No. 03-972

IN THE

Supreme Court of the United States

CAROL PAPPAS, *et al.*,

Petitioners,

v.

CITY OF LAS VEGAS DOWNTOWN REDEVELOPMENT AGENCY, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Nevada

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* PAUL AND LAUREL A. MOLDON IN SUPPORT OF PETITIONERS

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Dated: February 6, 2004

MOTION FOR LEAVE TO FILE
BRIEF OF *AMICI CURIAE*

Amici curiae Paul and Laurel A. Moldon hereby respectfully move for leave to file the following brief in support of the petition for certiorari. Petitioners have consented to the filing of this brief. Respondents have refused consent.

The interests of *amici* in this case arise from their ownership of property in Las Vegas that was condemned by respondent Las Vegas Downtown Redevelopment Agency to be given to a private casino. Although the property contained a viable commercial building that provided substantial income to the Moldons, and was not even remotely blighted, it was coveted for unspecified purposes by the casino and hence was targeted for appropriation. Following an initial appeal on statutory issues, their case is now pending back in the state trial court on public-use and just-compensation issues. Given that they have been subject to the same or even worse abuse of the eminent domain power by the Las Vegas Downtown Redevelopment Agency as have petitioners, *amici* have a direct and immediate interest in the issues presented by the petition and in the enforcement of the "public use" restriction on the taking of private property. This brief will focus on the nationwide importance of the questions presented, the division among the courts, and some proposed solutions for judicially enforcing the "public use" limit on takings authority.

Respectfully Submitted,

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INTEREST OF *AMICI CURIAE*[1]

Amici Paul and Laurel Moldon are the owners of property in Las Vegas that was condemned by the Las Vegas Downtown Redevelopment Agency to be given to a private casino. Although the property contained a viable commercial building that provided substantial income to the Moldons, and was not even remotely blighted, it was coveted for unspecified purposes by the casino and hence was targeted for appropriation. In 1995, the Redevelopment Agency filed a motion for immediate possession of the property which was granted and

[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

the property was then given to the casino. The tenants of the property were promptly evicted and the Moldon's livelihood was destroyed.

Although the order of possession was reversed later that year, and the property nominally returned to the possession of the Moldons while the case was pending, only one former tenant returned and then only at a drastically reduced rent. The ongoing condemnation proceedings and the active interference of the Redevelopment Agency and the casino have since prevented the Moldons from making any viable use of the property and thus they were left stuck with a half-dead albatross around their necks – forced to pay property and sewage taxes yet blocked from reaping economic advantage from the property.

Following an initial appeal on statutory issues, their case is now pending back in the state trial court on public use and just compensation issues. During this time, the Moldons have yet to receive a penny of compensation for the unlawful taking and *de facto* destruction of their investment. Despite having been taken under the guise of redevelopment and the elimination of blight, the land is not, and has never been, part of any redevelopment plan. The casino, meanwhile, has completed its project, has not even *proposed* any development of the Moldons' property, yet continues to covet it and refuses to relinquish its claim. The condemnation thus amounts to nothing more than the naked appropriation of property for transfer to a new private owner without even an inkling of what use would be made of it. In all likelihood the new owners eventually intend to sell all or part of the property arbitraging the difference between the artificially depressed price they will have to pay in the context of condemnation and the much higher price available in the market.

Given that they have been subject to the same or even worse abuse of the eminent domain power by the Las Vegas Downtown Redevelopment Agency as have petitioners, *amici* have a direct and immediate interest in the issues presented by

the petition and in the enforcement of the "public use" restriction on the taking of private property.

SUMMARY OF ARGUMENT

1. The taking of non-blighted property from one private owner for transfer to another private owner under the guise of "redevelopment" is a rapidly growing phenomenon that has spread like a plague across the country. A study by the Institute for Justice identified over 10,000 publicly reported actual or threatened condemnations for the benefit of private recipients from 1998-2002, and noted that such number likely underestimated the phenomenon by an order of magnitude or more. The sheer numbers and geographic scope of such takings and the tremendous value of that quantity of property illustrate that the petition presents important and recurring issues that should be addressed by this Court. Indeed, the litigation burden alone from so many questionable takings and the lack of definitive limits on the scope of public use is reason enough to warrant this Court's attention.

