No. 07-1247

IN THE

Supreme Court of the United States

DANIEL GOLDSTEIN, *et al.*,
Petitioners,

v.

GEORGE E. PATAKI, *et al.*,
Respondents.

On Petition for Writ of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF IN OPPOSITION FOR THE ESDC AND MUNICIPAL RESPONDENTS

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QUESTION PRESENTED

Did the courts below properly conclude that the complaint failed to state a claim under the Public Use Clause of the Fifth Amendment where:

- the proposed urban redevelopment project involving eminent domain undisputedly will revitalize a large swath of land in central Brooklyn, more than half of which has been designated blighted and earmarked for redevelopment for more than 40 years and is dominated by open, dilapidated and environmentally hazardous railyards, and

- the project admittedly will include, among other public purposes, construction of a new major sports arena, affordable housing, public open space, and significant public mass transportation improvements?

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This case involves the use of eminent domain in support of the proposed Atlantic Yards Arena and Redevelopment Project in central Brooklyn (the "Project"). The allegations in Petitioners' complaint do not refute, and both courts below unequivocally found, that the Project will remove blight that has plagued more than half the footprint of the Project for at least four decades.

The Project will also accomplish multiple other, well-established public purposes: construction of a $120 million platform over the Vanderbilt Yards—rail tracks which currently are below street level and create an enormous open trench that isolates the Project area from the surrounding communities; a new sports arena designed by renowned architect Frank Gehry containing a 10,000-square-foot public atrium and pedestrian passageway to the subways; office buildings; 6,680 housing units (2,250 of which will be below-market rate); significant mass transit improvements, including a new state-of-the-art railyard for the New York State Metropolitan Transportation Authority and its Long Island Rail Road as well as extensive public subway improvements; and eight acres of publicly accessible open space. The arena will be the home of the National Basketball Association franchise now known as the New Jersey Nets, finally fulfilling the goal of returning a major-league professional sports team to Brooklyn for the first time since the Brooklyn Dodgers left in 1957. The Project will also result in extensive environmental remediation of the Project site.

Although they do not dispute most of the Project's public purposes, Petitioners make the "far-reaching" (App. 10a)[1] claim that condemning their properties to facilitate the Project would violate the Public Use Clause of the Fifth Amendment because the public officials who approved the Project were in fact motivated by the sole or primary purpose of enriching the Project's private developer, and thus the Project's undisputed public purposes are merely "pretextual." Petitioners base this pretext claim upon nothing but conclusory allegations that a host of "corrupt and coopted" (App. 9a) state and city officials (including Respondents Mayor Bloomberg and former Governor Pataki), none of whom had any evident or alleged motive to abdicate their roles of significant public trust to curry favor with the developer or the other private Respondents, conspired to support the Project for private rather than public benefit.

The courts below each properly concluded that Petitioners' claim could not survive a motion to dismiss because, even if a pretext claim was theoretically cognizable in the face of multiple, concededly quintessential public uses, the speculative and conclusory allegations in Petitioners' complaint could not support a claim of pretext.

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[1] References to the Appendix to the Petition for Certiorari are "App." herein. References to the Joint Appendix in the court of appeals are "JA". The Joint Appendix consisted of the Petitioners' complaint and all documents referenced therein. *See, e.g., Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2509 (2007) (courts faced with a Rule 12(b)(6) motion "must consider the complaint in its entirety, as well as . . . documents incorporated into the complaint by reference").

STATEMENT

1. ESDC and the Eminent Domain Process in New York

Respondent New York State Urban Development Corporation d/b/a Empire State Development Corporation ("ESDC") is a public benefit corporation created by the New York State Legislature in 1968. ESDC's primary statutory role is to foster development, urban stabilization and revitalization of distressed areas by eliminating blight and constructing viable commercial, industrial and residential projects that create employment, increase state and local tax revenue and otherwise contribute to the public welfare and civic good.[2]

One of ESDC's most important revitalization tools is its power of eminent domain. The assembly of diversely owned parcels necessary for large-scale projects, particularly in densely populated urban areas that are layered with public infrastructure and competing private interests, is often impossible without condemnation. The original World

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[2] Respondents can be grouped into four sets: (1) former Governor George E. Pataki; (2) the "ESDC Respondents," consisting of ESDC and its former chief executive, Charles A. Gargano; (3) the "Municipal Respondents," consisting of the City of New York, Mayor Michael Bloomberg, former Deputy Mayor Daniel L. Doctoroff, the New York City Economic Development Corporation and two of its former presidents, Andrew M. Alper and Joshua Sirefman; and (4) the "Forest City Ratner (or "Private" or "FCRC") Respondents, consisting of Bruce C. Ratner; James P. Stuckey; Forest City Enterprises, Inc.; Forest City Ratner Companies; Ratner Group, Inc.; FCRC, LLC; Brooklyn Arena, LLC; Atlantic Yard Development Co. LLC; BR Land, LLC; and FCR Land, LLC. This brief in opposition is submitted on behalf of the ESDC and Municipal Respondents.

Trade Center, the revitalization of Times Square, and Lincoln Center for the Performing Arts all are examples of the crucial role of eminent domain in accomplishing critical public policy objectives within major cities such as New York.

In the legislation creating ESDC, the Urban Development Corporation Act of 1968 (the "UDC Act"), N.Y. UNCONSOL. LAWS §§ 6251-6292 (McKinney 2000 & Supp. 2008), New York's legislature delegated to ESDC the sovereign power of eminent domain to achieve its objectives. ESDC is directed to "encourag[e] maximum participation by the private sector of the economy," N.Y. UNCONSOL. LAWS § 6252 (McKinney Supp. 2008), "in part by promoting large-scale real estate projects that create and retain jobs and/or reinvigorate distressed areas." *Develop Don't Destroy Brooklyn v. Empire State Dev. Corp.*, 816 N.Y.S.2d 424, 427 (N.Y. App. Div. 2006), *appeal denied*, 862 N.E.2d 790 (N.Y. 2007). ESDC may use eminent domain to acquire property "necessary or convenient" to carrying out its mission, N.Y. UNCONSOL. LAWS § 6263 (McKinney 2000), and has power to override compliance with local laws (including zoning laws) after consultation with local officials, *id.* § 6266(3).

