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 OF THE AMERICAN PLANNING ASSOCIATION, THE CONNECTICUT CHAPTER OF THE AMERICAN PLANNING ASSOCIATION, AND THE NATIONAL CONGRESS FOR COMMUNITY ECONOMIC DEVELOPMENT AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether this Court should change the settled meaning of the "public use" limitation of the Just Compensation Clause by ruling either (i) that property cannot be taken by eminent domain solely for economic development, or (ii) that courts should apply a heightened standard of review in considering legislative determinations of public use.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATUTES

SECONDARY SOURCES

TABLE OF AUTHORITIES – Continued

IDENTITY AND INTEREST OF AMICI CURIAE[1]

The American Planning Association (APA) is a non-profit public interest and research organization founded in 1978 to advance the art and science of planning at the local, regional, state, and national levels. It represents more than 37,000 practicing planners, officials, and citizens involved, on a day-to-day basis, in formulating and implementing planning policies and land-use regulations. The organization has forty six regional chapters, including the Connecticut Chapter with 446 members which joins in filing this amicus brief, as well as nineteen divisions devoted to specialized planning interests. The APA is centrally concerned with redirecting growth and development into the nation's central cities, inner suburbs, and other areas already served by infrastructure and supported by urban services. It believes that it is critically important to preserve the ability of local governments to use redevelopment tools and techniques, including eminent domain when appropriate, to achieve well-defined public purposes. The APA also believes that an open and inclusive public participation process should be part of all redevelopment planning. To the extent possible, the APA believes that communities should use incentives – such as increased development densities and favorable zoning policies – as their primary redevelopment tool, and should resort to eminent domain only as a tool of last resort when incentives are insufficient to implement redevelopment plans.

Founded in 1970, the National Congress for Community Economic Development ("NCCED") is the representative and advocate for the community-based development industry. NCCED represents over 3,600 community development corporations ("CDCs") across America; its

[1] Counsel for the parties have consented to the filing of this brief. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than amici or their counsel, made a monetary contribution to the brief's preparation or submission.

membership encompasses a broad range of geographic, ethnic, racial, political, social, and economic interests, including neighborhood housing and community action agencies, farmworker organizations, public officials, financial institutions, municipalities, businesses and individuals. Community development corporations produce affordable housing and create jobs through business and commercial development activities, and are a vital force in empowering low-income communities across the nation to achieve economic and social progress.

SUMMARY OF ARGUMENT

Petitioners ask this Court to impose a restrictive gloss on the words "public use" in the Just Compensation Clause, interpreting those words to mean that property cannot be condemned solely for economic development. This is not the first time courts have been asked to police the ends to which the power of eminent domain is devoted. From roughly 1840 through the 1930s, many state courts applying state constitutional law sought to limit eminent domain to projects that were "used by the public," a project that was eventually abandoned as unworkable and unduly restrictive. Significantly, however, during that same period this Court never endorsed a restrictive reading of public use as a matter of federal constitutional law. To the contrary, it specifically approved condemnations designed to promote economic development, and consistently applied a highly deferential standard of review to public use determinations. This history is instructive in considering petitioners' proposals that this Court restrict the use of eminent domain for economic development, or adopt a more intrusive standard of review. It reveals that these proposals are not only unwise, but would require a radical departure from a jurisprudence that has been long settled.

Petitioners and their amici advance only two specific legal arguments in support of their proposals. Petitioners request that the Court emulate the reasoning of *County of Wayne v. Hathcock*, 471 Mich. 445, 684 N.W.2d 765 (2004).

But *Hathcock* rests on an idiosyncratic state constitutional methodology; would invite manipulation; and could lead to a variety of undesirable consequences in different areas of the law. Petitioners' amici suggest that *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), require a higher standard of review of public use determinations. However, there is no justification for transposing a standard of review designed to identify uncompensated expropriations to the wholly different context in which government agencies agree to pay just compensation for the property interests they acquire.

Eminent domain is concededly an unsettling power, and is subject to misuse or overuse if not properly constrained. But eminent domain is disruptive for all who experience it, not just those who might be able to persuade a reviewing court that a particular condemnation is not "public" enough. The dangers of eminent domain should be addressed by assuring that it remains a second-best alternative to market exchange as a means of acquiring resources, by encouraging careful planning and public participation in decisions to invoke eminent domain, and by building on current legislative requirements that mandate additional compensation beyond the constitutional minimum for persons who experience uncompensated subjective losses and consequential damages.

ARGUMENT

I. History Teaches That "Public Use" Should Be Given A Broad Interpretation That Includes Economic Development

The briefs filed in this case by petitioners and their amici can be read to imply that this Court in *Berman v. Parker*, 348 U.S. 26 (1954), and *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984), abdicated a constitutional role it had previously performed in protecting property owners from overly zealous exercises of the power of eminent domain, and that the law should now be restored

to its former glory. Nothing could be further from the truth. Petitioners are the ones who seek a sharp break with settled constitutional understandings. They are urging the adoption of novel constitutional limitations on the exercise of eminent domain that have never had, and never should have, any basis in federal constitutional law.

A. The Rise and Fall of "Use by the Public"

There is little affirmative evidence that the Framers understood the words "for public use" in the Just Compensation Clause to incorporate any kind of substantive limitation on the ends to which the power of eminent domain may be devoted. These words may have been intended merely to describe the type of taking for which just compensation must be given – a taking of specific private property by public authority as opposed to some other type of taking, such as a taking by tort or taxation.[2] Nevertheless, "for public use" has been read throughout our history as imposing an implied limitation on the exercise of eminent domain – that it can be used only for public and not private uses – and this Court has accepted this interpretation. *Brown v. Legal Found. of Washington*, 538 U.S. 216, 231-32 (2003); *Thompson v. Consol. Gas Utils. Corp.*, 300 U.S. 55, 80 (1937).

