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SUSETTE KELO, *ET AL.*
V.
CITY OF NEW LONDON, CONNECTICUT

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF CONNECTICUT

Amicus Curiae *Brief of Mountain States Legal Foundation and Defenders of Property Rights in Support of the Petitioners*

MOUNTAIN STATES LEGAL FOUNDATION and Defenders of Property Rights respectfully submit this *amicus curiae* brief on the merits in *Susette Kelo, et al. v. City of New London, Connecticut*, in support of Petitioners. Pursuant to Supreme Court Rule 37.3(a), this *amicus curiae* brief is filed with the written consent of all the parties.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Mountain States Legal Foundation ("MSLF") is a nonprofit, public interest legal foundation organized under the laws of the State of Colorado, with its principal place of business in Lakewood, Colorado. MSLF is dedicated to the defense and preservation of individual liberties, the right to own and use property, limited and ethical government, and the free enterprise system.

Since its inception in 1977, MSLF has been a leader in litigation to preserve the rights guaranteed by the U.S. Constitution. Specifically, MSLF has developed expertise in interpreting and

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[1]Counsel for Petitioners, Susette Kelo, *et al.*, and Respondents, the City of New London, Connecticut, have filed "blanket" consents for the filing of *amici* with the Clerk of the Court. In compliance with Supreme Court Rule 37.6, MSLF represents that no counsel for either party authored this brief in whole or in part and that no person or entity, other than MSLF, made a monetary contribution toward the preparation or submission of this brief.

applying the Fifth Amendment constitutional protections afforded property. For example, MSLF represented the prevailing party in *Laguna Gatuna, Inc. v. United States*, 50 Fed.Cl. 336 (2001). MSLF also participated as *amicus* in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Moreover, MSLF currently represents several clients whose property is under threat of transfer to private developers at the hands of eminent domain authorities under the guise of the so-called "public use" doctrine. MSLF believes that its expertise in the area of Fifth Amendment constitutional guarantees will assist this Court.

Defenders of Property Rights ("Defenders") is the only national legal defense foundation dedicated exclusively to protecting private property rights. Based in Washington, D.C., Defenders was founded as a nonprofit, public interest legal foundation in 1991. Its mission is to protect vigorously those rights considered essential by the Framers of the Constitution, and to promote a better understanding of the relationship between private property rights and individual liberty.

Defenders of Property Rights engages in litigation across the country on behalf of its members and the public interest to prevent government incursion into protections guaranteed by the Bill of Rights. Since its inception, Defenders has participated in every major property rights case before the U.S. Supreme Court. *See, e.g., Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Bennett v. Spear*, 520 U.S. 154 (1997); *Keene Corp. v. United States*, 508 U.S. 200 (1993); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

BACKGROUND

Susette Kelo would like to continue living in her newly-restored, waterfront home of seven years. Her neighbor, Wilhelmina Dery, would like to continue living in the home in which she was born in 1918 and, for the past fifty years, has shared with her husband, Charles. Pfizer Corporation, on the other hand, with sales last year totaling in excess of $45 billion, would prefer that the City of New London, Connecticut, condemn these and neighboring properties only to have the ninety acres on which they are located leased to a "Pfizer-pfriendly developer" at the bargain basement price of $1 per

annum.[2] Never mind that on this very same acreage, the developer is slated to construct some ninety "upscale residences."[3]

Of course, the ultimate question before the Court in this case is "whether the Fifth Amendment's 'public use' requirement prohibits the exercise of eminent domain solely for reasons of 'economic development'?" A threshold and more fundamental question must first be answered, however. That is, whether it is ever the proper role of government in a free society to confiscate property at below-market prices for divestiture to some private, politically-connected entity at some even lower, below-market price.[4] This Court initially answered such questions with a principled and resounding "no."[5] However, this Court subsequently abandoned that fundamental principle in deciding the cases of *Berman*[6] and *Midkiff*.[7] Even if this Court continues to ignore the inherent injustice of forced redistribution of property from the politically estranged to the politically connected under the guise of "public use," it should not, as requested by the City of New London, equate "public use" with "public benefit" or further broaden the definition of public use to include what some small band of central planners determine is "economic development." Rather, this Court should restore the pre-*Berman* definition of public use—especially given the bureaucrat's inherent inability to engineer

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[2]*Kelo, et al. v. City of New London*, 843 A.2d 500, 510 (Conn. 2004).

[3]*Kelo* at 539.