2. In addition to the split regarding public use identified in the petition, numerous state courts have adopted narrower interpretations of what constitutes a "public use" by interpreting that phrase as it appears in their own constitutions and statutes. As a practical matter, those cases interpreting state law analogues to the federal Constitution's "public use" requirement should be considered as part of the "split" justifying a grant of certiorari because courts having such narrow views of public use in general will rarely or ever find it necessary to even reach the federal constitutional question. Virtually every state has a Fifth Amendment analogue requiring that takings be for "public use" and hence property-protective states will always have a prior state-law ground for decision.

The no-public-use side of the split, therefore, will almost always have to be represented by state-law cases. It is only those state courts with a generally broad view of public use that will ever even need to reach the federal question at all

after upholding a taking as being for a valid "public use" under state law, and such courts will invariably interpret the federal requirement in the same broad manner as they interpreted their state requirement. What is important in the concept of a split, however, is that the result in this case would have been different in any of the states that have a narrower view of public use, regardless of the nominal source of the public-use requirement. That split in results on the conceptually identical issue of public use warrants this Court's attention.

3. A workable and administrable solution to the questions presented in this petition requires that the scope of the takings power be tied to the actual language of the Constitution and hence to some identifiable public *use*, not merely to some incidental public benefit from private use of the taken property. Any transfer of property to private parties must be no more than incidental to such a public use. For takings of so-called "blighted" property, the taking must include only such property as itself is blighted and non-blighted property that is *necessary* to the taking of the blighted property itself. And blight in such circumstances should be limited to conditions approximating a nuisance, not merely the absence of some favored use. Finally, insofar as public use is to be tied to some indirect public benefit, the links in the chain of causation must be kept extremely limited in order to preserve some meaningful difference between private and public use. The trickle-down theory that private benefit begets public benefit would destroy any such meaningful difference, and hence cannot be the basis of a claim for public use.

ARGUMENT

I. THE PETITION RAISES IMPORTANT AND RECURRING ISSUES THAT SHOULD BE ADDRESSED BY THIS COURT.

The exercise of the power of eminent domain to transfer property from one private owner to another is a widespread and recurring phenomenon. And with increasing frequency, government coercion of the transfer of property between private parties is being justified not on the basis of some fatal flaw in the property under the original owner – such as blight or nuisance – but rather in pursuit of economic redevelopment: the notion that some new owner would make a supposedly "better" use of the property than the existing owner. In virtually every instance, such takings are subject to the identical claim raised by the petition: That taking non-blighted property from one private owner and giving it to a preferred private owner does not constitute a "public use" of such property regardless of any incidental benefits such a change in ownership may have.

Petitioners in this case aptly note that "redevelopment" takings are "becoming an epidemic." Pet. 12. That description is, if anything, an understatement.[2] A recent study by the Institute for Justice, for example, found that between 1998 and 2002 there were over 10,000 filed or threatened condemnations for private parties in 41 States. Dana Berliner, PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN

[2] An "epidemic is usually heralded by an exponential rise in the number of cases in time and a subsequent decline as susceptible numbers are exhausted." Swinton, A DICTIONARY OF (ECOLOGICAL) EPIDEMIOLOGY (2002) (http://www.swintons.net/jonathan/Academic/glossary.html). A "pandemic," by contrast, is an epidemic "widely distributed in space." *Id*. The spread of private-use takings is worse still, given that not only is it widely distributed throughout the country, but it also shows no sign of decline and in fact seems to be gaining still more momentum.

2 (Institute for Justice, April 2003).[3] The study also found an additional 4,000 properties that were then living under the threat of private-use condemnation. *Id.* And, as if those numbers were not enough to demonstrate a critical threat to property rights, the report notes that they "represent only a fraction of the number of cases where private property has been condemned for another private party." *Id.* Because the study compiled its figures from public sources, and because "many, if not most, private condemnations go entirely unreported in [the] public sources" used for the report, the true number of cases affected by the issues raised in the petition is likely an order of magnitude higher than the confirmed number given by the study.[4]

Less comprehensive, but no less telling, are the plethora of news reports from around the country decrying the torrent of takings instituted for the benefit of private parties under the

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[3] In its state-by-state analysis, written before the decision by the Nevada Supreme Court in this case, the Institute for Justice study describes Nevada as "teetering on a precipice" of "either encouraging flagrant abuse or warning redevelopment agencies that there are limits to their power." PUBLIC POWER, PRIVATE GAIN, at 129. That characterization was based, in part, on the abuse suffered by petitioners the Pappases – which the report described as involving Redevelopment Agency behavior that "was so outrageous that it will be difficult for any court to approve," *id.* – and, in part, on the case involving *amici* the Moldons. *Id.* at 131. In deciding the *Pappas* case as it did, the Nevada Supreme Court elected to throw ordinary property owners in Nevada over that precipice, to be picked clean by the casinos and developers waiting below.

