood that included Polish Americans and African Americans for a General Motors auto plant. Jeanie Wylie, *Poletown: Community Betrayed* (1989) (*Wylie*); *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981).

### C. Eminent domain for private development exacts a devastating toll on the financial prospects, community ties, and mental and physical well-being of the displaced.

Most redevelopment projects, wrote renowned urban studies scholar Jane Jacobs, relied on "vast

involuntary subsidies wrought out of helpless site victims." Jane Jacobs, *The Death and Life of Great American Cities* 5 (1993). Eminent domain forces its victims to sacrifice more than their homes or businesses. The displaced often find themselves worse off financially, with higher housing costs or failed businesses, and without the support of crucial and impossible-to-replicate social networks.

Scholars have long argued that those ousted for urban renewal faced higher housing costs. *See*, *e.g.*, Martin Anderson, *The Federal Bulldozer: A Critical Analysis of Urban Renewal, 1949-1962* 60-62 (1964) (noting that a University of Southern California study of urban renewal in 41 cities found displaced families paid considerably higher rent); Chester Hartman, "*The Housing of Relocated Families*," *in Urban Renewal: The Record and the Controversy* 293-335 (ed. James Q. Wilson 1966) (higher housing costs reported in multiple studies of displacement from urban renewal and other public programs). In Boston's West End, for example, 86 percent of those displaced paid more rent at their new residences, and the increases were substantial, with the median rent almost doubling. *Gans* 380. Elsewhere, the financial hardships of displacement were particularly acute for African Americans, forced to spend an even larger share of their income on housing. *Id.* at 381.

The relocation of Gardens residents provides a contemporary example of the financial burdens of displacement. According to a 2008 report from the New Jersey Department of the Public Advocate, relocated

Gardens homeowners either could not afford replacement homes or were forced to assume greater debt with substantially larger monthly payments to purchase new homes, sometimes of lower quality. Department of the Public Advocate, Division of Public Advocacy, *Evicted from the American Dream: The Redevelopment of Mount Holly Gardens* 9-11 (2008) (*Public Advocate*). Reviewing Mount Holly and New Jersey real estate listings, the Public Advocate concluded that even a homeowner receiving the Township's most generous purchase and relocation package would be "unable to buy replacement housing. . . . There is simply nothing that is 'decent, safe and sanitary'" in the right price range. *Id.* at 11.

Moreover, for eminent domain victims, returning to the site of their old neighborhood is rarely an option. Few can afford the new housing. Through June 1967, urban renewal destroyed an estimated 400,000 housing units, but only 10,760 low-rent public housing units were built on the same sites. Mindy Thompson Fullilove, *Root Shock: How Tearing Up City Neighborhoods Hurts America, and What We Can Do About It* 59 (2004) (*Root Shock*) (citing Marc A. Weiss, "*The Origins and Legacy of Urban Renewal*," *in Urban and Regional Planning in an Age of Austerity* 53-79 (P. Clavel, J. Forester & W. W. Goldsmith eds., 1980)).[4]

[4] Data like these inspired sociologist and renewal critic Scott Greer to write, "At 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." Scott Greer,

(Continued on following page)

In the area of southwest D.C. at issue in *Berman*, 5,900 housing units were constructed, but only 310 were "moderate-income" and possibly affordable to former residents. Howard Gillette, Jr., *Between Justice and Beauty: Race, Planning and the Failure of Urban Policy in Washington, D.C.* 163-164 (1995). In the Gardens itself, the latest development plan called for a mere 56 of the contemplated 520 new houses to be "deed-restricted affordable housing units," with only 11 earmarked for existing Gardens residents. *Mt. Holly Gardens Citizens in Action, Inc.*, 658 F.3d at 379. *See also* Tom Feeney, *From their front porch, a dim view of eminent domain*, The Star-Ledger, July 6, 2006, at 1 (elderly couple could not afford $400,000 mortgage required to buy condo in development slated to replace their home).