As an implied limitation on the power of eminent domain, the core case of a forbidden private use has always been clear: when the government takes A's property and gives it to B, with no public justification other than the legislature's preference for B over A. *See Mo. Pac. Ry. v. Nebraska*, 164 U.S. 403, 417 (1896). What has been less clear is just what sort of justification is necessary to elevate a taking from the A to B category and transform it into a public use.

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[2] *See* David A. Dana & Thomas W. Merrill, *Property: Takings* 8-25 (2002); Matthew P. Harrington, "*Public Use*" *and the Original Understanding of the So-Called "Takings" Clause*, 53 Hastings L.J. 1245 (2002).

Historically speaking, three different interpretations of "public use" can be discerned.[3] The most restrictive interpretation requires that the government actually hold title to the property after the condemnation. The next-most-restrictive definition is that public use means "use by the public." Under this definition, public title to the property is irrelevant; what is decisive is whether the property is accessible as a matter of right to the public. The third and broadest definition is that public use means public benefit or advantage. Under this conception, neither title to the property after condemnation, nor access to the property by the general public, is necessary. Instead, property can be taken for any objective that the legislature rationally determines to be a sufficient public justification.

The narrowest possible definition – that public use means public ownership – has always been regarded as a fairly uncontroversial type of taking. Many routine examples of eminent domain – such as the acquisition of land for a highway – fit this definition. But public ownership has almost universally been regarded as too narrow to serve as a comprehensive definition of public use. Starting in the early years of the nineteenth century, States frequently delegated the power of eminent domain to privately-owned turnpike, canal and railroad corporations. Later, such delegations were extended to privately-owned gas, electric, and telephone utilities. The widespread practice of delegating the power of eminent domain to these sorts of privately-owned common carriers and public utilities meant that courts almost never regarded public

[3] For useful surveys of the history of interpretation of the public use limitation, *see* Errol E. Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 Envtl. L. 1, 4-41 (1980); Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 Or. L. Rev. 203, 204-25 (1978); Philip Nichols, Jr., *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L. Rev. 615 (1940).

title to condemned property as a complete definition of public use.[4]

During the colonial and early national periods, the understanding about the permissible scope of eminent domain appears to have been, at least implicitly, the broad view – that the power could be used for any purpose consistent with public benefit or advantage.[5] The issue received little attention by courts, presumably because land was plentiful and eminent domain was little used. Around 1840, however, a judicial reaction began to set in. Many state courts began to endorse the more restrictive "use by the public" test.[6] This permitted eminent domain to be delegated to railroads, turnpike companies, and the like, because these were common carriers subject to duties to serve the public on a nondiscriminatory basis. But, by definition, it would not permit eminent domain to be used by other types of enterprises, such as manufacturing plants or mining operations.

Almost immediately, those state courts which had endorsed the "use by the public" reading began to encounter cases in which the test appeared to be unduly restrictive. Mill Acts, which permitted riparian owners to build dams flooding the property of upstream owners, were a primary focus of controversy. With respect to grist mills that ground grain for area farmers, one could characterize the enterprise as being subject to common carrier-type duties, and hence as satisfying the "use by the public" criterion.[7] But as the nineteenth century unfolded, Mill Acts increasingly came to include other types of mill dams,

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[4] For a rare judicial expression of the public title view, *see Bloodgood v. Mohawk & Hudson R.R.*, 18 Wend. 9, 60-61 (N.Y. 1837) (concurring opinion of Senator Tracey).

[5] *See* Meidinger, *supra* note 3, at 25; Berger, *supra* note 3, at 207.

[6] *See* Nichols, *supra* note 3, at 617-18; Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem,* 58 Yale L.J. 599, 603-04 (1949).

[7] *See Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 18-19 (1885).

such as those powering textile plants and other types of manufacturing operations. Courts that had embraced the "use by the public" test struggled with these applications.[8] Similar problems were encountered when public utility companies began to acquire easements for electric and telephone distribution lines across private property, and many States, especially in the West, adopted statutes broadly permitting eminent domain to be used to facilitate the construction of mining operations, irrigation projects, and drainage districts. State courts that had adopted the "use by the public" test engaged in a variety of contortions in an effort generally to sustain these exercises of eminent domain.[9] By the beginning of the twentieth century, as one commentator observed, "there had developed a massive body of case law, irreconcilable in its inconsistency, confusing in its detail and defiant of all attempts at classification."[10]

The *coup de grace* to the "use by the public" test was delivered in the 1930s. Beginning with the National Industrial Recovery Act, followed by the Housing Acts of 1937 and 1949, Congress began appropriating significant federal funds to state and local government authorities to assist in the process of slum removal and construction of public housing.[11] Many of these projects entailed the use of eminent domain either to clear deteriorated properties and/or to acquire sites for public housing. Following the lead of the New York Court of Appeals,[12] state courts uniformly rejected claims that these condemnations violated the public use limitation. From this point on, the

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[8] *See* Nichols, *supra* note 3, at 620-21.

[9] *See Dayton G. & S. Mining Co. v. Seawell*, 11 Nev. 394, 400-01 (1876).

[10] Comment, *supra* note 6, at 605-06.

[11] *See* Berger, *supra* note 3, at 214-17; Nichols, *supra* note 3, at 629-33.

[12] *New York City Hous. Auth. v. Muller*, 270 N.Y. 333, 1 N.E.2d 153 (1936).