[4]*See generally* Murray N. Rothbard, *Man, Economy, and State: A Treatise on Economic Principles*, 201–205 (Ludwig Von Mises Institute rev. ed. 1993). (Any legitimate market price is established by market participants engaging in voluntary, rather than forced, exchanges. It is axiomatic that the initiation of forceful condemnation is by definition not voluntary and thus, does not generate a market price. Also, insofar as the law generally recognizes real estate as unique, no price absent that generated between the buyer and seller of a specific property truly qualifies as a market price.)

[5]"[A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them. . . . To maintain that our Federal, or State, Legislature possesses such powers, if they had not been expressly restrained; would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments."
Calder v. Bull, 3 U.S. 386, 388-89 (1798).

[6]*Berman v. Parker*, 348 U.S. 26 (1954).

[7]*Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

in advance, in any scientifically viable or economically legitimate way, economic development or growth.

ARGUMENT

I.
THE PROPER ROLE OF GOVERNMENT IS SECURING INDIVIDUAL RIGHTS; NOT MAXIMIZING TAX REVENUE. THE COURT MUST SERVE AS A CHECK TO PREVENT TYRANNY BY THE MAJORITY

> [R]espect for the sanctity of the home . . . has been embedded in our traditions since the origins of the Republic . . . The great end for which men entered into society, was to secure their property.[8]

A dominant theme of the Declaration of Independence is that individual rights pre-exist governments and that governments are created for the purpose of securing these pre-existing rights.[9] It necessarily follows that, if government receives its power only from the individuals it governs, only rights held by those individuals could, in turn, be bestowed upon that government. That is, if the individual has no right to take by force his neighbor's justly-acquired property for his private use, neither could it be said that government could legitimately acquire such a right to act collectively for those individuals over whom it governs. Yet, this is exactly the role the City of New London hopes this Court will again sanctify. Unfortunately for Ms. Kelo, the City of New London has reason to be optimistic because, as this founding principle and, hence, property rights have been neglected by this Court and others, government has become the very means by which individuals acting collectively do exactly that which government was established to prevent in the first place—the forcible taking of property.

Following the lead of this Court and citing to both *Berman* and *Midkiff*, the Connecticut Supreme Court has, in the instant case, likewise abandoned its proper check on a legislature that has ignored

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[8] *United States v. James Daniel Good Real Property*, 510 U.S. 43, 81 (1993) (Thomas, J., concurring in part and dissenting in part) (quoting *Entick v. Carrington*, 19 How. St. Tr. 1029, 1066 (C.P. 1765)).

[9] "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed." *The Declaration of Independence* para. 2 (U.S. 1776).

both "respect for the sanctity of the home" and the "great end for which men entered into society." The Connecticut Court, in fact, goes so far as to categorize the simple maximization of revenue as a "public use" and a governmental end in itself—an end, in fact, that, in that court's view, justifies ignoring the plain language of both the state and federal constitutions.[10]

Certainly, while governments need money to operate police forces and court systems to protect individual rights, maximizing revenue through forced private exchanges of justly-acquired property as we see in this case is hardly a means consistent with *bona fide* governmental ends. Here, of course, central planners at the New London Office of Development and Planning attempt only to forcibly seize property rights rather than protect them because, they claim, with dollar signs in their eyes, they are somehow privy to how to best utilize any given property, irrespective of the owners' prior investment, knowledge, or desire.

As a result of this Court's prior decisions and the decisions of the States that have followed them, this Court will likely be reminded *ad nauseum* (and deservedly so) by individual rights advocates in this case that "[A] law that takes property from A. and gives it to B: It is against all reason and justice."[11] This reminder is most appropriate given the Court's abandonment of its proper role of protecting property rights against the tyranny of the majority.

The Framers were well acquainted with the danger of subjecting the determination of the rights of one person to the "tyranny of shifting majorities." *I.N.S. v. Chadha*, 462 U.S. 960, 961 (1993). The Framers properly perceived that "[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47, p. 324 (J. Cooke ed. 1961) (J. Madison). Theirs was not a baseless fear. "Under British rule, the colonies suffered the abuses of unchecked executive power that were attributed, at least popularly, to an hereditary monarchy." *See* Levi, *Some Aspects of Separation of Powers*, 76 Colum.L.Rev. 369, 374 (1976); The Federalist No. 48.

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[10]"We, therefore, conclude that the plaintiffs have not proven beyond a reasonable doubt that the provisions of chapter 132 of the General Statutes authorizing the use of eminent domain are facially unconstitutional when used in furtherance of an economic development plan such as the development plan in the present case." *Kelo* at 536.

[11]*See supra* note 5.