Business owners also feel the pain of displacement, as client bases are dispersed and advantageous locations are lost, often leading to the loss of a lifetime of work. Of 350 businesses ousted by urban renewal or highway projects in Providence, Rhode Island, one-third failed after moving, and most of those that survived faced higher rents and declining sales. *Frieden & Sagalyn* 35. Owners who found work

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*Urban Renewal and American Cities: The Dilemma of Democratic Intervention* 3 (1965) (*Greer*). Urban renewal's impact on affordable housing persisted into the 1970s: From 1949 to 1971, 538,044 housing units were demolished, but only 200,687 new units were built, only about half of which were public or low- or moderate-income housing. *Mushkatel & Nakhleh* 149.

after losing their businesses nearly always earned less. *Id.* The loss of such business opportunities was particularly hard on African Americans: "[T]he massive loss of capital and of entrepreneurial know-how set African American economic development back by at least two decades." Mindy Thompson Fullilove, *Eminent Domain & African Americans: What Is the Price of the Commons?*, 1 Perspectives on Eminent Domain Abuse 6 (2007), http://www.castlecoalition.org/pdf/publications/Perspectives-Fullilove.pdf (*Eminent Domain & African Americans*).

Economic development takings do not just uproot individuals or businesses, they destroy entire communities – often communities such as the Gardens, Detroit's Poletown, and Boston's West End that, while not the wealthiest or the prettiest, functioned well for those within them.[5] Such close-knit communities

[5] *See Public Advocate* 2 (noting that despite various problems in the neighborhood, "our visits to Mount Holly Gardens also revealed a community in every sense of the word: a close-knit collective whose residents have worked and lived together and depended on one another in all aspects of daily life"); *Wylie* 26 (describing Poletown's strong community ties and signs of renewal before GM plant was announced); *Gans* 11-16 (demolished West End neighborhood of Boston had been "by and large a good place to live"). *See also* Roberta Brandes Gratz, *The Battle for Gotham: New York in the Shadow of Robert Moses and Jane Jacobs* 279-80 (2010) (Brooklyn area targeted for massive "Atlantic Yards" development was, on its own, developing into a "thriving" neighborhood); *id.* at 286-288 (describing vibrant, if run-down, area of small businesses and lower-income residents targeted for Columbia University expansion); *id.* at 291-296 (targeted industrial area in Queens housed 260 mostly long-time

(Continued on following page)

provide a sense of place in the world, "a superb support system that maximize[s] [the] ability to navigate the trials and tribulations of daily life." *Eminent Domain & African Americans* 4. For African Americans uprooted by urban renewal, these communities had been "launching pads for making it to first class American citizenship." *Id*.

One scholar has described the feeling of being ripped from one's community as "root shock." *Root Shock* 11. A "profound emotional upheaval," its effects are substantial, including a loss of trust, increasing anxiety, and increasing "the risk for every kind of stress-related disease, from depression to heart attack." *Id.* at 14. *See also* Jeffrey T. Powell, *The Psychological Cost of Eminent Domain Takings and Just Compensation*, 30 L. & Psychol. Rev. 215 (2006). In a recent study of eminent domain victims in Mississippi, 100 percent of participants identified a "strong sense of family" in their former neighborhood and felt that displacement from it had a "lasting negative impact on their personal and family life." Bryan Carlyle Grizzell, *The Effects of Displacement by Eminent Domain on African Americans in Mississippi* 147, 150 (2009). The taking of their homes left victims feeling hopeless and with no control over their lives. *Id.* at 154. Likewise, one year after being displaced from southwest D.C., former residents still "felt a deep sense of loss" and "25% had not made a

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businesses serving a low-income community and providing 1,700 to 1,800 jobs to nearby Spanish-speaking workforce).

single friend." *Eminent Domain & African Americans* at 5 (citing *Frieden & Sagalyn* 34). *See also Gans* at 379 (46 percent of women and 38 percent of men experienced "a fairly severe grief reaction" from upheaval of neighborhood).

Such losses amount to involuntary, uncompensated, and often unacknowledged subsidies of redevelopment accomplished through eminent domain.[6] Takings for economic development manifest a policy of "Robin-Hood-in-reverse," as disproportionately poor and minority communities bear the crippling burdens deemed necessary for improvements intended to benefit their wealthier neighbors. *Frieden & Sagalyn* 36; *Testing O'Connor and Thomas* 2457.