"use by the public" test faded into obscurity. It is today the law in at most only a few States.[13]

B. This Court Has Consistently Embraced the Broad View of Public Use.

Throughout the roughly 100 years that witnessed the rise and fall of the "use by the public" standard in the state courts, this Court never once sought to impose such a restriction on eminent domain as a matter of federal constitutional law. Four cases decided by this Court around the turn of the twentieth century involving the development of natural resources are particularly instructive. These cases involved challenges to the use of eminent domain to construct a ditch to remove water from a drainage district, *O'Neill v. Leamer*, 239 U.S. 244 (1915); to construct ditches to bring water to irrigation districts, *Clark v. Nash*, 198 U.S. 361 (1905); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112 (1896); and to build an aerial bucket line to transport minerals taken from a mine, *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531 (1906). They establish three propositions of importance to the present controversy.

First, in none of the four cases did the general public have any right of access to the property condemned. The Court specifically rejected the contention that a lack of public access made the exercise of the power of eminent domain constitutionally problematic. Speaking for the Court in *Strickley*, Justice Holmes noted "the inadequacy of use by the public as a universal test." 200 U.S. at 531. The Court soon reaffirmed this conclusion in a variety of contexts not involving the development of natural resources.[14] Given that

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[13] *See, e.g., Karesh v. City Council*, 271 S.C. 339, 247 S.E.2d 342 (S.C. 1978).

[14] *See Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co.*, 240 U.S. 30, 32 (1916); *Block v. Hirsh*, 256 U.S. 135, 155 (1921); *Rindge Co. v. Los Angeles County*, 262 U.S. 700, 707 (1923).

the two contending approaches to interpretation of public use at the time were the "use by the public" test and the public benefit or advantage test, the Court's explicit rejection of the narrow test represented a firm embrace of the broad public benefit or advantage interpretation.

Second, the Court stressed that the conditions that might justify the exercise of eminent domain vary greatly from one section of the country to another, making it inappropriate to lay down a single federal rule binding on all States. In *Clark*, the Court upheld a Utah statute which had been applied to permit the condemnation of a ditch to convey water for irrigation to a single farm. Justice Peckham (who in other contexts was quite skeptical of state intervention in economic affairs, *see Lochner v. New York*, 198 U.S. 45 (1905)) wrote that whether such a purpose is a valid public use will "depend upon many different facts":

> Those facts must be general, notorious, and acknowledged in the State, and the state courts may be assumed to be exceptionally familiar with them. They are not the subject of judicial investigation as to their existence, but the local courts know and appreciate them. They understand the situation which led to the demand for the enactment of the statute, and they also appreciate the results upon the growth and prosperity of the State, which in all probability would flow from the denial of its validity. 198 U.S. at 368.

Given the variability of conditions from one State to another, Justice Peckham concluded: "[W]here the right of condemnation is asserted under a state statute, we are always, where it can fairly be done, strongly inclined to hold with the state courts, when they uphold a state statute providing for such condemnation." *Id.*

Third, the public rationale for the takings in each of these cases was the State's determination that the property was needed in order to enhance the productivity of particular resources. The Court recognized that the takings in these cases could not be justified on public

health and safety grounds, *see Fallbrook Irrigation Dist.*, 164 U.S. at 163, or on the ground that large numbers of persons directly benefited from the takings, *see Clark*, *supra*; *Stickley*, *supra*. Instead, in each case the condemnation was justified because of its impact on "the growth and prosperity of the state," *Clark*, *supra*, 198 U.S. at 368, or "the prosperity of the community," *Fallbrook Irrigation Dist.*, 164 U.S. at 163 – in other words, *because it was needed to promote economic development*. Each of these decisions therefore stands for the proposition that condemnation for the sole purpose of economic development *is* a legitimate public use, provided a State so determines and this judgment is a rational one in light of the circumstances of the property and the needs of the public. Petitioners cite some of these decisions in footnotes (*see* Pet. Br. at 22 n.18, 33 n.31). But they have not explained why they should now be overruled based on a novel theory that the power of eminent domain cannot be used to promote economic development.[15]

Throughout the period when many state courts followed the "use by the public" standard, this Court invalidated only one state action as an impermissible private use. This was an order of the Nebraska Board of Transportation directing a railroad to allow a group of farmers to construct an elevator on railroad property on terms and conditions similar to those previously extended to two other firms. *Mo. Pac. Ry. v. Nebraska*, 164 U.S. 403 (1896). The Court observed that the challenged order was not framed or defended as an exercise of the power of eminent domain for public use, that the beneficiaries were private individuals associated for their own benefit, that they had not been incorporated for any public purpose, and

[15] Petitioners suggest that these cases involved "instrumentalities of commerce" (Pet. Br. at 21). But if the private ditches and aerial bucket line were "instrumentalities of commerce," then so is every private driveway in the country. The stated justification for the taking in each case was that it would enhance the productivity of resources, and the Court upheld each of the takings on the assumption that this was the "public use."

that they did not represent that the new elevator would be open to use by the public. *Id.* at 416. On these assumptions, the Court held that "[t]he taking by a State of the private property of one person or corporation, for the private use of another, is not due process of law . . . ." *Id.* at 417. *Missouri Pacific* stands for the proposition that when government takes property from A and gives it to B, and fails altogether to advance a rational public purpose justification for the taking, this violates the public use limitation. There is no reason to believe that this does not remain good law.

As the federal government grew in the scope of its activities, this Court also began to encounter public use challenges to the exercise of eminent domain by federal authorities. The Court in these cases adhered to the broad conception of public use, permitting eminent domain to be used for a variety of ends, including acquiring land for a park, *Shoemaker v. United States*, 147 U.S. 282 (1893); acquiring the site of the Battle of Gettysburg for a national memorial, *United States v. Gettysburg Elec. Ry.*, 160 U.S. 668 (1896); acquiring land to retransfer to persons whose property had been flooded by a federal reservoir, *Brown v. United States*, 263 U.S. 78 (1923); and acquiring homes that had been cut off from access to the outside world by a federal reservoir. *United States ex rel. TVA v. Welch*, 327 U.S. 546 (1946).