During the Confederation, the States reacted by removing power from the executive and placing it in the hands of elected legislators. But many legislators proved to be little better than the Crown. "The supremacy of legislatures came to be recognized as the supremacy of faction and the tyranny of shifting majorities. The legislatures confiscated property, erected paper money schemes, [and] suspended the ordinary means of collecting debts." Levi, 76 Colum.L.Rev., at 374–375.

Yet, here, the Supreme Court of Connecticut has (as has this Court, previously) neglected its proper constitutional role as a check on the legislature and allowed, as Henry Louis Mencken would say of pure democracy unchecked by courts, the "running of the circus from the monkey cage."[12] Mencken further emphasized, in an essay criticizing the Court and Justice Holmes for deferring (at the expense of individual rights) to the legislature and deciding cases consistent with Holmes' belief "that the law-making bodies should be free to experiment almost *ad libitum*, that the courts should not call a halt upon them until they clearly passed the uttermost bounds of reason, that everything should be sacrificed to their autonomy, including, apparently, even the Bill of Rights":[13]

> It is the aim of the Bill of Rights, if it has any remaining aim at all, to curb such prehensile gentry. Its function is to set a limitation upon their power to harry and oppress us to their own private profit. The Fathers, in framing it, did not have powerful minorities in mind; what they sought to hobble was simply the majority. But that is a detail. The important thing is that the Bill of Rights sets forth, in the plainest of plain language, the limits beyond which even legislatures may not go.[14]

Addressing below the Connecticut Supreme Court's failure to acknowledge the "plainest of plain language" as it relates to the requirement of "public use" rather than "public benefit," the Connecticut Supreme Court errs as significantly by deferring inappropriately to the legislature and allowing the tyrannical majority to reign supreme. While paying lip service to "specific constitutional limitations,"[15] the court below nevertheless embraced the notion that "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive" and "a public use defies

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[12]http://www.watchfuleye.com/mencken.html.

[13]Henry Louis Mencken, *A Mencken Chrestomathy* 259 (Alfred A. Knopf 1949), note 5.

[14]*See* Mencken, *supra* note 13 at 261.

[15]*Kelo* at 525.

absolute definition, for it changes with varying conditions of society, new appliances in the sciences, changing conceptions of the scope and functions of government."[16]

"However, if the legislature may say that a transfer of property from one to another may be deemed for public use because of any amount of public benefit incidentally arising therefrom, then the whole control of the subject is with the legislature, and the constitutional restraint is gone." *Olmstead v. Camp*, 33 Conn. 532 (1866) (Petitioner's argument). Moreover, if generating additional tax revenue is sufficient for condemnation, there is then virtually no security left in residential private property; nearly any individual lot could be put to some commercial use that would generate more property tax income.

II.
"PUBLIC USE" IS NOT "PUBLIC BENEFIT"

The Connecticut Supreme Court failed to adhere to the Bill of Rights' "plainest of plain language" because "public use," as required by both the state and federal constitutions, and "public benefit" are entirely different things.

"It may be a public benefit that all the lands of the state should be under cultivation or that all the vacant building lots in our cities should be built upon and occupied by industrious families, but a transfer of title by legislative authority in these instances to such as should so cultivate and occupy in order to produce such public benefit, would be void, because though for public benefit it is not a taking for public use." *Olmstead v. Camp*, 33 Conn. 532 (1866). The "public may have an interest in the particular use which is made of property, as for instance in having it used for manufacturing instead of agricultural purposes, but that does not make the manufacturing use a public use. The legislature has no power to make that a public use which in its nature is a private use." *Id.* As was the decision in *Olmstead*, it is also "true that [some] courts have indulged the fiction that a private use is a public use, simply because it was for the general welfare or of public utility or benefit, but this conceit, however pardonable, does not change the use from private to public." *Inspiration Consol. Copper Co. v. New Keystone Copper Co.*, 144 P. 277, 279 (Ariz. 1914).

Fortunately, at least for the citizens of several states, application of the plain language of the law to facts is not lost on their respective

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[16] *Kelo* at 524–25.

judiciaries. Rather, in those states, "[T]he public use implies a possession, occupation, and enjoyment of the land by the public at large, or by public agencies; and due protection to the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another, on vague grounds of public benefit, to spring from the more profitable use to which the latter may devote it." *County of Wayne v. Hathcock*,[17] 684 N.W.2d 765 (Mich. 2004) citing *Portage Twp. Bd. of Health v. Van Hoesen*, 87 Mich. 533, 538, 49 N.W. 894 (1891).