## II. Disproportionate Impacts on Racial and Ethnic Minorities and on the Economically Disadvantaged Are a "Predictable Consequence" of Allowing Eminent Domain for Economic Development.

Justice Thomas decried the "predictable consequence" of *Kelo*'s authorization of economic development

[6] Compensation for eminent domain takings is limited to their "fair market value," which fails to account for subjective losses and also for any gains in the property's value that might result from its redevelopment. Instead, those gains accrue to the new private owner. As a result, current owners are systematically undercompensated and private developers are incentivized to seek eminent domain takings. Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61, 82-85 (1986).

takings: disproportionate impacts on racial and ethnic minorities. *Kelo*, 545 U.S. at 521 (Thomas, J., dissenting). This consequence is predictable not just because of the history of such takings, but because of their very nature as a tool for upgrading the ownership of certain properties with the hope of improving the economic lot of the rest of the community. Disparate impacts are also driven by the political realities of the eminent domain process, which – absent constitutional protections – put all owners at a disadvantage, but make especially easy targets of the politically and economically weak.

### A. By their nature, takings for economic development target underprivileged communities.

Cities, planners, and developers take property for economic development to upgrade it – to replace homes or businesses that produce less in the way of taxes or jobs with different ones that will produce more. That is the point. And it makes poor communities natural targets, as they are "systematically less likely to put their lands to the highest and best social use." *Id.*

Mount Holly's plan to bulldoze modest row houses to make way for more upscale housing and commercial development is just one example. In the first year after the *Kelo* ruling, at least 117 projects involving eminent domain for private development moved forward, and the vast majority aimed to swap

lower-income residents and small businesses for wealthier people and enterprises; nearly half targeted lower-income homes, apartments or mobile home parks. Dana Berliner, *Opening the Floodgates: Eminent Domain Abuse in a Post-*Kelo *World* 1, 4 (2006).

Likewise, in the era of urban renewal, cities leveled lower-income neighborhoods "to make room for downtown commercial development activities, more upscale residents or both." *Testing O'Connor and Thomas* 2449 (citing multiple studies). Urban elites backed such plans in hopes of maintaining property values "to protect and enhance their real estate investments." *Pritchett* 4. Arresting "blight" was the purported justification for these urban renewal projects, but planners and real-estate interests often targeted well-functioning, working-class areas with viable businesses and affordable housing. *Id.* at 21. These areas were declared "blighted" not because of intrinsically harmful characteristics, but because they were "not profitable enough – [they] did not produce enough tax revenues for the city, and [they] did not create profit opportunities for those who most coveted the land." *Id.* As a sociologist studying urban renewal remarked, blight often meant "simply that 'this land is too good for these people.'" *Id.* (quoting *Greer* 31).

Under urban renewal, blight declarations often intertwined with racial and ethnic prejudices as business leaders and politicians faced an influx of new populations after World War II. Thus, for example, all but one of 11 areas in Los Angeles designated as blighted in 1950 were majority Mexican American or

African American, while city planners declared nearly all of Chicago's "black belt" on the Southside blighted. *Id.* at 34. The designation of certain areas as blighted, marking them for redevelopment, enabled urban leaders "to relocate minority populations and entrench racial segregation." *Id.* at 6.

Even absent prejudiced motives, urban renewal would have devastated minority communities. Then, as now, racial and ethnic minorities were often concentrated in poorer neighborhoods. *See* Kevin Fox Gotham, *A City without Slums: Urban Renewal, Public Housing, and Downtown Revitalization in Kansas City, Missouri*, 60 Am. J. of Econ. & Soc. 285 (2001). Because of its economic logic – upgrading properties to improve the tax base, achieve job growth, lure wealthier residents, and prop up nearby property values – eminent domain for private development would have disproportionately victimized these populations, as it does today.

### B. Absent constitutional protections, the political powerlessness of historically and economically disadvantaged communities makes them easier targets for eminent domain.

The political process of eminent domain systematically favors developer and real-estate interests, discounting the interests of existing owners, particularly poor and minority communities. The Public Use Clause was designed precisely to be a safeguard for

"those owners who, for whatever reasons may be unable to protect themselves in the political process against the majority's will." *Kelo*, 545 U.S. at 496 (O'Connor, J., dissenting). Yet in *Kelo*, this Court removed this safeguard and left such owners with no other option.