From its earliest encounters with the public use issue, the Court's understanding of the applicable standard of review remained essentially unchanged. In *Gettysburg Electric,* the Court said: "[W]hen the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation." 160 U.S. at 680. In *Old Dominion Land Co. v. United States*, 269 U.S. 55, 66 (1925), the Court said: "Congress has declared the purpose to be a public use, by implication if not by express words. . . . Its decision is entitled to deference until it is shown to involve an impossibility." In *Welch*, after quoting the foregoing standard, the Court said: "Any departure

from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields." 327 U.S. at 551-52.

Against this background, it is clear that *Berman v. Parker*, 348 U.S. 26 (1954), and *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984), represented no break with the past. Those decisions simply restated the settled jurisprudence established by this Court more than fifty years before *Berman* was decided. Under that jurisprudence, the determination of what ends constitute a public use is for the legislature to make, without any artificial restrictions on legislative choice such as the "use by the public" test. Legislative determinations of public use are subject to judicial review, but only under the highly deferential rationality standard that applies to constitutional challenges to social and economic legislation more generally.

In the years since *Berman* and *Midkiff*, litigation over the public use issue has settled into a stable pattern.[16] Federal courts, following the teachings of *Berman* and *Midkiff*, have played a minor role in the process, and have been highly deferential to legislative determinations of public use. There are thirty-one published federal appellate decisions resolving public use controversies since *Berman*. Only one of these decisions holds that a condemnation is not for a public use, and that decision turns largely on the conclusion that the taking was not an authorized public use under Indiana state law.[17] The outcome in state courts, not surprisingly in a federal system, is somewhat more variable. There have been 513

[16] The data in this paragraph are drawn from Corey J. Wilk, *The Struggle Over the Public Use Clause: Survey of Holdings and Trends, 1986-2003*, 39 Real. Prop. Prob. & Tr. J. 251 (2004); Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61 (1986).

[17] *Daniels v. Area Plan Comm'n. of Allen County*, 306 F.3d 445 (7th Cir. 2002).

state appellate decisions resolving public use controversies since *Berman*, the vast majority of which interpret "public use" language in state constitutions rather than the parallel language found in the federal Constitution. These decisions are also deferential to legislative determinations of public use, but less so than federal appellate decisions. Altogether, about one in six of these decisions (17%) holds that a challenged taking is not for a proper public use, mostly under state constitutional law.

In short, the law of public use has been and largely remains state constitutional law, reflecting the vagaries and traditions of each individual state. State courts have not failed to scrutinize the use of eminent domain to assure that States do not take property from A and give it to B without an adequate public justification. They have in fact invalidated a sizeable number of takings as lacking a sufficient public use. The Connecticut Supreme Court's decision in this case, decided by a four-to-three margin, reflects the kind of careful consideration that state appellate courts continue to give to these issues. Federal courts, however, have stood to one side, and have allowed the state courts to police this issue. Petitioners and their amici have offered no compelling argument as to why this settled division of constitutional authority, reflecting over a century of unbroken federal constitutional precedent established by this Court, should now be upended.

II. Petitioners And Their Amici Have Advanced No Principled Legal Basis For Adopting A Novel And Restrictive Approach To Public Use

Given the longstanding and settled meaning of "public use," petitioners and their amici offer surprisingly little by way of legal argument that would justify adopting a novel and restrictive approach to the public use limitation. Petitioners' primary argument is to urge the Court to emulate the reasoning of a recent Michigan Supreme Court decision construing the Michigan Constitution (Pet. Br. 18-27). Their secondary argument is that the Court should adopt a more

searching standard of review of public use determinations than the one reflected in its past decisions (Pet. Br. 30-40). Although petitioners offer no specific legal argument in support of this secondary argument, some of petitioners' amici contend that the Court's decisions involving exactions require adopting an intermediate standard of review for public use cases. None of these claims has merit.

A. The Public Use Standard Recently Adopted as a Matter of Michigan Constitutional Law in *Hathcock* Is Unworthy of Emulation

Petitioners invite the Court to adopt as a matter of federal constitutional law the restrictive definition of public use recently adopted as a matter of Michigan constitutional law in *County of Wayne v. Hathcock*, 471 Mich. 445, 684 N.W.2d 765 (2004). *Hathcock* involved a challenge to the use of eminent domain to acquire a number of parcels of land in Wayne County adjacent to the Detroit Airport. The project started when the airport was expanded, exacerbating noise pollution of nearby properties. With the aid of a grant from the Federal Aviation Administration, the County began to purchase nearby property affected by noise. The County eventually determined to acquire 1,300 acres in all, and to use the property to develop a business and technology park that would promote economic development in the County. Scattered within this tract were nineteen individual parcels whose owners declined to sell, which the County sought to acquire by eminent domain.

As explained in Part I, courts historically have assumed that "public use" should be defined in terms of a single variable: public ownership, use by the public, or public benefit or advantage. *Hathcock* breaks new ground by combining these definitions into a more complex, multi-part definition of what is *not* a public use. Specifically, the decision holds that property is not dedicated to public use when it is taken for the use of a private for-profit enterprise, unless one of three circumstances applies: (1) the condemnation is for a highway, railroad, canal, pipeline or

similar "instrumentality of commerce" that requires the assembly of many contiguous parcels of land and hence presents the potential for an extreme holdout problem; (2) the private transferee will remain accountable to the public for its use of the property because it will be subject to continuing regulatory oversight; or (3) property has been selected for condemnation based on some attribute or condition of the condemned property of "independent public significance" such as being blighted. 471 Mich. at 472-76, 684 N.W.2d at 781-83. The Michigan Supreme Court, finding that the County did not propose to retain title to the land in the technology park, and that the project did not otherwise fit any of the categories where eminent domain was permitted, held the taking was not for a valid public use. 471 Mich. at 476-78, 684 N.W.2d at 781-83.