To exercise its power of eminent domain, ESDC must comply with New York's Eminent Domain Procedure Law ("EDPL"), adopted in 1977 to govern and lend uniformity to eminent domain proceedings in New York. *See* N.Y. EM. DOM. PROC. LAW §§ 101-709 (McKinney 2002 & Supp. 2008). The EDPL establishes comprehensive procedures for extensive up-front public review and input followed by expedited judicial review.

A prospective condemnor first must notice and convene a public hearing concerning the "proposed public project." N.Y. EM. DOM. PROC. LAW § 201 (McKinney 2002); *see also* N.Y. EM. DOM. PROC. LAW §§ 202-203 (McKinney 2002 &

Supp. 2008). A record of the hearing is maintained, and those in attendance have a right to be heard and to have their views entered into the record in writing or orally. N.Y. EM. DOM. PROC. LAW § 203 (McKinney 2002). Next, the condemnor must make and publish "its determination and findings" specifying, among other things, "the public use, benefit or purpose to be served by the proposed public project." N.Y. EM. DOM. PROC. LAW § 204(A), (B)(1) (McKinney Supp. 2008). The deadline for such publication is 90 days from the close of the public hearing. *Id.* § 204(A).

Any "aggrieved" person then has 30 days to challenge the determination and findings in a petition before the Appellate Division of the State Supreme Court, which has "exclusive" jurisdiction. N.Y. EM. DOM. PROC. LAW §§ 207(A), (B), 208 (McKinney 2002). The EDPL directs that the Appellate Division "shall either confirm or reject the condemnor's determination and findings" after considering whether:

> (1) the proceeding was in conformity with the federal and state constitutions,
>
> (2) the proposed acquisition is within the condemnor's statutory jurisdiction or authority,
>
> (3) the condemnor's determination and findings were made in accordance with procedures set forth in this article and with article eight of the environmental conservation law, and
>
> (4) a public use, benefit or purpose will be served by the proposed acquisition.

Id. § 207(C). The EDPL's pre- and post-determination procedures have been upheld as furnishing due process. *See Brody v. Vill. of Port Chester*, 434 F.3d 121, 134-36 (2d Cir. 2005).

Under Article 4 of the EDPL, the last stage of the process before condemnation is the proceeding to acquire title to the properties designated for taking. The prospective condemnor has three years to initiate such a proceeding after a "final order or judgment" has been rendered in the EDPL § 207 proceeding (if one has been filed). *See* N.Y. EM. DOM. PROC. LAW § 401(A)(3) (McKinney 2002). Once notified of the Article 4 proceeding, condemnees-to-be may appear and answer. *Id.* § 402(B)(4). If the court determines that the procedural requirements of the EDPL have been complied with, it grants the petition. *Id.* § 402(B)(5). The "acquisition of the property" becomes "complete" when the condemnor files the court's order with the acquisition map with the county clerk or register. *Id.* The condemnor has 30 days to serve a notice of acquisition upon each condemnee, *see id.* § 502(B), who then may file a claim for just compensation. *See id.* § 503(B).

ESDC's exercise of eminent domain is a discretionary action subject to the State Environmental Quality Review Act ("SEQRA"), N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to 8-0117 (McKinney 2005 & Supp. 2008), which requires state agencies to study and attempt to mitigate the adverse environmental effects of actions they approve.

2. The Atlantic Yards Project

ESDC is the sponsor and lead agency for the Atlantic Yards Project, which was first announced in December 2003. (App. 189a ¶ 68.) Petitioners allege (App. 184a-185a ¶¶ 51-53), and Respondents must assume for purposes of this appeal, that Respondent Forest City Ratner Companies ("FCRC") initiated the Project.

a. The Project Site

The Project's site encompasses 22 acres of land that "has suffered from physical deterioration and relative economic inactivity for at least four decades. Dominated by an approximately 9-acre open rail yard and otherwise generally characterized by dilapidated, vacant, and underutilized properties, the site creates a clear visual and physical barrier between the neighborhoods north and south of Atlantic Avenue" near downtown Brooklyn. (JA222 (blight study).)

While surrounding neighborhoods have experienced a revitalization that began in the late 1970s, the Project site has not—largely because of the remaining below-grade open-air rail yards that divide the area. (JA161-162; 228-229; 237; 1044.) At the heart of this area lie portions of the "Atlantic Terminal Urban Renewal Area" or "ATURA," which was created in 1968 and earmarked for comprehensive redevelopment pursuant to an urban renewal plan. (JA215-216.) As Petitioners concede, the City first designated ATURA as blighted in 1968. (App. 186a ¶¶ 55, 58.) The renewal plan for ATURA has been repeatedly amended over the years, but all prior plans to remediate this blighted site have proven fruitless. As late as April 2004, the City reconfirmed, for the tenth consecutive time, the ATURA's blight designation and extended the accompanying renewal plan for another 40 years. (App. 186a-187a ¶ 57; JA215.)

Petitioners have never disputed that the ATURA is blighted, and that it has been so designated and earmarked for comprehensive redevelopment for forty years. While they grudgingly allege that "[n]early half" the Project site falls within the ATURA (App. 186a¶ 55), the record shows that number to be approximately 63%. (JA215.) The district court accepted the 63% figure (App. 35a), and Petitioners conceded it at oral argument before the court of appeals. Petitioners have defined as the "Takings Area" the entire

non-ATURA section of the Project site (App. 186a ¶ 55), which consists of numerous parcels that were owned by 76 different parties prior to 2003. Currently, only 27 separate tax lots in the Takings Area remain wholly or partially under the control of parties other than the Project sponsor, the City, or the Metropolitan Transportation Authority.

The blight study ESDC commissioned in early 2006, before making the findings necessary to proceed under the UDC Act, confirmed that the blight extended beyond the ATURA into the Takings Area. (JA213-593.) Specifically, the study concluded that one or more blight characteristics were present on most lots within the Takings Area. (JA310-482.) Buildings on five of those lots—ones that FCRC had acquired through private purchase—had so deteriorated that they posed a threat to public safety and had to be demolished immediately. (JA502-543.)[3] *See Develop Don't Destroy Brooklyn*, 816 N.Y.S.2d at 428-29. More generally, the blight study showed that "the non-rail yard portion of the project site is characterized by unsanitary and substandard conditions" including vacant and underutilized buildings, vacant lots, and structures "suffering from serious physical deterioration." (JA216.)[4]

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[3] These buildings' major structural deterioration was not, as Petitioners conclusorily assert (App. 187a ¶ 60), caused by the Project itself. The blight study documents severe and long-standing damage to roofs, floors, and walls, as well as water and rot damage to the timber floorings and floor joists. (JA502-543.) These buildings were, when the study was conducted, "permanently exposed to the elements." (JA502, 510, 515, 519, 522, 530.)