Fighting to save one's home or business from the wrecking ball of eminent domain is a daunting task. People with little or no political or legal expertise must learn to organize and become persuasive public advocates, master the complicated thicket of laws governing eminent domain, steel themselves against hostility from project advocates, overcome conflicts that naturally arise in any coalition of diverse personalities – assuming neighbors are also willing to fight – all while continuing to work and care for family. *See*, *e.g.*, *Wylie* 59-83. Set against them will be well-heeled and sophisticated private interests accustomed to getting their way with city officials. *See* Donald J. Kochan, "*Public Use*" *and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 Tex. Rev. L. & Pol. 49, 79-83 (1998) (describing political incentives that give developers and real estate interests advantages over property owners with the legislature); Dick M. Carpenter II & John K. Ross, *Victimizing the Vulnerable: The Demographics of Eminent Domain Abuse* 5 (2007), http://www.ij.org/images/pdf_folder/other_pubs/Victimizing_the_Vulnerable.pdf (citing multiple studies on the power of urban mayors, federal officials, and real estate representatives in urban renewal); Laura Mansnerus, Note,

*Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. Rev. 409, 434 (1983) (*Mansnerus*) (noting that local officials "are especially vulnerable to powerful private interests," namely, developers and real estate interests).

Groups that do manage to organize will still be at a systematic disadvantage in the political process. Usually, development plans are well-established and at least informally approved by city leaders in consultation with development interests well before a project is publicly announced. *See*, *e.g.*, Jeff Benedict, *Little Pink House: A True Story of Defiance and Courage* 49-61 (2009) (*Benedict*) (describing behind-the-scenes negotiations among New London Development Corporation, Pfizer and the State of Connecticut before the project at issue in *Kelo* was announced); *Wylie* 60 (Poletown project already "an accomplished fact"); Roberta Brandes Gratz, *The Battle for Gotham: New York in the Shadow of Robert Moses and Jane Jacobs* 278 (2011) ("so-called public process" reviewing proposed Atlantic Yards development in Brooklyn was in reality "the last step in a privately worked-out deal with a predetermined conclusion"). Thus, whatever "thorough deliberation," *Kelo*, 545 U.S. at 484, occurs happens behind closed doors and before owners are even aware their properties are at risk. Affected owners often have no chance to influence these plans and negotiations. Once a plan becomes public, officials and developers typically resist any changes, even those that could accommodate new development alongside existing homes, businesses, and churches.

*See*, *e.g.*, *Benedict* 265 (even though *Kelo* plaintiffs' homes occupied less than two percent of development area, New London Development Corporation insisted on acquiring "every inch"); *Wylie* 64 (Poletown residents' proposal to build vertical parking garage instead of flat lot to save church ignored); Darren Rovell, *The Battle of Brooklyn*, ESPN.com (March 21, 2004, 12:46 PM), http://sports.espn.go.com/nba/news/story?id=1763204 (developer and borough president rejected alternative proposal to Atlantic Yards development that would have spared residents).

All this gives an "overwhelming sense of inevitability" to proposed projects, as Justice Ryan wrote in dissenting from the Michigan Supreme Court's *Poletown* ruling, leaving little hope for the "miniscule minority of citizens most profoundly affected by this case." *Poletown Neighborhood Council*, 304 N.W.2d at 482 (Ryan, J., dissenting). Poletown's "miniscule minority" consisted of 4,200 residents with 1,400 homes, 144 businesses, and 16 churches, many of whom organized in opposition. *Wylie* 52, 59-83. Smaller groups or individual owners have even less hope of securing the support of just a single city council member, particularly when "the rest of the community believes they stand in the way of 'economic development.'" NAACP *Kelo* Brief at 29; *see also Mansnerus* 437 ("legislators have little or no incentive to heed a small, poorly organized group of condemnees, whatever its burden, as against a much larger constituency that might realize some marginal gain from a transfer of property and that has no reason to object to it.").