There are a number of reasons not to emulate the *Hathcock* decision. First, *Hathcock* rests on an interpretative method unique to Michigan constitutional law, which deviates sharply from federal constitutional law. *Hathcock* sought to fix the meaning of broad constitutional language by incorporating the particular applications of that language that a "legally sophisticated" reader would recognize to exist at the time of ratification. *See* 471 Mich. at 468-71, 684 N.W.2d at 779-80 (purporting to derive this methodology from the writings of the nineteenth-century Michigan jurist Thomas Cooley). The current version of the Michigan Constitution was ratified in 1963. The court asked: What would a legally sophisticated reader of the constitutional text in 1963 understand by the term "public use"? The answer: Such a reader would have examined Michigan decisional law on the subject, and would have understood that law to comprise only those uses that had been previously recognized by the Michigan judiciary prior to 1963, namely, public ownership, condemnations for common carriers facing extreme holdout problems, condemnations for other private entities subject to close regulatory supervision, and elimination of blighted property. Use of eminent domain for any other purpose would have been understood to be impermissible.

Whatever merits it may have as a matter of Michigan constitutional law, *Hathcock*'s methodology is inconsistent with the way this Court generally interprets the Federal Constitution. Although the Court is guided by its understanding of the general concepts the Framers understood they were constitutionalizing, it does not treat the "broad and majestic" Clauses of that document[18] as incorporating a specific list of permitted applications that a "legally sophisticated" reader would recognize at the time of ratification.[19] To some degree the Seventh Amendment's right to jury trial in suits at common law has been interpreted this way.[20] But there is a textual basis for this: the Seventh Amendment directs that the right to trial by jury in suits at common law "shall be preserved." Ordinarily, however, constitutional provisions are not construed as incorporating contemporaneous applications frozen in time. For example, the Commerce Clause, the First Amendment, the Fourth Amendment and the Equal Protection Clause have not been construed this way. Indeed, the other elements of the Takings Clause – most prominently, the word "taken" – have not been construed as having a fixed historical meaning.[21] It would be very odd, to say the least, to interpret one word of the Takings Clause ("taken") as a general concept whose application is to be determined over time, and three other words ("for public use") in an historically frozen fashion.

Interpreting the "public use" language in the Federal Constitution in a historically-frozen manner would obviously have deeply unsettling consequences. The Fifth

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[18] *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972).

[19] *See* Antonin Scalia, *A Matter of Interpretation* 140-41 (Amy Gutmann ed., 1997).

[20] *See, e.g., Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977).

[21] *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992) (observing that Takings Clause was originally understood to reach only direct appropriations of property or practical ousters from possession).

Amendment has not been amended since it was adopted in 1791. If only those projects recognized as proper objects of eminent domain in 1791 were deemed permissible, huge swathes of settled eminent domain law would now have to be repudiated as unconstitutional. If we decide that 1868, when the Fourteenth Amendment was adopted, is the appropriate reference point, then the effect would be only slightly less avulsive. Takings for public utility lines, pipelines, water reclamation projects, and urban renewal were all unrecognized as of 1868.

Second, *Hathcock*'s attempt to limit the use of eminent domain for economic development to cases where property is "blighted" would generate undesirable consequences. Such a limitation could work to the disadvantage of poor and minority communities, which could be more readily subject to condemnation based on a finding of blight than middle class communities.[22] More broadly, it would seriously distort the process of development planning, by skewing economic development projects toward locations most plausibly characterized as blighted. Proper economic development planning looks to a wide range of factors, including not just the condition of existing properties, but also the potential for future economic activity in the area, population densities, proximity to transportation facilities, the presence or absence of public amenities, and other variables.[23] The straightjacket *Hathcock* seeks to impose on eminent domain could undermine the quality of planning for economic development, to the detriment of all the community.

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[22] Scholars have concluded that traditional urban renewal as practiced from the 1940s through the 1960s tended to have a disproportionate impact on minority communities. *See* 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).

[23] The American Planning Association policy guide on redevelopment, ratified in April 2004, provides a summary of the principles that planning professionals follow in designing urban redevelopment projects. See http://www.planning.org/policyguides/redevelopment.htm.

Any constitutionally-mandated finding of "blight" would also be subject to manipulation. This Court observed in *Lucas* that "the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eyes of the beholder" and cautioned against using this distinction as a basis for interpretation of the Just Compensation Clause.[24] Restricting the use of eminent domain to blighted areas would confront similar imponderables, as municipalities and property owners would contest whether particular takings are blight prevention programs ("harm-preventing") or "mere" economic development programs ("benefit-conferring"). Federal courts could arbitrate these disputes only by developing a jurisprudence of "blight," and closely reviewing the factual records in state eminent domain proceedings to make sure that the States are conforming to the federalized standard.

Third, *Hathcock*'s restrictive definition of public use could limit the options of government in solving important social problems in a variety of areas. Of particular relevance to the issues in this case, *Hathcock*'s limitations could severely restrict government efforts to combat urban sprawl. Developers of new shopping centers, townhouse complexes, and business centers need large tracts of land to configure their projects in ways that will attract customers. The easiest way to acquire large tracts of land is to buy up greenfields at the outer fringes of urban areas. Large sites in existing urban centers are hard to come by because of the high transaction costs of land assembly. One way to reduce the advantage developers currently see in greenfield development is to use eminent domain to assemble tracts of land in high density urban areas. But *Hathock* seems to say that, outside the context of property found to be blighted, this will be possible only if the government retains title to the property. *Hathcock* observes dismissively that "the landscape of our country is

[24] 505 U.S. at 1024.

flecked with shopping centers, office parks, clusters of hotels, and centers of entertainment and commerce." 471 Mich. at 477, 684 N.W.2d at 783. What it fails to observe is that these are mostly located along arterial highways at the perimeter of urban areas. The only meaningful land assembly option *Hathcock* leaves for fighting sprawl is state ownership of shopping centers, townhouse complexes or business centers – not a very appealing idea.