[4] The study gives the example of Connecticut, the only State that records the number of redevelopment condemnations, as listing 543 such condemnation proceedings between 1998 and 2002, as compared to the 31 instances identified and counted by the study from other sources. PUBLIC POWER, PRIVATE GAIN, at 2. And even that larger figure in Connecticut does not take into account instances in which the *threat* of a private-use condemnation was used to coerce a property owner into selling rather than face a ruinous and likely futile legal battle challenging an actual condemnation. Rather than 10,000 cases over a four-year period, the issues in this case more likely affect *hundreds of thousands* of cases over such a period.

guise of "redevelopment." *See, e.g.*, Associated Press, *Lawsuit filed over tax incentive for Wal-Mart*, Miami Herald, Sept. 17, 2003 (suit "accuses Birmingham of improperly using eminent domain to force property owners to sell" to Wal-Mart for purpose of building a new store) (available at http://www.miami.com/mld/miamiherald/business/6789539.htm)[5]; Daniels, *Shelby court may hear land case*, Birmingham News, Aug. 25, 2003 (noting that the City of Alabaster, Alabama is moving to use eminent domain to take land from nine families so it can be used for a commercial development for Wal-Mart and several other large businesses) (available at http://www.propertyrightsresearch.org/articles3/shelby_court_may_hear_land_case.htm); Marks, *Eminent domain and private gain*, Christian Science Monitor, May 9, 2003 (Village of Port Chester, N.Y., used eminent domain to take four successful commercial buildings "so that another private developer could build part of a Stop & Shop and parking lot where [those buildings] sat") (available at http://www.csmonitor.com/2003/0509/p01s03-ussc.html); Vela, *Threatened homeowners ask: What is blight?*, Cincinnati Enquirer, Dec. 23, 2002 (noting that Norwood, Ohio is considering designating a well-maintained middle-class neighborhood as "blighted" as a prelude for takings on behalf of a commercial development and noting similar tactics in several other Greater Cincinnati communities) (available at http://www.enquirer.com/editions/2002/12/23/loc_blight23.html).[6]

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[5] All web pages cited are as viewed on February 5, 2004. PDF versions of each of the cited web pages on the date viewed are on file with counsel and can be provided to the Court upon request.

[6] *See also Eminent domain: the nationwide epidemic*, Issues & Views, Oct. 6, 2003 (discussing September 28, 2003, *60 Minutes* segment on abuse of eminent domain to transfer property between private parties; describing common strategy of declaring ordinary and valuable property "blighted" and an Ohio town's declaration that any home without 3 bedrooms, 2 baths and an attached 2-car garage was blighted) (available at http://www.issues-views.com/index.php/sect/25000/article/25069); Bates, *Eminent Domain Abuse in Alabama*, Bates Line, Aug. 22, 2003 (describ-

The sheer number and value of property being taken by local governments or special redevelopment agencies and given, lock, stock, and barrel, to favored private users amply demonstrates the importance of the issues raised by the petition. And the numerous cases contesting such abuses create a substantial legal burden on the courts that cries out for clear legal rules regarding what is or is not a "public use" sufficient to support the exercise of eminent domain. Because a ruling on the questions presented in the petition would affect so many current and future transactions and cases throughout the country, granting the petition would be an especially worthwhile and effective use of this Court's limited resources.

II. THE PETITION RAISES QUESTIONS REGARDING THE SCOPE OF THE "PUBLIC USE" REQUIREMENT FOR TAKINGS THAT HAVE DIVIDED THE COURTS.

Given the frequent occurrence and importance of the issues raised by the petition, it is no surprise that they arise in numerous cases and spawn conflicting results and rules among the lower courts. The petition notes the split between

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ing land transferred by eminent domain to a developer in Alabama, examples in Oklahoma, and similar abuses in ten other states, including Nevada) (available at http://www.batesline.com/archives/000175.html); Porteus, *Homeowners Battle to Keep Their Property*, Fox News Channel (online), May 2, 2003 (describing efforts by New London (CT) development Corp. "to take property for various private uses" and discussing occurrence of same practice around the country) (available at http://www.foxnews.com/story/0,2933,85753,00.html); Greenhut, *The Blight of Eminent Domain*, The Freeman: Ideas on Liberty, Sept. 2002 (describing California city's plans to take property from a church and give it to developers to build a Costco retail center) (available at http://www.fee.org/vnews.php?nid=5160); Witt, *Power to seize property a political morass*, The Mercury News, June 30, 2002 (describing San Jose (CA) efforts to transfer property to private developers through eminent domain and wildly overbroad declarations of "blight") (available at http://www.mercurynews.com/mld/mercurynews/news/editorial/3575061.htm).