[4] The Petition contains numerous factual assertions that were shown to be false by the record or by the state court in *Develop Don't Destroy (Brooklyn) v. Urban Development* *(cont'd)*

b. Approval of the Project

The extensive review, public input, and approval procedure under multiple state laws is discussed exhaustively in *Develop Don't Destroy (Brooklyn) v. Urban Development Corp.*, No. 104597/2007, 2008 N.Y. Misc. LEXIS 551 (N.Y. Sup. Ct. Jan. 11, 2008), *see id.* at *5-15, and is summarized briefly herein.

In February 2005, ESDC, along with the City of New York and the New York City Economic Development Corporation, joined FCRC in signing two memoranda of understanding concerning the Project (JA1005-1016, 1028-1034), by which it was agreed, among other things, that ESDC would be the "lead agency" under SEQRA for purposes of examining the proposed project's environmental impacts, and that, subject to the approval of ESDC's Board of Directors and other conditions, ESDC would exercise its power under New York state law to override New York City zoning. (App. 189a ¶ 70.) Neither memorandum was an

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Corp., No. 104597/2007, 2008 N.Y. Misc. LEXIS 551 (N.Y. Sup. Ct. Jan. 11, 2008), or that were not properly preserved for consideration by this Court. These include assertions that: (1) property was excluded from condemnation because of a "deal" between FCRC and another developer (Petition at 6 n. 2); (2) a rival developer bid more than FCRC did for the right to build over the Vanderbilt Yards facility (*id.* at 8); (3) the request for proposals to which FCRC and the rival bidder responded was inferior to a subsequent request made by the MTA in connection with a site in Manhattan (*id.* at 9 n. 4); and (4) the Project's creation of 2,250 units of affordable housing will be offset by the displacement of "2,929 at-risk households" (*id.* at 12-13). Respondents reserve the right to present a more comprehensive rebuttal of these and other erroneous factual assertions by Petitioners should the Petition be granted.

approval, binding agreement or final determination concerning the Project.

On September 16, 2005, ESDC announced that the Project might have a "significant effect" on the environment and would therefore necessitate preparation of an environmental impact statement. (JA1036.) On August 23, 2006, in accordance with the directives of EDPL Article 2, ESDC held a duly noticed public hearing on the Project. Additional community forums not mandated by the EDPL were held on September 12 and 18, 2006. (*See* JA1206.) After reviewing comments and testimony received at the public hearing and community forums, as well as the written comments submitted and the Final Environmental Impact Statement, ESDC made its Final Determination and Findings under the EDPL. (*See* JA1204-1227.)

In its Determination and Findings, ESDC announced its decision to exercise eminent domain to support the Atlantic Yards Project. Chief among the public purposes it found the Project would serve was the elimination of blighted conditions within the Project site—both in the ATURA and in the Takings Area. (JA1204, 1207.) Other public benefits and uses identified included:

- "a publicly owned state-of-the-art arena to accommodate the return of a major-league sports franchise to Brooklyn [and] a valuable athletic facility for the City's colleges and local academic institutions";

- "2,250 affordable housing units and between 3,075 and 4,180 market-rate housing units";

- "8 acres of publicly accessible open space that links together the surrounding neighborhoods";

- improved public transit facilities;
- "environmental remediation of the Project Site"; and
- a host of "economic benefits," including the creation "4,538 new jobs in the City" and the generation of billions of new tax dollars for the City and State.

(JA1208-09.)

On December 21, 2006, the New York State Public Authorities Control Board (PACB)—whose three voting members are designees of the Governor, the Speaker of the State Assembly, and the Majority Leader of the State Senate—issued its resolution approving the State's financial contribution to the Project. (JA1310-18.) The City of New York and the Metropolitan Transportation Authority (a State agency) have also consented to the Project. The Project has the support of a host of elected state and local officials, including Senator Charles Schumer and Congressman Ed Towns, then-Governor George Pataki, Mayor Michael Bloomberg, Brooklyn Borough President Marty Markowitz, City Comptroller William C. Thompson, Public Advocate Betsy Gotbaum, and numerous State and City legislators, local leaders, affordable housing advocates and union officials. (JA605-623.)

3. This Action

In October 2006, short-circuiting the EDPL's judicial review process, the Petitioners filed a federal complaint in which they asserted, pursuant to 42 U.S.C. § 1983, that ESDC and the other public Respondents were threatening to violate their constitutional rights under the Public Use Clause of the Fifth Amendment and the Equal Protection and

Due Process Clauses of the Fourteenth Amendment. (App. 204a-212a.) Their theory was—and remains—that a host of public officials, including ESDC employees, Mayor Bloomberg, and then-Governor Pataki, engaged in a wholesale abdication of governmental responsibility by banding together to support the Atlantic Yards Project for the *sole purpose* of conferring a benefit on the Project's corporate sponsor, FCRC, and its CEO, Bruce Ratner. A few days after they filed their complaint, a reporter asked Petitioners' counsel how suit could have been filed "before eminent domain has been used by the state." (JA1228.) Counsel responded: "[W]e need to get discovery, where we get to question people under oath and get documents that will support what we already know . . . ." (JA1228-29 (emphasis added).)

Kicking off their complaint with bald accusations of "misuse of government[] power" and "betrayal of public trust," Petitioners asserted that all of the public Respondents acted at all relevant times "in service of the interests of a private developer," and, oblivious to their public responsibilities, "obediently [fell] into line" with FCRC's plans for the Project. (App. 171a-172a) The "facts" identified to support this conspiracy theory consisted, in essence, of complaints about the process and sequence by which the Project was first proposed and developed (App. 184a-194a)—a process and sequence that comported fully with the procedures enacted by the legislature directing ESDC to cooperate with—indeed, "encourag[e] maximum participation by"—private entities. N.Y. UNCONSOL. LAWS § 6252 (McKinney Supp. 2008). Not a single paragraph in the entire complaint alleged any *fact* demonstrating that the public Respondents had or could have had any reason to abdicate their professional and public responsibilities in order to collude for the sole purpose of enriching the private developer.