Hathcock could have other unhappy consequences as well, many undoubtedly unforeseeable. For example, *Hathcock* might call into question federal legislation providing for compulsory licensing of intellectual property rights.[25] The statutes that incorporate these provisions represent an exercise of the power of eminent domain in the sense that the government authorizes one party (the licensee) to "take" the rights of another person (the intellectual property owner) without permission, in return for the payment of just compensation. Yet these devices also do not appear to fit into any of *Hathcock*'s permitted "exceptions."[26] Similarly, *Hathcock* could call into question statutes that exist in about half the States authorizing private landowners to condemn rights of way to landlocked property. Michigan has specifically disapproved such takings,[27] but other States permit them, and *Hathcock*'s test for public use would arguably wipe out any room for state variation in terms of these longstanding practices.[28]

These and other uncertainties suggest that the primary effect of *Hathcock*'s complex and poorly defined test

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[25] *See, e.g.*, 17 U.S.C. § 115 (compulsory license for making and distributing phonorecords).

[26] This Court has held this type of statutory scheme satisfies the public use requirement, at least in the context of licensing the use of trade secret information for federal regulatory purposes. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1014-16 (1984).

[27] *See Tolksdorf v. Griffith*, 464 Mich. 1, 626 N.W.2d 163 (2001).

[28] *See* Kristin Kanski, Case Note, 30 Wm. Mitchell L. Rev. 725, 729-30 & n.34 (2003) (collecting state statutes).

would simply be to transfer discretion over approval of projects that involve the use of eminent domain from politically accountable bodies to courts. The decision would almost surely impose a new source of litigation costs, as lawyers for property owners and public authorities debated different aspects of the multi-part rule. This Court should decline petitioners' invitation to subject state and local authorities throughout the Nation to this unjustifiable headache.

B. There Is No Basis for Transplanting the Heightened Standard of Review Applicable to Development Exactions to Public Use Cases.

Petitioners argue in the alternative that this Court should jettison its longstanding commitment to deferential review of legislative determinations of public use. Although petitioners offer no specific legal argument that would justify this step, several of petitioners' amici contend that the Court's decisions in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), should be read effectively to overrule the Court's public use precedents and compel use of a heightened standard of review in eminent domain cases. *See, e.g.*, Brief of Cascade Policy Institute *et al.*; Brief Amicus Curiae of Professors David L. Callies *et al.* In fact, those decisions do not in any way alter or undermine the Court's settled standard of review for public use determinations.

Nollan and *Dolan* establish a special legal standard to deal with the situation where government officials, in the course of making individual land-use permitting decisions, seek to attach conditions requiring owners to grant the public permanent physical access to their property. Under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982), these types of requirements, if imposed directly, would constitute per se takings. The question the Court faced in *Nollan* and *Dolan* is whether it makes a difference if such requirements are imposed, not directly,

but as conditions of regulatory permits the government might simply deny altogether without incurring takings liability. The Court resolved the question by ruling that such "exactions" do not effect a taking so long as (1) there is an essential "nexus" between the exaction and the government's regulatory purposes in establishing the permitting scheme, *Nollan*, *supra*, 483 U.S. at 837, and (2) there is a "rough proportionality" between the impact of the proposed development and the property right exacted, *Dolan*, *supra*, 512 U.S. at 319. The Court acknowledged that application of these tests entails a more heightened standard of review than the traditionally deferential, rational-basis standard. *See Dolan*, *supra*, 512 U.S. at 391.

The heightened standard established in *Nollan* and *Dolan* for exactions does not extend to the quite different context of public use determinations for the exercise of eminent domain. A critical difference is that government affirmatively offers to pay just compensation in an eminent domain case, whereas the very question at issue in an exactions case is whether the government has affected an appropriation for which it must pay compensation. *Nollan* and *Dolan* themselves make this distinction clear by indicating that the government in each case could have acquired the property rights in question in those cases, regardless of whether the nexus and proportionality tests were met, so long as it was willing to pay compensation. *See Nollan*, *supra*, 483 U.S. at 842 ("if [California] wants an easement across the Nollan's property, it must pay for it"); *Dolan*, 512 U.S. at 396. The standard for deciding whether government can evade paying for an appropriation should not govern the very different question of whether government can take property upon payment of just compensation.

Furthermore, *Nollan* and *Dolan* represent an application of the doctrine of unconstitutional conditions, which has no bearing on eminent domain cases. While reaffirming the government's broad authority to regulate land uses, *Nollan* and *Dolan* focus on the danger that government

could use its ad hoc regulatory authority as leverage to extract interests in property that are unrelated to government's regulatory objectives. As the Court stated in *Nollan*, where there is no "essential nexus" between an exaction and government's regulatory objectives, there is a risk that a permitting decision can be converted into "an out-and-out plan of extortion." *Nollan*, 483 U.S. at 837. The same risk of potential misuse of government authority does not exist where government mandates a straightforward exchange of property for compensation equal to the fair market value of the property taken.