The Washington Supreme Court has also "consistently held that 'a beneficial use is not necessarily a public use.'" *Manufactured Housing Communities of Washington v. State*, 13 P.3d 183, 189 (Wash. 2000). Likewise in Virginia, "the public use implies a possession, occupation, and enjoyment of the land by the public at large, or by public agencies." *Ottofaro v. City of Hampton*, 574 S.E.2d 235, 237 (Va. 2003) citing *Phillips v. Foster*, 211 S.E.2d 93, 96 (1975). In fact, the states of Arkansas, Florida, Kentucky, Maine, New Hampshire, South Carolina and Washington (and now Michigan[18]) have ruled, using a narrow view of their public use clauses, that economic development is, by itself, not a "public use" for eminent domain purposes.[19]

III.
EVEN IF "PUBLIC BENEFIT" WERE THE TEST, FORCED REDISTRIBUTION BETWEEN PRIVATE PARITIES AT THE HANDS OF CENTRAL PLANNERS DOES NOT CONSTITUTE ECONOMIC DEVELOPMENT

The City of New London would have this Court believe that its condemnation of the properties in question for divestiture by way of a discount lease to Pfizer-pfriendly developers constitutes economic development. But "economic development" is not something engineered by central planners at the New London Office of Development and Planning or any other planning bureau, for that matter. In fact, because of the subjectivity of utility, no measure of

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[17]Although *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455 (Mich. 1981), was relied upon heavily by the *Kelo* court, the Michigan Supreme Court, in deciding *County of Wayne*, expressly overturned *Poletown* subsequent to the Connecticut Supreme Court deciding *Kelo*.

[18]*County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

[19]*Kelo* at 532.

economic development exists outside the market mechanism of pareto superior actions.[20]

Moreover, as is nearly always the case, elected officials justify their actions by relying on "what is seen" and ignoring "that which is not seen."[21] It's easy to point to a new hotel adjacent to a research facility built with subsidized (or confiscated) means and proclaim, "see what I, the benevolent politician, have done for the community." What is less apparent or not seen is the production or enjoyment that would have been generated by the money or property left in the taxpayers or landholders hands to spend or enjoy freely.[22] But by what means does or can the central planner balance the value or benefit of the Pfizer-pfriendly development with that value or benefit forcibly taken from the taxpayer or property owner?

The not-readily-seen economic damage, however, is considerably more widespread. Not only does the Development and Planning Department engage in malfeasance with respect to Petitioners, it does so only at additional injury to every other landowner who could otherwise compete in the commercial or residential real estate marketplace for the purchasing dollars of Pfizer-pfriendly developers—to include adjoining landowners and those in neighboring communities (or states) who would have been delighted to sell their properties to Pfizer in a non-coercive market and at a price that would allow Pfizer to operate its research facility without enlisting the aid of bureaucrats and taxpayers.

In fact, the citizens in Arkansas, Florida, Kentucky, Maine, New Hampshire, South Carolina and Washington[23] (and most recently Michigan[24]), whose states have embraced the literal and property right-embracing view of their "public use" clauses, are no longer allowed to compete fairly for the research centers of the Pfizers of the world because those states are not willing to abandon principle as the Connecticuts and federal courts have done. Yet, when the seeds of interventionism sown by the likes of Connecticut result in

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[20]*See* Rothbard, *supra* note 4, at 78-79. *See also* Joseph F. Becker, *Procrustean Jurisprudence: An Austrian School Economic Critique of the Separation and Regulation of Liberties in the Twentieth Century United States*, 15 N. Ill. U. L. Rev. 671, 695 (1995).

[21]*See* Henry H. Hazlitt, *Economics in One Lesson*, Chapter 4 (Laissez Faire Books 1996).

[22]*See* Hazlitt, *supra* note 21, Chapter 4.

[23]*Kelo* at 532.

[24]*See supra* note 18.

the misallocation of resources and further blight (as they necessarily will),[25] it will be the federal tax dollars paid by the more prosperous taxpayers in the property-respecting states that bail out the fiscal woes of the outlaw states through federal Urban Development Action Grants ("UDAG"s) and their ilk.[26]

Institutional deficiencies such as these, when allowed to exist by the Courts, can hardly be said to engender a public benefit. Internalizing costs to decisionmakers, to the extent it can be done, is the means by which economies can grow and benefit by minimizing efficiency losses.[27]

Rather, real economic development (and public benefit) exists only within the pareto superior actions of moving resources to uses more compatible with societal needs and wants—genuine economic development does not consist of forced governmental transfers of property from owners who value it more highly to those, like Pfizer Corporation, who value it less highly. Meanwhile, such illegitimate actions leave property available for sale and use that would have been sold voluntarily by owners at a price that also would have allowed Pfizer to be truly profitable (in a market sense).[28] Pareto superior actions are defined as those actions by which "one or more people are better off (in terms of satisfying utility) . . . while no one is worse off."[29] These actions move society toward a pareto optimal state of efficient allocation where no further actions with property can be taken without making someone else worse off. Socializing costs while internalizing profits for the politically connected is an

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[25]Properties best suited for development by market standards, instead of being used as such, lie dormant, whereas property already properly utilized (in the property owners' view) is misused.