the decision below and the decisions in *Southwestern Illinois Development Authority* v. *National City Environmental*, 768 N.E.2d 1 (Ill.) ("*SWIDA*"), *cert. denied*, 537 U.S. 880 (2002), *Mayor* v. *Thomas*, 645 So.2d 940 (Miss. 1994), and *City of Center Line* v. *Chmelko*, 416 N.W.2d 401 (Mich. App. 1987). *See* Pet. 17-19. But that exposition of the conflict is just the tip of the iceberg. Numerous other cases have likewise have taken positions contrary to that of the Nevada Supreme Court regarding what constitutes a "public use" where property is taken from one private owner and given to another private owner.

Initially, it is worth noting that, in looking for a "split" on the issue of public use, this Court also should take into consideration cases finding no public use under state statutes or constitutions. As a practical matter, cases on the no-public-use side of the split will only be found in state-law decisions that rarely will reach the federal question. Virtually every State has a "public use" requirement in its own statutes and constitutions, hence insofar as a state court takes a narrower view than Nevada of what constitutes a public use, it will always be able to resolve the issue on state law grounds and have no need to proceed to the federal question even where the answer would be identical. Only cases that find a permissible public use under state law will ever be forced to reach the *federal* question of public use, and those cases invariably interpret the federal constitution as broadly as their existing interpretation of "public use" under state law. A literal "split" on the federal question, as distinct from the interpretation of analogous state provisions, thus is unlikely to arise because state law would always produce the same answer first where the use is deemed to be "private."

The correct comparison of public-use rulings, therefore, must include cases finding no "public use" regardless of the nominal source of the public-use requirement. What should be important for determining whether a split exists is that this and similar cases would have a different outcome in states

with a narrower view of public use than the Nevada Supreme Court. The differential interpretation of public use under *either* state or federal law raises the precise same inconsistency of results that is of concern to this Court in the case of literal splits on a federal question and, insofar as States with overly broad views of public use are exceeding the limits on their authority imposed by the Fifth and Fourteenth Amendments, they must be reined in by this Court regardless of whether the more property-protective States check unconstitutional private-use takings by relying on identically worded state provisions rather than on the federal Constitution *per se*.

With a proper understanding of what should constitute a split for purposes of demonstrating a need for certiorari, there are numerous additional cases finding that taking property to be given to a new private owner does not constitute a "public use." For example, the Kentucky Supreme Court, in *City of Owensboro* v. *McCormick*, 581 S.W.2d 3 (Ky. 1979), invalidated the condemnation of private land where, like here, the purpose was to turn that land over to private developers for commercial use. The court noted that the Kentucky Constitution required that private property could only be taken for "public use" and that requirement "has been consistently construed to forbid the taking of private property for private uses. *Id*. at 5. In rejecting the condemnation of "productive agricultural property for the sole purpose of private or industrial commercial development," *id*. at 6, the court held that:

> Naked and unconditional governmental power to compel a citizen to surrender his productive and attractive property to another citizen who will use it predominately for his own private profit just because such alternative private use is thought to be preferable in the subjective notion of governmental authorities is repugnant to our constitutional protections * * *.

Id. at 5.

The Kentucky Supreme Court took a decidedly narrower view of public use than did the Nevada Supreme Court below, and expressly rejected the suggestion that "public use" was coextensive with any public purpose "for which public funds might be expended":

> The opportunity for tyranny, particularly by the self righteous, exists in condemnation of private property to a vastly greater degree than in the levying of taxes and the expenditure of public funds. The popular political response to abuse of the taxing and spending power is generally swifter and more effective than is true where the citizen's private property is effectively and finally taken from him. In our view, the constitutional provisions involved clearly require that finding of "public purpose" does not satisfy the requirement of a finding of "public use." We concur in the Court of Appeal's observation that "government cannot use the power of eminent domain in order to act as land broker for private interests."