Petitioners immediately sought permission to seek expedited, far-flung discovery of written communications and deposition testimony to reveal the subjective "motives" of public officials in supporting or facilitating the Project. That motion for expedited discovery was stayed in relevant part.

Respondents thereafter moved to dismiss the complaint for failure to state a claim, as well as on grounds of ripeness and abstention. The district court referred the motion initially to a magistrate judge.

4. The Decisions Below

Magistrate Judge Levy issued a Report and Recommendation recommending dismissal (App. 116a-168a) on grounds that abstention under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), was warranted in light of the State's comprehensive statutory scheme for judicial review of public use determinations. Accordingly, he did not reach the question whether plaintiffs had stated a federal constitutional claim upon which relief could be granted.

The district court dismissed with prejudice the federal claims in their entirety. (App. 31a-115a.) Although it rejected Judge Levy's recommendation that abstention was warranted, it concluded that plaintiffs had failed to state a claim for relief under the Public Use Clause.

After analyzing the three controlling Supreme Court cases—*Berman v. Parker*, 348 U.S. 26 (1954), *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), and *Kelo v. City of New London*, 545 U.S. 469 (2005)—the district court articulated its view of the pertinent inquiry under that Clause: "[A] taking fails the public use requirement if and only if the uses offered to justify it are 'palpably without reasonable foundation,' such as if (1) the 'sole purpose' of

the taking is to transfer property to a private party, or (2) the asserted purpose of the taking is a 'mere pretext' for an actual purpose to bestow a private benefit." (App. 103a (citations omitted).) Under neither test, the district court held, could Petitioners' challenge survive dismissal.

The district court concluded that Petitioners' bare accusation that "[t]he public does not benefit from the taking of Plaintiffs' properties" was unsupported by their own allegations, which challenged only the extent—but not the existence—of the Project's numerous public purposes. (App. 104a.) Because Petitioners plainly had not alleged that the Project would serve no public purpose, the district court found that their claim necessarily failed under the well-worn principles established by *Berman* and *Midkiff*. The court, however, construed *Kelo* as permitting Petitioners to state a claim if they could allege facts that the asserted public purposes for the Project were "mere pretexts" for an "actual purpose" to "bestow a private benefit." (App. 107a (quoting *Kelo*, 545 U.S. at 478).) Applying that test, the district court concluded that Petitioners' allegations again fell short of the mark. Petitioners had failed to "allege any facts suggesting that any Defendant had any reason to bestow a benefit on any private party. Therefore, even if plaintiffs could prove every allegation in the Amended Complaint, a reasonable juror would not be able to conclude that the public purposes offered in support of the Project [were] 'mere pretexts' within the meaning of *Kelo*." (App. 109a.)

The court of appeals affirmed. Recognizing that "the primary mechanism for enforcing the public-use requirement has been the accountability of political officials to the electorate, not the scrutiny of the federal courts" (App. 13a), the court rejected the "argument that the ESDC is undeserving of such deference because it is merely a state agency deputized by the legislature." (App. 20a.) The court noted that this Court "has expressly extended deference in

such matters to both 'Congress and its authorized agencies.'" (*Id.* (quoting *Berman*, 348 U.S. at 33).) It further took judicial notice of the fact that the PACB (a body that included designees of the Speaker of the State Assembly, the Majority Leader of the State Senate, and then-Governor Pataki) had approved the State's financial contribution to the Project. (App. 20a n.7.)

The court of appeals held that the complaint's allegations foreclosed "any blanket suggestion that the Project can be expected to result in no benefits to the public." (App. 16a.) For example, "the complaint does not allege, nor could it, that either the Renewal Area or the Takings Area are devoid of blight." (App. 17a.) In fact, the court found that the Petitioners had "effectively acknowledged the Project's rational relationship to numerous well-established public uses" (App. 24a)—"among them the redress of blight, the creation of affordable housing, the creation of public open space, and various mass-transit improvements." (App. 17a.)

Finally, the court of appeals disagreed with Petitioners that these public purposes "should nonetheless be rejected as 'pretextual,' not because they are false, but because they are not the real reason for the Project's approval." (App. 17a.) The court concluded that the kind of pretext claim advanced by Petitioners was of "especially dubious jurisprudential pedigree" (App. 24a) because it would require, contrary to this Court's holdings in *Berman* and *Midkiff*, analysis of the "purity of the motives" of government officials (App. 25a) through "full judicial inquiry into the subjective motivation of every official who supported the Project, an exercise . . . fraught with conceptual and practical difficulties" (App. 26a.)

While "preserving the possibility that a fact pattern may one day arise" where "a closer *objective* scrutiny of the justification being offered is required" (App. 27a (emphasis

in original)), the court rejected that this is such a case. In this case, "[a]lthough the claim is far-reaching, the specific allegations underlying it are less so." (App. 10a.) Petitioners "have failed to allege any specific examples of illegality in the elaborate process by which the Project was approved, any specific illustration of improper dealings between Mr. Ratner and the pertinent government officials, or any specific defect in the Project that would be so egregious." (App. 30a.)

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT AMONG THE LOWER COURTS WARRANTING THIS COURT'S ATTENTION

A. The Second Circuit's "Pretext" Analysis is Consistent with the Very Few Lower Court Decisions that Have Addressed Pretext Claims in Public Use Clause Cases.

Attempting to create a conflict among the courts where none exists, Petitioners cite only three other cases since *Kelo* in which pretext claims arguably have been litigated: an unpublished decision from the Northern District of California, *MHC Financial Ltd. Partnership v. City of San Rafael*, No. C 00-3785 VRW, 2006 WL 3507937 (N.D. Cal. Dec. 5, 2006), a New York State intermediate appellate court decision, *49 WB, LLC v. Village of Haverstraw*, 839 N.Y.S.2d 127 (N.Y. App. Div. 2007), and a decision of the District of Columbia Court of Appeals, *Franco v. National Capital Revitalization Corp.*, 930 A.2d 160 (D.C. 2007).

That sparse and undeveloped case law in itself strongly militates against this Court's review. Moreover, the decision below does not conflict with those cases, and is fully in accord with the few other decisions that have addressed pretext claims in the aftermath of *Kelo*.