[26]*See* William L. Anderson, Ph.D., *The Upside of the Chavez Debacle*, http://www.mises.org/fullstory.aspx?Id=585.

[27]James D. Gwartney, *Economics: Public and Private Choice* 127–128 (Dryden 9th ed. 2000). (When property rights are not fully enforced, the actions of a producer or consumer might harm the property [or the person] of another, because the law fails to force the party doing the harm to bear the cost or to stop the harm. This failure results in efficiency losses and spillover effects called externalities, actions of an individual or a group that influence the well-being of others without their consent.) Or, as said by economist Thomas Sowell, "It is hard to imagine a more stupid or more dangerous way of making decisions than by putting those decisions in the hands of people who pay no price for being wrong."

[28]*See* Anderson, *supra* note 26.

[29]*See supra* note 20.

economic system incompatible with a free society. In fact, it will be these unseen, unsold Pfizer-viable properties that will soon be labeled "blighted" and become justification for the next round of corporate/government partnership land grabs thus setting the whole cycle in motion, yet again.[30]

A court of law that myopically views only that which is seen and ignores the overall economic efficiency loss to the state or country as a whole in the name of boosting a narrow economic region upholds a system of laws that, at a minimum, fails the rational basis test on which *Kelo* is, in part, decided. That is, it cannot even rationally be said that the actions of the City of New London result in economic development—especially economy-wide.

These, however, are not the only economic losses. Further losses result from injecting further uncertainty into an economy. Should this Court continue in its decisions to abandon again the sanctity of the home and the great end for which men entered into society, it will do so at the cost of further destroying economic development countrywide. Uncertainty in property rights will generate economic stagnation—not development. Economic growth and long run prosperity can only increase, *ceteris paribus*, as savings or investment increase.[31] A society that must devote all of its present resources to producing the consumer goods necessary to sustain life from day to day is necessarily stagnant and will enjoy no increase in prosperity. Only by producing more than it consumes, can it sustain itself during periods of production of higher order capital goods, which, once produced, can be used to produce consumer goods more efficiently.

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[30]Although not argued as justification for using the power of eminent domain in this case, even to the extent that blight exists, it is either a consequence of nature-given scarcity or, more often, little more than the consequence of some prior market intervention ranging from rent control, prohibition, public housing projects, or excessive taxation. To the extent so-called blight is a consequence of nature-given scarcity, there is no serious science to suggest that intervention will do anything other than make matters worse—if not on location, then somewhere else (see above). The City of New London, of course, does not contend it is engaged in the ill-informed but well-meaning attempt at blight removal. Instead, revenue maximization for its own sake is its stated purpose.

[31]Ludwig Von Mises, *Human Action* 490 (Laissez Faire Books 3rd rev. ed. 1966). ("[P]ostponement of consumption makes it possible to direct action toward temporally remoter ends. It is now feasible to aim at goals which could not be thought of before on account of the length of the period of production required. . . . Saving is the first step on the way toward improvement of material well being and toward every further progress on this way.")

Uncertainty, however, plays a major role in the utility increasing aspects of savings and investment.[32] To the extent that savings are not possible to safeguard or property rights become suspect, a shift from savings to consumption invariably results and, again, economic growth is curtailed.[33] For this reason, to maximize societal wealth and economic growth, a legal system must avoid allowing property rights to become subject to forceful abdication.

CONCLUSION

Thomas Jefferson said, "A democracy is nothing more than mob rule, where fifty-one percent of the people may take away the rights of the other forty-nine." It is this Court's role to check the tyranny of the majority and secure individual rights from legislatures and planning commissions. It is also this Court's role to apply the plain language of the Connecticut and federal constitutions and restrict eminent domain condemnations to those legitimately for "public use." Lastly, no system of rules or laws that allows confiscation of property below genuine market price for delivery to the politically connected could rationally be said to foster economic development. Rather, these non-pareto superior actions and the resulting institutional uncertainty undermine the fundamental framework that would otherwise promote genuine economic growth. For all these reasons, *amicus curiae* urge this Court to reign in those who would remove Petitioners from their homes and restore the narrow and proper definition of "public use" to exclude forceful private entity to private entity transfers.

Submitted December 2, 2004.

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[32] *See* Rothbard, *supra* note 4 at 52.

[33] *See* Von Mises, *supra* note 31.