Overcoming these myriad political disadvantages would be difficult for anyone, but it is especially challenging for the communities most often targeted – poor and predominantly minority neighborhoods that tend to lack political clout. *See*, *e.g.*, Myron Orfield, *Segregation and Environmental Justice*, 7 Minn. J.L. Sci. & Tech. 147, 152 (2006) (discussing the political powerlessness of poor communities in land-use planning). As a result, the very communities most likely to fall prey to economic development takings are those that are least equipped to overcome the overwhelming odds against stopping them. This makes them easier – and more attractive – targets. In Poletown, for example, "[m]any people assumed that [the largely lower-income and elderly residents] would not have the resources or the know-how to fight back." *Wylie* 58. Examining the history of urban renewal, some scholars have concluded that its disproportionate impact on the poor and minorities was in fact driven by the "political powerlessness of the target groups." Alvin Mushkatel & Khalil Nakhleh, *Eminent Domain: Land-Use Planning and the Powerless in the United States and Israel*, 26 Soc. Probs. 147, 157 (1978).

*Kelo*'s deference to legislative judgments of public use exacerbates these inequities. As the NAACP, the homeowners in Mount Holly and other groups argued to this Court in urging it to reject the takings in *Kelo*, such deference eliminates "the ability of the judiciary to function as a check on the legislature in precisely the setting where . . . certain historically

discriminated-against groups are at a systematic disadvantage." NAACP *Kelo* Brief at 28; *see also Mansnerus* 434 (because of the sway private interests hold over local officials, "[j]udicial deference in these cases amounts to abdication exactly when the individual most needs protection from political – and not necessarily majoritarian – forces").

## III. Allowing Eminent Domain for Economic Development Encourages Inflated Predictions of Project Benefits, Heightening the Risk of Abuse and Putting Targeted Communities at Further Disadvantage.

The *Kelo* majority declined "to second-guess the City's considered judgments about the efficacy of its development plan." *Kelo*, 545 U.S. at 488. Yet such plans – including New London's – often fail to live up to the lofty expectations of their government and private promoters. In economic development takings, there are no institutional checks on cities' analyses of projected benefits and costs, encouraging inflated predictions. *Kelo*'s blanket deference to legislative judgments only makes the problem worse. Inflated forecasts in turn increase the risk of abuse, impair democratic decision-making, and put already politically weak communities targeted for eminent domain at further disadvantage.

### A. The purported benefits of eminent domain projects often fail to materialize.

According to the *Kelo* majority, New London's economic development plan attempted to carefully coordinate commercial, residential, and recreational land uses "with the hope that they will form a whole greater than the sum of its parts." *Id.* at 483. All too often, such hopes prove illusory as economic development projects instead yield results that are considerably less than the sums of their parts.

The best example of this is the New London project itself. It was "'projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas.'" *Id.* at 472 (quoting Connecticut Supreme Court opinion). The plan aimed to accomplish this revitalization by replacing the Fort Trumbull neighborhood with, among other things, a hotel, a "small urban village" with restaurants and shopping, a marina and riverwalk, at least 90,000 square feet of office space, and 80 new homes. *Id.* at 474. With this plan, the New London Development Corporation intended to "capitalize on the arrival" of a new Pfizer research facility nearby and "the new commerce it was expected to attract." *Id.*

Instead, "eight years after the landmark Supreme Court decision . . . there is still no new construction in Fort Trumbull." Kathleen Edgecomb, '*It still hurts*': *Fight to save home scars one Fort Trumbull family*,

The Day, June 23, 2013, *available at* http://www.theday.com/article/20130623/NWS01/306239947 (*Edgecomb*). The land where homes once stood is "a field of tall grasses and wildflowers," *id.*, that has at times been home to feral cats. David Collins, *Feral Cats Ignore Eminent Domain*, The Day, Dec. 10, 2008, *available at* http://www.theday.com/article/20081210/DAYARC/312109860. Contract disputes have put a proposed condominium development in jeopardy, *Edgecomb*, and Pfizer pulled out of the city. Lee Howard, *Pfizer layoffs slightly larger than projected*, The Day, Feb. 11, 2013, *available at* http://www.theday.com/article/20130211/biz02/302119958/1017. Meanwhile, New London remains a "distressed municipality" – Connecticut's ninth most distressed, according to a 2012 state ranking – and its unemployment rate still outpaces the state's.[7]