In *Franco*, the District of Columbia Court of Appeals reversed the trial court's striking of a Public Use Clause defense to a condemnation, but did so under very different circumstances. There, the draft bill authorizing the condemnation "did not explain why the properties were 'necessary' or to what 'public use' they would be devoted." *Franco*, 930 A.2d at 163. Nine months later, after public hearings, the District of Columbia Council passed the bill approving the condemnation, but the passed version included a set of findings that were not in the version that had been reported on by the committee. These inserted findings, which no further public hearings had been held to address, asserted in conclusory fashion that the properties were part of a complex that was "'a blighting factor'" in the nearby communities. *Id.* There was no cited study that supported this legislative "finding," and no opportunity for the public to contest the finding.

Mr. Franco, the owner of the condemned property, sought to block the condemnation by asserting that the asserted public purpose was pretextual. Concluding that Mr. Franco had properly pled a pretext defense on the merits, the Court of Appeals stated that while "the permanent legislation recites that NCRC [the condemning agency] had 'advised the Council that the Skyland Shopping Center is blighted,' . . according to Mr. Franco, NCRC admitted that it had made no such finding." *Id.* at 171.

In fact, *Franco* is in accord with the decision below. The court in *Franco*, like the Second Circuit below, stated that in those rare cases where a pretext claim or defense might be pled, litigation of such a claim is limited to review of the objective record underlying a public use determination. *Franco* admonished that the word "pretextual" in *Kelo* "is used to characterize the public benefits that will flow from the taking, not the thought processes of legislators or other governmental officials." *Franco*, 930 A.2d at 173 (citing

Kelo, 545 U.S. at 490 (Kennedy, J., concurring)). Thus, "if the record discloses . . . that the taking will serve 'an overriding public purpose' and that the proposed development 'will provide substantial benefits to the public,' the courts must defer to the judgment of the legislature." *Franco*, 930 A.2d at 174. Reviewing *Kelo*, *Franco* also expressly rejected the constitutional significance of Mr. Franco's allegations that the taking failed the public use requirement because "the identities of the benefiting private parties were known before the taking was authorized by the legislature and that there is no comprehensive plan for redeveloping the area." *Franco*, 930 A.2d at 175.

The two additional cases cited by Petitioners are inapposite and not in conflict with the decision below. In *MHC Financing Ltd. Partnership v. City of San Rafael*, No. C 00-3785 VRW, 2006 WL 3507937 (N.D. Cal. Dec. 5, 2006), a rent control ordinance applicable to mobile home parks was challenged as violative of the Public Use Clause. Citing *Kelo*, the district court denied the city's motion for summary judgment on plaintiff's private takings claim, *see MHC Financing*, 2006 WL 3507937, at *14, because there was no evidence that the ordinance was part of a "'carefully considered development plan,'" or that the ordinance did more than confer "a private benefit on the incumbent tenants." *Id.* In making the latter determination, the court stated that a court should "'*review the record*'" to see if a "'plausible accusation of impermissible favoritism to private parties'" has merit. *Id.* (emphasis added) (quoting *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring)). But the case had nothing to do with the transfer of real estate or other tangible property from one owner to another, and thus the court's discussion of *Kelo* was purely a matter of analogy.

Similarly, in *49 WB, LLC v. Village of Haverstraw*, 839 N.Y.S.2d 127 (N.Y. App. Div. 2007), an on-the-face review of the allegations concerning public use and the underlying

record exposed the pretextual nature of the asserted public purposes. The owner of the property proposed to devote it to substantially the same uses (including affordable housing) as the village proposed, and the village's determination and findings in support of condemnation "fail[ed] to articulate how or in what manner the condemnation . . . fosters any benefit to the public which would not be obtained absent the condemnation." *Id.* at 139; *see generally id.* at 139-42.

Here, by contrast, the Petitioners' allegations on their face concede multiple undisputed public purposes served by the Project. It is only the subjective motivation of officials that Petitioners seek to challenge as impure and pretextual. Other lower courts have refused to recognize a pretext claim in the face of much less support for valid public purposes than presented here. *See, e.g.*, *Western Seafood Co. v. United States*, 202 Fed. Appx. 670, 675 (5th Cir. 2006) (rejecting pretext argument although the beneficiaries of the transfer of property were "identified prior to or at the earliest stages of the City's planning process"); *CBS Outdoor Inc. v. New Jersey Transit Corp.*, Civil Action No. 06-2428 (HAA), 2007 WL 2509633, at *14-15 (D.N.J. Aug. 30, 2007) (rejecting "bald legal allegations" that the purported purposes of a project were dubious, or that there was favoritism or bias, as insufficient to state a pretext claim).

B. There is No Legal Conflict or Confusion that Agencies Such as ESDC with Legislatively Delegated Eminent Domain Powers are Entitled to the Same Deference as Legislatures in Their Public Use Determinations.

The court of appeals correctly rejected the argument that ESDC's determination to condemn is undeserving of deference merely because ESDC is a state agency with legislatively delegated eminent domain powers (rather than

the legislature itself). There is no lower court conflict on this point.

This Court has expressly extended deference to both "Congress *and its authorized agencies*." *Berman*, 348 U.S. at 33 (emphasis added) (upholding condemnation by the District of Columbia Redevelopment Land Agency, a public benefit corporation created by Congress and granted the power of eminent domain for "the redevelopment of blighted territory"). *Id.* at 29; *see also Schneider v. District of Columbia*, 117 F. Supp. 705, 710-11 (D.D.C. 1953) (summarizing the District of Columbia Redevelopment Act), *aff'd as modified on other grounds, sub nom. Berman v. Parker*, 348 U.S. 26 (1954).

The cases cited by Petitioners do not evidence a lower court conflict regarding the degree of deference to be afforded to a condemning agency as opposed to a legislature. In *Daniels v. Area Plan Commission*, 306 F.3d 445 (7th Cir. 2002), the reason the court did not extend deference to the condemnor's determination was not because of its status as a local planning commission with delegated eminent domain powers, but because the commission had premised its public use determination on a ground (economic development) that fell outside the Indiana legislature's delegation of authority to it. *See id.* at 462-63.

In fact, consistent with the decision below, the *Daniels* court acknowledged that a local agency acting *within* its delegated powers of eminent domain should be afforded the same deference due to a legislature: "[T]o the extent that the decisions of the . . . Commission fall under specific Indiana legislative determinations of public use, they should not be disturbed unless the decision is 'palpably without reasonable foundation.'" *Id.* at 460 (quoting *Midkiff*, 467 U.S. at 241).