Id. at 7. The court further endorsed a summary of "public use" that expressly distinguished the incidental public benefits of private development from the sort of public use necessary to support a taking of private property:

> "Generally, it may be taken as established law that the incidental benefit accruing to the public from the establishment of a large factory, mill, department store, or other industrial or commercial enterprise, is not a valid ground for ranking such an enterprise as a public use and entrusting it with the power to acquire a suitable site by eminent domain. Private enterprises that give employment to many and produce various kinds of commodities for the use of the people are not necessarily public uses. Every legitimate business, to a greater or lesser extent, indirectly benefits the public by benefiting the people who constitute the state, but that fact does not make such enterprises public businesses."

Id. (quoting 26 AM. JUR.2D EMINENT DOMAIN § 34, at 684-85 (1966)). It thus concluded that, in " the language used by the Court of Appeals, 'No "public use" is involved where the land of A is condemned merely to enable B to build a factory or C to construct a shopping center.'" *Id*. at 8.

Other courts similarly have rejected condemning property for transfer to private persons who were thought to have better uses for the property, concluding that such ensuing use and benefit was primarily private rather than public, notwithstanding some incidental economic benefit to the government. *See, e.g., Wilmington Parking Auth.* v. *Land With Improvements*, 521 A.2d 227, 231, 233 (Del. 1987) (discussing generally "whether a taking which results in a substantial benefit to private interests may nevertheless be for 'public use' as required by the State and Federal constitutions" and, in light of those constitutional principles and the subsidiary "primary purpose" rule, affirming the trial court's finding that the Parking Authority acted beyond its authority because it "was primarily motivated by the purpose of benefiting the City by retaining [a newspaper publisher] as a corporate citizen, and that the primary beneficiary of the project would be [the newspaper] rather than the public"); *Baycol, Inc.* v. *Downtown Dev. Auth.*, 315 So.2d 451, 455-58 (Fla. 1975) (noting that "eminent domain cannot be employed to take private property for a predominantly private use; it is, rather, the means provided by the constitution for an assertion of the public interest and is predicated upon the proposition that the private property sought is for a necessary public use"; holding that taking private property to be given to a private commercial development and to create parking for that private development did not constitute a public use); *City of Lansing* v. *Edward Rose Realty*, 502 N.W.2d 638, 641, 646 (Mich. 1993) (noting that both state and federal Constitutions mandate that "private property shall not be taken for public use without just compensation," and holding that a condemnation of property for use by a private cable company was beyond the City's au-

thority because "the primary beneficiary of this ordinance is [the cable company], a private user, not the public"); *Karesh* v. *City of Charleston*, 247 S.E.2d 342, 344-45 (S.C. 1978) (noting South Carolina Constitution's limitation on eminent domain to takings for "public use" and rejecting use of eminent domain in favor of developers of a hotel and convention center, refusing to "constitutionally condone the eviction of the present property owners by virtue of the power of eminent domain in favor of other private shopkeepers"); *In re Petition of Seattle*, 638 P.2d 549, 554-55 (Wash. 1981) (noting that under the Washington Constitution the "acquisition of land through eminent domain proceedings must be for a public use" and rejecting a condemnation of land for purposes of developing a private shopping center; court noted that a "beneficial use is not necessarily a public use," and concluded that "the proposed project contemplated a predominantly private, rather than public, use").

As the cases above illustrate, in numerous other jurisdictions the taking and transfer of the Pappases' property to a private consortium of casinos for their own commercial use would not have constituted a "public use" such as is necessary to support the exercise of eminent domain. For all practical purposes, therefore, the different outcome that would have resulted in other jurisdictions establishes a split on the issue of public use that warrants this Court's attention. That still *other* jurisdictions would undoubtedly have reached the same result as below only deepens the split on public use and increases the importance of taking this case to check such abuse of the power of eminent domain.

III. THIS COURT SHOULD READ NARROWLY THE SCOPE OF ANY SUPPOSED "PUBLIC USE" THAT CAN BE USED TO JUSTIFY A TRANSFER OF PROPERTY FROM ONE PRIVATE PARTY TO ANOTHER PRIVATE PARTY.

Correcting the ever-expanding abuse of the eminent domain power in the service of covetous private parties requires

a workable judicial solution that is both faithful to the language of the Constitution and capable of administration by the courts. Such a solution should have several characteristics.