The GM Cadillac plant that uprooted the diverse, lower-income Poletown neighborhood likewise failed to reverse Detroit's economic fortunes, let alone deliver the promised 6,000 jobs; instead, by 1988, after years of delay and $200 million in public subsidies, it

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[7] Department of Econ. & Community Development, Distressed Municipalities List (2012), http://www.ct.gov/ecd/cwp/view.asp?a=1105&q=251248 – 2012 document; CT Dept. of Labor Reports, http://www1.ctdol.state.ct.us/lmi/laus/lauslma.asp – *2013 Year-to-Date Statewide/LMAs and Norwich/New London. As of July 2013, the city of New London's unemployment rate was 11 percent (reported on line 71 of the Norwich/New London Labor Market Area document), while the statewide rate was 8.3 percent (reported on line 56 of the Statewide/LMAs document)*.

employed only 2,500. Marie Michael, *Detroit at 300: New Seeds of Hope for a Troubled City*, Dollars & Sense, July 2001, *available at* http://business.highbeam.com/5449/article-1G1-77384515/detroit-300. Ten years later, it still employed only 3,600. *Id.* The failure of New London's and Detroit's economic development plans to revitalize their cities mirrors a long string of similar disappointments. *See* Dick Carpenter, *Comment on Carpenter and Ross (2009): Eminent Domain and Equity – A Reply*, 48 Urb. Stud. 3621 (2011) (describing failed projects in West Palm Beach, Florida, and Cincinnati, Ohio, and debunking claims that eminent domain was essential to redevelopment of Times Square); Castle Coalition, *Redevelopment Wrecks* (2006), http://www.castlecoalition.org/pdf/publications/Redevelopment%20Wrecks.pdf (describing 20 failed redevelopment projects involving eminent domain).

### B. Lacking independent review or accountability, predictions regarding eminent domain projects will be consistently inflated, further tilting the political playing field against existing owners.

It is no accident that private developers and cities pursuing economic development projects consistently over-promise and under-deliver. To secure public support, developers and cities face strong incentives to claim the broadest possible array of benefits with the fewest risks, and whether intentionally or unintentionally, exaggerated claims can result – especially absent independent review and accountability.

The project that gave rise to this case provides an example of how economic projections can easily go astray. In September 2008, Richard B. Reading Associates provided the Township of Mount Holly with a "fiscal impact analysis" predicting a substantial windfall from the proposed West End development slated to replace the Gardens. Richard B. Reading Associates, *Fiscal Impact Analysis for West End Redevelopment, A Proposed Mixed-Use Redevelopment in the Township of Mount Holly, Burlington County, New Jersey* (2008). A later analysis, however, pointed out that the Reading report relied on unrealistic and outdated assumptions, particularly in overvaluing the housing market in the Township in the wake of the recession. Erin Norman, *Analysis of the West End Redevelopment in the Township of Mount Holly* (2011), http://www.ij.org/images/pdf_folder/castlecoalition_PDF/mh_analysis.pdf. Revising these assumptions lowered the value of the proposed townhomes by 30 percent and the proposed rental units by 50 percent, resulting in lower tax revenues and other fees for the Township. *Id.* at 2. According to the updated analysis, lower projected revenues and higher than anticipated costs for schools and other community support could turn the hoped-for windfall into a loss to the Township of more than $1 million annually – or about 10 percent of Mount Holly's annual budget. *Id.*

Mount Holly's fiscal analysis may have been deliberately misleading, outdated, or simply "generated with less care," *Kelo*, 545 U.S. at 504 (O'Connor, J., dissenting), but in any case there are few, if any,

institutional checks on such faulty claims.[8] In economic development takings, no independent entity reviews and verifies analyses of projected benefits and costs, even though cities and their agents "cannot be expected to assess [their] own plan[s] soberly." *Mansnerus* at 434 (noting that condemnees usually have no "umpire comparable to a benefits review board or even to a zoning appeals board"). And because this Court's interpretation of the Public Use Clause does not require that economic development agreements contain guarantees to hold the new owners of property accountable for providing the benefits that justified condemnation, the promises of economic development are entirely empty. As Justice Ryan pointed out in his *Poletown* dissent, "General Motors will be accountable not to the public, but to its stockholders," and would make decisions on the use of the property accordingly. *Poletown Neighborhood Council*, 304 N.W.2d at 480 (Ryan, J., dissenting).