Similarly, in *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (en banc), the Ninth Circuit addressed not the

deference owed to a public agency's condemnation determination pursuant to its legislatively delegated authority, but "an *uncompensated* taking through a raw misuse of government power." *Id.* at 1321 (emphasis added). At issue there was an alleged "scheme by [city officials] to evict tenants, deprive the plaintiffs of rental income . . . , prevent owners from learning what repairs were necessary to come into compliance, and invent new violations." *Id.* "The alleged purpose of this scheme was to deprive the plaintiffs of their property, either by forced sale, driving down the market value of the properties so a shopping-center developer could buy them at a lower price, or by causing the plaintiffs to lose their properties by foreclosure." *Id.* The court not surprisingly stated as dictum that "the usual extreme deference that courts owe to legislative determinations of public use" was not appropriate to such *de facto* confiscatory enforcement activity by individual city officials acting without legislative delegation of eminent domain powers. *Id.*; *see also id.* at 1313-15 (detailing alleged scheme).

The limited holdings of *Daniels* and *Armendariz* are fully consistent with the decision below. There is no claim that ESDC acted outside, or in excess of, the power granted to it by the legislature under the UDC Act. In fact, ESDC's authority to proceed with the Project under state law (including the UDC Act and SEQRA) was specifically upheld in a comprehensive and lengthy decision by the New York State Supreme Court, New York County. *See Develop Don't Destroy (Brooklyn) v. Urban Dev. Corp.*, No. 104597/2007, 2008 N.Y. Misc. LEXIS 551, at *1, *6-14, *30-77 (N.Y. Sup. Ct. Jan. 11, 2008); *see also id.* at *1, *7-14, *20-30 (upholding Project approvals by the Metropolitan Transportation Authority and the PACB).

II. THE DECISION BELOW IS FULLY IN ACCORD WITH THIS COURT'S LONGSTANDING PRECEDENTS

The decisions below are a straightforward application of this Court's long-standing precedents concerning the deferential level of judicial review accorded to public use determinations—precedents that were reaffirmed in 2005 and embraced by eight Justices in *Kelo v. City of New London*, 545 U.S. 469 (2005).

This Court long has construed the "public use" limitation to trigger only the most deferential judicial scrutiny. A taking serves a "public use" when "the exercise of the eminent domain power is rationally related to a conceivable public purpose." *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984). Because "[t]he role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one," *Berman v. Parker*, 348 U.S. 26, 32 (1954), a court should not "substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be *palpably without reasonable foundation.*" *Midkiff*, 467 U.S. at 241 (emphasis added) (quoting *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 680 (1896)).

Applying these bedrock principles, the proposed taking of Petitioners' properties plainly passes constitutional muster.

A. The Project Serves Multiple Undisputed Public Purposes.

Petitioners do not and cannot deny that remediation of longstanding blight is a quintessential public purpose. *See, e.g.*, *Berman*, 348 U.S. at 33-35; *Rosenthal & Rosenthal Inc. v. New York State Urban Dev. Corp.*, 771 F.2d 44, 46 (2d Cir. 1985) (removal of blight "is a classic example of a taking for a public use"). They admit, moreover, that the

majority of the Project site is in fact blighted (App. 186a-187a ¶¶ 55, 57; App. 198a ¶¶ 104-05), and the courts below recognized as much in reviewing the complaint (App. 18a, 104a-105a). *See also Develop Don't Destroy (Brooklyn)*, 2008 N.Y. Misc. LEXIS 551 at *58; ("[P]etitioners concede that the majority of the Project area is blighted, as they are not challenging the blight designation under ATURA as to 63 percent of the site, which has stood for nearly 40 years.").

And other purposes that will be served undeniably are public ones: a new sports arena—home to a major-league professional sports team in Brooklyn for the first time since the move (heartbreaking for many residents) of the Brooklyn Dodgers in 1957—will be built on the Project site; mass transit will be improved by the building of, among other things, a new railyard to service the massive public transportation hub at Atlantic Yards and a new subway entrance; new public open space will be created; and below-market-rate affordable housing will be constructed. *Cf., e.g.*, *Kelo*, 545 U.S. at 497-98 (O'Connor, J., dissenting) (identifying as clear "public uses" "a railroad" and "a stadium"); *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 422-23 (1992) (taking to facilitate intercity rail service furthered a public use); *Pennell v. City of San Jose*, 485 U.S. 1, 11-12 (1988) (efforts to relieve housing market pressures were within State's police powers); *Shoemaker v. United States*, 147 U.S. 282, 297 (1893) (noting numerous decisions holding that "land taken in a city for public parks and squares, by authority of law . . . is taken for a public use"); *Southeast Land Dev. Assocs., L.P. v. District of Columbia*, No. Civ.A. 05-1413RWR, 2005 WL 3211458, at *5 (D.D.C. Nov. 1, 2005) (taking to build baseball stadium did not violate the Public Use Clause).

Thus, as the district court concluded, plaintiffs' bare accusation that "[t]he public does not benefit from the taking of Plaintiffs' properties" was unsupported by their own

allegations. (App. 104a.) In truth, "although Plaintiffs allege that the net gain in tax revenues will be lower than defendants have predicted, they do not allege that there will be no net gain." (*Id.*) Likewise, "although Plaintiffs allege that Defendants' claims about job creation are overstated, they do not suggest that the Project will fail to create jobs." (*Id.*) And "Plaintiffs do not allege that the Project will fail to achieve a significant net increase in housing units in the area, and it is clear that it is intended to do so." (App. 105a.) Finally, "Plaintiffs also do not allege that the Project's non-quantifiable public benefits"—like the return of a major-league sports team to Brooklyn—"are false." (App. 106a.)

While Petitioners do challenge some of the asserted public purposes (creation of affordable housing and jobs) on grounds that the full targeted gains will not be realized, assertions about the *inadequate extent* rather than the *nonexistence* of certain public benefits, even if true, do not state a claim under the Public Use Clause. It has been settled for over half a century that "the legislature, not the judiciary, is the main guardian of the public needs to be served" by an exercise of eminent domain and the appropriate scope of the project. *Berman*, 348 U.S. at 32. Accordingly, even in those cases—*unlike* this one—where the *sole* justification for the taking at issue is economic development, a federal court should not "second-guess [a condemnor's] considered judgments about the efficacy of its development plan," or try to evaluate for itself whether the public purpose asserted will actually be realized. *Kelo*, 545 U.S. at 488-89. Nor should it "second-guess [a condemnor's] determinations as to what lands it needs to acquire in order to effectuate the project." *Id.*; *see also Berman*, 348 U.S. at 35-36 ("It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, [these decisions rest] in the discretion of the legislative branch.").