Consistent with the specific nature of the problem these cases address, the Court has made clear that *Nollan* and *Dolan* have only a narrow scope. Petitioners' suggestion that *Nollan* mandates a complete rethinking of the pubic use standard was implicitly rejected by the Court's decision in *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407 (1992), issued five years after *Nollan* was decided, in which the Court applied, without any dissent, the deferential rational basis test in a public use case involving property retransfer to a private party. Subsequently, in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999), the Court ruled that the rough proportionality test of *Dolan* (and, by clear implication, the companion *Nollan* essential nexus test) does not extend "beyond the special context of exactions – land use decisions conditioning approval of development on the dedication of property to public use." In any event, in *Dolan* the Court said that the heightened standard of review for exactions does not apply to "legislative determinations" that do not present the same risk of improper leveraging as ad hoc permitting decisions. 512 U.S. at 385. Thus, the heightened standard established by *Nollan* and *Dolan* does not apply to New London's legislative determination, made in conjunction with a comprehensive planning process involving full public participation, to use the eminent domain power to affect a compensated taking.

III. Heightened Public Use Review Is Not The Answer To Misuse Or Overuse Of Eminent Domain

Eminent domain is admittedly an unsettling power. To be wrenched from one's home or business by order of the government is a deeply disruptive experience – with or without the payment of compensation. Such coercive power should be used sparingly. Heightened judicial review under the public use requirement, however, would provide a poor mechanism for protecting property owners against the misuse or overuse of eminent domain. Such review would aid only the lucky few who could persuade a panel of judges that the purpose of a particular exercise of eminent domain is not sufficiently "public." To be displaced by eminent domain is a potentially disorienting event for any property owner who experiences it, whatever the justification for the condemnation. What is needed are more general mechanisms that will assure that eminent domain is used as a last resort, not a first resort, and that mitigate the harshness of eminent domain for all who experience it.

Fortunately, there is reason to believe that those mechanisms are already in place. They do not work perfectly, and there is unquestionably room for refinements that would provide additional protections for property owners. But constructive solutions to eminent domain abuse or overuse lie in directions other than developing novel substantive limitations on the ends to which eminent domain can be used, or injecting federal courts into local land use planning processes through a heightened standard of review.

A. Keeping Eminent Domain a Second-Best Option

As a general rule, it is cheaper to acquire resources through voluntary exchange in the market than it is to obtain them through eminent domain. Market exchange

is of course not without cost. But the costs of eminent domain are generally greater. This is confirmed by the fact that when government units want to acquire property for which there is a thick market – such as personal property – they invariably make open market purchases or use competitive bidding, rather than having to resort to eminent domain.[29]

Eminent domain is generally more expensive because the power is cabined by a variety of procedural requirements that entail significant cost and delay for agencies seeking to acquire resources. The power of eminent domain must be properly delegated by the legislature to the body that is conducting the condemnation; the condemning authority typically must formally determine under applicable law that the exercise of eminent domain is "necessary" in order to achieve the stated public purpose; many States require that the property be properly appraised by the condemning authority before proceeding to negotiate over its acquisition; many States require that the authority make a good faith effort to acquire the property through voluntary negotiation before proceeding to condemnation; many States allow condemnees to demand trial by jury on the question of just compensation; in all States, the Due Process Clause requires that the condemnee be given a full and fair opportunity for a hearing to determine whether all legal requirements for eminent domain have been satisfied, and to contest in court the amount of compensation she will receive.[30]

One other procedural requirement, of course, is important. The legislature or its delegate must make an actual determination that condemnation is for a public use before exercising the power of eminent domain. We do not

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[29] *See* Merrill, *supra* note 16, at 80.

[30] For an overview of eminent domain procedures, *see* 7 *Nichols on Eminent Domain* (Patrick J. Rohan & Melvin A. Reskins, eds., 3d ed. 2004).

believe that a restrictive judicial gloss should be imposed on the meaning of public use, or that courts should apply a heightened standard of review to public use determinations. But we *do* believe it is important that some politically accountable body determine that the exercise of eminent domain is for a public use, and that judicial review of such determinations remain available, even if under a deferential standard. The prospect of judicial review and potential invalidation of public use determinations, especially in state courts where review has been more intrusive than in federal courts, adds another important increment to the expected costs of acquiring resources through eminent domain.

Perhaps the most constructive contribution courts can make in protecting against misuse or overuse of eminent domain is to insist that the procedural requirements associated with the exercise of eminent domain be faithfully followed in every case. These requirements not only provide valuable protections *ex post* for individual property owners when they have been singled out for condemnation. Perhaps more importantly, by increasing the costs and the delay associated with acquiring resources by eminent domain, they provide important protection *ex ante* to all property owners, by creating a powerful incentive for authorities with condemnation authority to use market transactions wherever possible. Strict enforcement of procedural requirements, in other words, makes eminent domain largely self-regulating, in the sense that it will only be used in situations where the costs of negotiated exchange are prohibitive.

B. Integrating Eminent Domain Into Land Use Planning

Another source of protection for all property owners is to assure, to the extent possible, that eminent domain is exercised only in conjunction with a process of land use planning that includes broad public participation and a careful consideration of alternatives to eminent domain.

Integrating the decision to use eminent domain into a sound planning process has a number of desirable consequences. Such a process can help minimize the use of eminent domain, by identifying alternatives to proposed development projects, such as relocating or re-sizing projects, or perhaps forgoing them altogether. It can also reduce public concerns about the use of eminent domain, by providing a forum in which the reasons for opposition can be considered, offering explanations for the proposed course of action and possible alternatives, and perhaps instilling a greater degree of understanding on the part of both the proponents and opponents of the proposed project. To the extent the need to undertake a planning process including public participation magnifies the cost differential between eminent domain and market transactions, these processes also provide a further disincentive to use eminent domain.