First, the Court should give distinct substance and meaning to the requirement of "public use" as opposed to the baseline due process requirement that *all* government action must serve a public purpose. As this Court has had occasion to remind us, it is always important to "start with first principles." *United States* v. *Lopez*, 514 U.S. 549, 552 (1995). In this instance, the relevant first principle is that all words in the Constitution are presumed to have meaning. Conflating the "public use" requirement with any public purpose regardless of who ends up using the property would completely vitiate the meaning of the Fifth Amendment's discrete limitation on the government's power to take *property* as opposed to its power to act in general. As this Court has recognized in another context, the very act of enumeration of a particular power also constitutes a limit on such power. *Lopez*, 514 U.S. at 552 (*quoting* Federalist No. 45); *id.* at 553 ("'The enumeration presupposes something not enumerated'" (*quoting Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 194-95 (1824)).). In the case of eminent domain, government is only given the power to take property for the enumerated purpose of public use. That enumeration presupposes something not enumerated, and hence "private use" cannot be converted into a null set by the mere mantra that such use would fulfill some asserted public purpose. If it remains true that a "purely private taking could not withstand the scrutiny of the public use requirement," *Hawaii Housing Auth.* v. *Midkiff*, 467 U.S. 229, 245 (1981), then there must be a definition of public use that admits the existence and allows the identification of such private uses.

The natural import of the phrase "public use" thus should be made the anchor of any workable solution: The property taken must actually be *used* by the public, with the construction of government buildings or public parks and roads being

the most obvious examples. While some incidental transfer of property to private parties may be permissible, this Court should adopt a strong requirement that the transfer indeed be incidental to some actual use by the public, not merely the sole or even primary object and result of the taking. Thus, if after the completion of a public project on land taken by eminent domain the government is left with a slight excess of property that it then wishes to sell back to the private sector, that might well be an incidental transfer that was permissible. But if the initial take was substantially in excess of that needed for the public project itself, and a substantial purpose of the take was to transfer such property to preferred private owners, the condemnation, at least to the extent of the excess, would not be for public use.

Second, in situations such as physical blight essentially amounting to a nuisance, any power to take such property and transfer it to private parties ought, at a minimum, be closely tied to property that is actually blighted – and hence subject to potential forfeiture as a nuisance – or such narrow category of non-blighted property whose taking is necessary to the primary condemnation of the blighted property itself. *Cf. Allydon Realty* v. *Holyoke*, 23 N.E.2d 665, 668 (Mass. 1939) ("[T]he analogy between a slum and a public nuisance cannot be overlooked . . . . The abatement of a public nuisance may well be a public purpose."). What should be outside the scope of public use is the taking of non-blighted property where the actual blighted property remains uncondemned. The tactic proposed by the respondents below – taking non-blighted property and transferring it to preferred owners in the hope that they will bring benefits to the rest of the City and thereby create inducements for others to actually cure the blighted areas is far too tenuous a chain of reasoning to be shoe-horned into the concept of public use. *Cf. United States* v. *Morrison*, 529 U.S. 598, 615 (2000) (reasoning that follows a "but-for causal chain * * * to every attenuated effect" im-

plicating an enumerated power is "unworkable if we are to maintain the Constitution's enumeration of powers").

Third, even if the concept of public use were somehow to be tied to a somewhat indirect public benefit, allowing such benefit to turn on a "trickle-down" theory that private advantage begets public advantage would completely eliminate all conceivable distinctions between "public" and "private" use. As the Illinois Supreme Court correctly observed in *SWIDA*, "every lawful business" contributes to positive economic growth, and "if property ownership is to remain what our forefathers intended it to be, if it is to remain a part of the liberty we cherish, the economic by-products of a private capitalist's ability to develop land cannot justify a surrender of ownership to eminent domain." 768 N.E.2d at 9, 10 (internal quotation marks omitted).

The taking condoned by the Nevada Supreme Court below violates all of these principles. Petitioners' property was never intended to be or actually used by the public, it was not taken incidentally to the taking of some other property that would be used by the public, and the only justification given for its taking was the supposed public benefits that came from a preferred private enterprise occupying the land. What makes the taking even more problematic is that it will be paid for entirely by the private recipients of the land, and hence there is not even the political check of public spending to force government officials to carefully weigh the costs and benefits of the proposed taking. Such a disconnect between the persons wielding the power of eminent domain and those paying the costs of its exercise severely undermines any argument for deference to the governmental decisionmakers choosing to take petitioners' property.

Ultimately, the taking of private property paid for by private funds and given over to private casinos is so far from a public use that it demands attention if the Constitution's protection of property is to retain serious meaning.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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