B. There is No Warrant for Examining the Subjective Thoughts of Public Officials to Determine Whether Admittedly Valid Public Purposes are "Pretextual".

While the court of appeals held open the possibility that allegations in a particular case (not present here, it found) may allow for some *objective* inquiry concerning the validity of cited traditional public purposes, it properly held that the subjective thought processes of public officials should not be probed in order to determine whether admittedly valid multiple public purposes are "pretextual." Petitioners' argument to the contrary misreads *Kelo*.

Petitioners and *amicus curiae* curiously argue that *Kelo expanded* rather than *constricted* the degree of constitutional scrutiny under the Public Use Clause. They contend that a Public Use challenge can now proceed by merely alleging a principal motive or intent to benefit a private party—even if the public purposes of the project at issue are plain and admitted (and not limited to economic development). Given that *Kelo* itself reaffirmed the deferential standard of judicial scrutiny of *Berman* and *Midkiff*, the court below properly rejected that broad proposition.

Indeed, the Court granted certiorari in *Kelo* "to determine whether a city's decision to take property *for the purpose of economic development* satisfies the 'public use' requirement of the Fifth Amendment." *Kelo*, 545 U.S. at 477 (emphasis added); *see also* Petition for Writ of Certiorari at i, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04-108), *available at* 2004 WL 1659558. Acknowledging the narrowness of the question presented, the *Kelo* Court emphasized a key factual distinction from *Berman*: "Those who govern the City [of New London] were not confronted with the need to remove blight in" the area designated for redevelopment. *Kelo*, 545 U.S. at 483. It also noted

plaintiffs' argument that "using eminent domain for economic development impermissibly blurs the boundary between public and private takings." *Id.* at 485. Nonetheless, the Court explained, under the broad deferential standards enunciated in *Berman* and *Midkiff*, the City's determinations that the takings would foster economic development and therefore served the public interest were entitled to respect, and foreclosed any challenge under the Public Use Clause. *See id.* at 480-82, 484-86.

Amicus curiae counsels against a rule of law that would limit the ability of plaintiffs to develop a factual record to support suppositions of illicit motive. But as the Second Circuit correctly observed, even if a pretext claim can survive review of the complaint and documents referenced therein on a motion to dismiss, litigation of such a claim must be limited to an *objective* factual record, because "a full judicial inquiry into the subjective motivation of every official who supported the Project [is] an exercise . . . fraught with conceptual and practical difficulties." (App. 26a; *see also id.* at 27a (quoting *Edwards v. Aguillard*, 482 U.S. 578, 636-37 (1987) (Scalia, J., dissenting)).) Where that objective record demonstrates that a proposed condemnation will further numerous, substantial and undisputed public purposes, even proof of impure subjective motives on the part of public officials approving the condemnation could not negate the public purposes served by the project. A contrary rule of law would allow harmful fishing expeditions into the subjective motivations of public officials.

That kind of subjective—rather than objective, on-the-record—scrutiny is precisely what has been rejected by every lower court to consider the possibility of a pretext claim in the wake of *Kelo*. *See supra* pp. ___ (discussing *Franco v. Nat'l Capital Revitalization Corp.*, *49 WB, LLC v. Vill. of Haverstraw*, and *MHC Fin. Ltd. P'ship v. City of San Rafael*; *see also Brody v. Vill. of Port Chester*, 434 F.3d 121,

136 (2d Cir. 2005) (no judicial "examination of the thought processes of those exercising the legislative prerogative" is warranted under the Public Use Clause).

C. The Lower Courts' Determination that the Complaint's Allegations of Improper Motive Cannot Survive Dismissal Does Not Merit Review by this Court.

Even if the subjective motives of public officials could be relevant to a Public Use Clause inquiry, both courts below determined that this particular complaint did not allege facts sufficient to challenge such motives. (App. 30a, 108a-109a.) As the district court found, Petitioners' conclusory allegations concerning former Governor Pataki's, Mayor Bloomberg's and other public officials' purportedly illicit desires and intents in this case did not amount to alleged *facts* or "'a *plausible* accusation of impermissible favoritism to private parties.'" (App. 108a (quoting *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring)).) The complaint did not allege, for example, any special relationship between any of the public Respondents and Bruce Ratner, or how or why the former would have had any reason to abdicate their significant professional and public responsibilities in order to benefit the latter. Accordingly, the court of appeals concluded that "[a]lthough [Petitioners' pretext] claim is far-reaching, the specific allegations underlying it are less so." (App. at 10a.)

That case-specific determination does not merit review by this Court, and thus this case is not a proper vehicle to

consider the question presented concerning the viability of a properly pled claim of pretext.[5]

III. THIS COURT'S REVIEW IS UNWARRANTED BECAUSE ISSUES CONCERNING THE BOUNDS OF EMINENT DOMAIN POWER ARE ACTIVELY PERCOLATING IN STATE LEGISLATURES AND COURTS

Insofar as Petitioners and *amicus* seek review by this Court of the appropriate bounds of eminent domain power in the wake of *Kelo*, such review is unwarranted because these issues are being vigorously debated and resolved in the political and judicial branches of state and local governments, where they are best resolved. *Kelo* itself emphasized that while the decision set forth the broadest extent of the eminent domain power, "nothing in [it] precludes any State from placing further restrictions on its exercise of [that] power." *Kelo*, 545 U.S. at 489.

Indeed, through statute, citizen initiative and constitutional amendment, or a combination of those instruments, 42 states have changed their eminent domain laws since *Kelo* was decided. *See* CASTLE COALITION, 50 STATE REPORT CARD: TRACKING EMINENT DOMAIN REFORM LEGISLATION SINCE *KELO* 1 (2007), http://www.castlecoalition.org/pdf/ publications/report_card/ 50_State_Report.pdf (last visited May 15, 2008); *see also* NATIONAL CONFERENCE OF STATE LEGISLATURES, EMINENT DOMAIN, http://www.ncsl.org/programs/natres/

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[5] *Amicus curiae* suggests that this case is a vehicle for the Court to clarify the scope of *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007). But as the court of appeals made clear, its decision was not predicated upon the outer bounds of *Twombly* or determination of pleading standards. (App. 12a.)