We do not suggest that a mandate to engage in a sound planning process can be extracted from the "public use" requirement of the Fifth Amendment. Planning processes, including public participation and a requirement of considering alternatives, have other roots, most prominently the administrative law traditions surrounding the local land use planning. We do think, however, that the presence of these features is relevant to this Court's consideration of whether the public use determination of New London and the New London Development Corporation was a rational one. New London and its Development Corporation engaged in an extensive planning process before determining that it was necessary to exercise the power of eminent domain; they provided multiple opportunities for public participation in the planning process; and they gave extensive consideration to alternative plans before settling on the final plan. *See* Resp. Br. at 4-9. We would urge the Court to note these features of the instant case as relevant factors confirming that the public use determination was rational – without of course necessarily suggesting that they are constitutionally required. We would also suggest that the Court note other recent

decisions in the lower courts, such as *S.W. Ill. Dev. Auth. v. Nat'l City Envt'l, L.L.C.*, 199 Ill.2d 225, 768 N.E.2d 1 (2002), where eminent domain decisions were *not* accompanied by any significant degree of planning or public participation, and where the state courts held that the taking was not for a public use – without of course necessarily suggesting that the same result would be required by the Federal Constitution. The Court can instruct by example as well as by mandate.

C. Providing Additional Compensation for Takings of Occupied Structures

The default standard for determining just compensation is fair market value – what a willing buyer would pay a willing seller of the property, taking into account all possible uses to which the property might be put other than the use contemplated by the taker.[31] This standard, however, sometimes fails to provide full indemnification to all property owners whose property is taken by eminent domain. The most obvious shortfall is the subjective value that individual owners attach to their properties. Subjective value has many sources. Owners may have made modifications to the property to suit their individual needs and preferences; they may treasure friendships they have formed in the neighborhood; they may simply enjoy the security that comes from being in familiar surroundings. These values are ignored under the fair market value test.[32] Another important shortfall involves consequential damages caused by a taking of property, including moving expenses, attorneys fees, loss or damage to tangible personal property, and loss of business good will. The constitutional formula does not provide any compensation for any of

[31] *See, e.g., United States v. 564.54 Acres*, 441 U.S. 506, 511-12 (1979); *United States v. Miller*, 317 U.S. 369, 374 (1943).

[32] *See, e.g., United States v. 50 Acres of Land*, 469 U.S. 24, 35-36 (1984).

these values either.[33] These systematic shortfalls in compensation help account for the intensity of opposition many homeowners express even to compensated takings.

Adjusting compensation awards to provide more complete indemnification would be a far more effective reform of the existing system of eminent domain than increasing federal judicial review of public use determinations. Additional compensation would reduce the burden imposed on particular individuals by the imposition of uncompensated residual losses. It would provide a further incentive for public authorities to forego eminent domain, if at all possible, in favor of market exchange. And it would provide a targeted and calibrated remedy for the concerns about uncompensated losses suffered by certain property owners, homeowners in particular,[34] without erecting an unnecessary general barrier to the use of the eminent domain power as a tool for economic development.

The Constitution requires "just compensation," not fair market value, and it is possible that constitutional compensation standards could be modified in ways that would provide more complete compensation for persons who experience uncompensated subjective losses and consequential damages. The Court has been reluctant to endorse deviations from the market value standard, however, because differentiating between claimants who experience such losses and those who do not would create

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[33] *Miller*, *supra*, 317 U.S. at 376.

[34] As recognized in one amicus brief in support of petitioners, "A fair market price is not everyone's price. Some may come out ahead, in the sense that they would have been willing to sell for less. Some will find the price is fair. But others will be paid less than they were willing to sell for." Brief of Cascade Policy Institute, at 7-8. *See also* Serge F. Kovaleski and Debbi Wilgoren, *Landowners Feel Stadium Squeeze; Twenty Acres Earmarked for Baseball Isn't the District's – Yet*, Wash. Post, September 26, 2004 at C1 (describing the different reaction of different property owners to the prospect of eminent domain being used to acquire land for a new baseball stadium for the District of Columbia).

administrative problems for courts.[35] Legislatures are in a much better position to identify categories of claimants who deserve additional compensation, and to develop administrable mechanisms for providing such compensation. Congress has shown the way, through the landmark Uniform Relocation Assistance Act of 1970, 42 U.S.C. § 4601 et seq. The Relocation Act requires that all real property condemnations undertaken by the federal government provide, in addition to compensation for the fair market value of the property taken, additional compensation for moving expenses, direct losses of tangible personal property, reasonable expenses of searching for a substitute business or farm, and certain other incidental expenses. *Id.* §§ 4622(a), 4653. Federal agencies may not make financial grants to state agencies that will result in takings of real property without first receiving adequate assurances that the state agency will follow similar policies. *Id.* § 4630. Pursuant to these requirements, Relocation Act awards will be provided to the petitioners in this case. *See* Resp. Br. at 8.

The additional compensation mandated by the Relocation Act, which has not been significantly amended since it was adopted, obviously goes only part way toward solving the problem of uncompensated subjective losses and consequential damages. But the Act targets the properties of greatest concern: occupied residential structures and operating businesses and farms. A logical further step for reform would be to amend the Act to provide a further increment in compensation for classes of property at risk for significant uncompensated losses, perhaps by providing a percentage bonus above fair market value.[36] Petitioners and their supporters would be well advised to channel

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[35] *See, e.g., 564.54 Acres of Land*, 441 U.S. at 511-13; 516-17.

[36] Some of the Mill Acts provided for awards equal to 150% of the damages found to have been sustained, *see Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 10 n.1 (1885); and the English practice at one time was to provide compensation equal to 110% of market value. *See* Merrill, *supra* note 16, at 92 n.97.

their energies toward pursuing this kind of reform of eminent domain – and in directing their proposals to the appropriate legislative bodies – rather than asking this Court to adopt unprecedented restrictions on the purposes to which the eminent domain power can be devoted.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Connecticut should be affirmed.

Respectfully submitted,

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