Despite repeatedly emphasizing the "careful" nature of New London's development plan, *Kelo* provides no independent check on cities' and developers' assertions. There is nothing in the ruling, Justice O'Connor observed, "to prohibit property transfers

[8] The second fiscal analysis in Mount Holly was completed for free by a public policy analyst at the nonprofit law firm of *Amicus*. Most communities targeted for eminent domain will not have the resources or expertise to generate an alternative fiscal analysis or challenge the projections presented by the city or private development interests.

generated with less care, that are less comprehensive, that happen to result from less elaborate process." *Kelo*, 545 U.S. at 504 (O'Connor, J., dissenting). By giving a blanket authorization to all economic development takings, *Kelo* encourages and sanctions flawed forecasts of their benefits and risks. And, given the actual results in New London a full eight years after the *Kelo* decision, it should be apparent that so-called "careful" development plans, *Kelo*, 545 U.S. at 478, often have no relationship to reality.

Rubber-stamping the projections of cities and developers not only heightens the risk of abuse, it further tilts the playing field against targeted communities. Projections of benefits and costs are not only likely to be consistently flawed, they are likely to be consistently flawed in favor of economic development projects. Such faulty analyses, backed by the authority of government and its experts, distort democratic deliberations on proposed projects with inflated predictions of public benefits, and thus make the task of already politically weak communities fighting to save their homes and businesses all the more difficult.

## IV. Judicial Enforcement of the Public Use Clause Is the Proper Solution to the Disparate Impacts of Economic Development Takings.

As long as the government can take land from A and give it to B because B might make the "highest

and best social use," *Kelo*, 545 U.S. at 521 (Thomas, J., dissenting), poorer and minority neighborhoods will not be safe from cities and developers. So what can be done? Judicial enforcement of the Public Use Clause.

The government must be prevented from taking property from one person and giving it to another private party for the purpose of economic development. If neighborhoods can be demolished because more valuable uses might be made of them, then, on sheer economics alone, poorer neighborhoods – which are disproportionately minority neighborhoods – are inviting targets. The difference between their existing property values and taxes and those of a grandiose redevelopment project will always be too great a temptation.

Taking the Public Use Clause seriously would address the disproportionate impact of eminent domain on poor and minority neighborhoods. Property owners could make public use defenses in condemnation actions tied to redevelopment schemes. This possibility would, of course, eliminate most of those schemes in the first place. Residents of those neighborhoods would then be secure in their homes, businesses, social networks, and communities.

Moreover, this case demonstrates that the political process cannot be relied upon to protect against the disproportionate impact of eminent domain. As demonstrated above, victims of eminent domain abuse are all too often politically powerless groups,

unable to perform the daunting task of organizing opposition to the pet projects of politicians, both in court and at city hall. Protecting those without political power is a primary and hallmark purpose of judicial review. Mount Holly's elected officials rejected the pleas of Gardens residents to preserve their homes and lives. Tragically, this Court stripped those residents of the use of the Constitution instead.

## CONCLUSION

With real constitutional protections in place, Respondents could have challenged the Township's redevelopment plan under the legal provision best suited to prevent it, the Public Use Clause. And numerous other residents and businesses in poor and minority neighborhoods across the country could have successfully prevented the taking of their properties because someone else might have made more money or paid more in taxes. When the interpretation of the Public Use Clause next comes before this Court, it will be incumbent upon it to correct its jurisprudence and stop the victimizing of the vulnerable that its prior rulings have enabled.

In the present case, what this Court can do is refuse to condone the use of eminent domain for the purpose of economic development, and, specifically, refuse to legally, constitutionally, or morally justify the Township's outrageous and systematic destruction of the Gardens. Instead it should simply address whether Respondents have a claim under the FHA.

Again, *Amicus* understands that the FHA covers many different types of issues beyond the use of eminent domain. The purpose of this brief is to urge that when a case comes before this Court properly presenting the constitutionality of takings for private development, the Court reexamine its rulings on that subject, and that in this case it refrain from addressing whether the challenged project furthers a public purpose.

Respectfully submitted,

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