EMINDOMAIN.htm (last visited May 15, 2008); *see also, e.g., Harrison Redevelopment Agency v. DeRose*, 942 A.2d 59, 89 (N.J. Super. Ct. App. Div. 2008) ("Since *Kelo* was decided, greater judicial and legislative scrutiny of redevelopment-based takings has occurred" in various States.).

Of the eight States that have not responded to *Kelo* with enacted legislation, referenda, or amendments, three have seen changes to their eminent domain laws through court decisions. *See, e.g., Bd. of County Comm'rs v. Lowery*, 136 P.3d 639, 647-52 (Okla. 2006); *see also Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447, 460 (N.J. 2007) (interpreting the State's statutory definition of blight narrowly); *R.I. Econ. Dev. Corp. v. Parking Co., L.P.*, 892 A.2d 87 (R.I. 2006); *see generally City of Norwood v. Horney*, 853 N.E.2d 1115, 1141 (Ohio 2006) (holding that "economic development" is not a "public use" under the State's Constitution and noting that it need not follow *Kelo* in interpreting its own constitution).

Although New York State has not yet enacted legislation since *Kelo*, at least 17 bills have been introduced in the state legislature. *See 49 WB, LLC*, 839 N.Y.S.2d at 130, n.1. And New York's state courts have scrutinized the public uses served by proposed takings. *See generally, e.g., id.*

This locus for activity, initiative and diversity at the state level is as it should be. As *Kelo* recognized, this Court's "earliest [public use] cases in particular embodied a strong theme of federalism, emphasizing the 'great respect' that we owe to state legislatures and state courts in discerning local public needs." 545 U.S. at 482 (citation omitted); *see also Rindge Co. v. L.A. County*, 262 U.S. 700, 705-706 (1923) (what constitutes public use "is influenced by local conditions; and this Court . . . [should] regard with great

respect the judgments of state courts upon what should be deemed public uses in any state.").

The variety of changes across the country reflects the robust nature of the debate. Intervention by the Court at this time would risk curtailing the vibrant discussion of policy choices occurring at the state level.

IV. THIS CASE IS NOT A GOOD VEHICLE TO CONSIDER THE QUESTION PRESENTED BECAUSE OF ISSUES CONCERNING THE NEED FOR *BURFORD* ABSTENTION.

The question presented by Petitioners concerning the scope of a "pretext" claim under the Public Use Clause may not ultimately be reached in this case. Accordingly, this case is not a good vehicle for consideration of the question.

Petitioners' action was brought in federal court in derogation of a comprehensive state statutory scheme that provided for expedited judicial review of public use determinations in state court. *See* N.Y. EM. DOM. PROC. LAW § 207 (McKinney 2002). Bypassing this state review mechanism, Petitioners instead filed this action in federal court. Respondents argued before the district court that the court should abstain from deciding the matter. Magistrate Judge Levy accepted that argument, although the district court ultimately dismissed the complaint on the merits rather than on abstention grounds.

Magistrate Judge Levy concluded that *Burford* abstention is called for because the federal interest in retaining jurisdiction is outweighed by the State's competing concern to have particular kinds of cases adjudicated in a state forum. (App. 157a-158a.) Here, Judge Levy reasoned, "New York's EDPL sets forth a highly specific and comprehensive mechanism for condemnees to challenge any aspect of a condemnation in a state-created system of administrative and

judicial review" (App. 159a), and "it is indisputable that eminent domain is traditionally a matter of local concern and that the state has a vital interest in establishing a coherent policy with respect to it" (App. 160a). Finally, Judge Levy observed, "allowing plaintiffs to do an end-run around the EDPL and instead litigate their claims in federal court would provide incentive for forum shopping and thereby undermine New York's legislative scheme governing the exercise of eminent domain power." (App. 163a.)

Petitioners' invocation of the Public Use Clause as a basis for asking the federal courts to review a public use determination before state procedures have run their course is extraordinary. The Supreme Court and lower federal courts consistently have held that the exercise of eminent domain, as well as public use determinations in support thereof, are matters of quintessentially local concern. *See, e.g., La. Power & Light Co. v City of Thibodaux*, 360 U.S. 25, 28-29 (1959). Challenges to such determinations—even federal constitutional challenges—therefore ordinarily belong in state court, subject to ultimate review in this Court. Federal district court scrutiny in the first instance is severely limited and, when exercised, highly deferential. Indeed, in the thirty years since the EDPL was enacted in 1977 and until this case, federal district courts sitting in New York have, in decisions published in the Federal Supplement or available through online sources, considered just *five* suits challenging a condemnor's proposed exercise of eminent domain pursuant to New York law under the Public Use Clause of the Fifth Amendment. Of those five cases, not one proceeded to trial. One was dismissed for lack of ripeness (*Port Chester Yacht Club, Inc. v. Iasillo*, 614 F. Supp. 318, 323 (S.D.N.Y. 1985)); two were disposed of on, *inter alia*, abstention grounds (*Didden v. Village of Port Chester*, 322 F. Supp. 2d 385, 388 (S.D.N.Y. 2004) *aff'd*, 173 Fed. Appx. 931 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 1127 (2007); *Broadway 41st Street Realty Corp. v. New York State Urban*

Development Corp., 733 F. Supp. 735, 744 (S.D.N.Y. 1990)); one was dismissed on the basis of *res judicata* (*Waldo's, Inc. v. Village of Johnson City*, No. 89-CV-897, 1989 WL 153727, at *5 (N.D.N.Y. Dec. 15, 1989)); and one was dismissed for failure to state a claim before discovery commenced (*Rosenthal & Rosenthal, Inc. v. New York State Urban Development Corp.*, 605 F. Supp. 612, 619 (S.D.N.Y), *aff'd*, 771 F.2d 44 (2d Cir. 1985)). By contrast, during that same thirty-year period, the Appellate Division of the New York Supreme Court has, in reported decisions alone, adjudicated well over 100 proceedings brought pursuant to EDPL § 207—with many of those proceedings involving the consolidated petitions of multiple allegedly aggrieved parties.

Federal district court review of local public use determinations is the exception, not the rule. Allowing plaintiffs to pursue challenges to public use determinations in federal court in the first instance undermines the state statutory scheme. Issues concerning the need for *Burford* abstention may therefore prevent this Court from reaching the merits of Petitioners' public use claim, counseling against grant of the Petition.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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