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SUPREME COURT OF NEW JERSEY

62-64 MAIN STREET, L.L.C., Plaintiff-Appellee, v. MAYOR AND COUNCIL OF THE CITY OF HACKENSACK, Defendants-Appellants.	Docket No. 072699 On Appeal from the Superior Court of New Jersey Appellate Division Docket No. A-3257-11T4 Hon. Jane Grall Hon. Ellen Koblitz Hon. Allison E. Accurso Civil Action

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, INSTITUTE FOR JUSTICE, AND ILYA SOMIN IN SUPPORT OF PLAINTIFF-APPELLEE 62-64 MAIN STREET, L.L.C.

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INTRODUCTION

In *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, this Court held that a municipality could not designate property as in need of redevelopment under section 5(e) of the Local Redevelopment and Housing Law (Redevelopment Law) unless it supported its designation with substantial evidence showing that the statutory criteria *and* the constitutional requirement of blight are satisfied. 924 A.2d 447, 458-63 (N.J. 2007). This case gives the Court an opportunity to decide whether that holding applies to each of the subsections under section 5 of the Redevelopment Law or only to the particular subsection considered in that decision. Because *Gallenthin* was based on the New Jersey Constitution and the legislative history of the Redevelopment Law—and not some unique aspect of subsection 5(e)—there is no logical reason to distinguish this case from *Gallenthin*.

This Court should reaffirm *Gallenthin* and apply it to the entirety of section 5. Meaningful judicial review of blight designations is crucial to protecting individual property owners, especially the poor and members of minority groups—who are typically the victims of redevelopment condemnations—from a political process in which they have less influence than those who seek condemnation. *Cf. Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 486 (1982) (recognizing "judiciary's special role in safeguarding the interests of those groups that are 'relegated to such a position of political powerlessness as to command

extraordinary protection from the majoritarian political process.'" (quoting *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973))).

For more than half a century, legislatures have expansively interpreted "blight" to benefit the politically well-connected at the expense of those property owners who lack the means or political power to defend themselves. *See Kelo v. City of New London*, 545 U.S. 469, 522 (2005) (Thomas, J., dissenting). This Court has recognized that the political process will often fail to respect the interests of these communities in the land-use context, requiring the Judicial Branch to step in to guard against abuse. *See, e.g., S. Burlington County N.A.A.C.P. v. Mount Laurel Twp.*, 336 A.2d 713, 729-730 (N.J. 1975) (declaring the widespread practice of zoning to exclude housing for the poor as unconstitutional). Therefore, the judiciary's continued role in enforcing the Constitution's Blighted Areas Clause is essential to protecting all property owners from abuse.

BACKGROUND

The New Jersey Constitution allows the state to take private property through eminent domain; but only for "public use." N.J. Const. art. I, ¶ 20. It further provides, in the Blighted Areas Clause, that "[t]he clearance, replanning, development or redevelopment of *blighted areas* shall be a public purpose and public use." N.J. Const. art. VIII, § 3, ¶ 1 (emphasis added). This constitutional restriction on the exercise of eminent domain

prevents the condemnation of private property for redevelopment unless the condemned property is in a blighted area. Pursuant to this clause, the legislature adopted the Redevelopment Law, N.J.S.A. 40A:12A-1 to -73, to govern the designation of property as in need of redevelopment and subject to eminent domain. The Redevelopment Law authorizes the designation of seven categories of properties for redevelopment. N.J.S.A. 40A:12A-5.

In *Gallenthin*, this Court considered one of those categories, subsection 5(e), construing the Blighted Areas Clause to limit the reach of this subsection to only those areas that are actually blighted. 924 A.2d at 458-63; N.J. Const. art. VIII, § 3, ¶ 1. It also required the municipality to support its decision with substantial evidence that the statutory and constitutional elements were met, emphatically rejecting reliance on bland recitations of these criteria or unsupported assertions that they are met. 924 A.2d at 465. The Court joined the highest courts of several other states that, in the wake of *Kelo*, held that state courts must apply meaningful scrutiny to redevelopment condemnations to prevent abuses. *See, e.g., Mayor & City Council of Baltimore City v. Valsamaki*, 916 A.2d 324, 354 (Md. 2007); *City of Norwood v. Horney*, 853 N.E.2d 1115, 1136-39 (Ohio 2006); *Bd. of County Comm'rs of Muskogee County v. Lowery*, 136 P.3d 639, 651 (Okla. 2006); *In re Opening Private Rd. for Benefit of O'Reilly*, 5 A.3d 246, 258 (Pa. 2010).

Here, the Superior Court interpreted *Gallenthin* to only apply to subsection 5(e). *62-64 Main St., L.L.C. v. Hackensack*, No. A-3257-11T4, 2013 WL 1845452, at **2-3 (N.J. Super. Ct. App. Div. May 3, 2013). Therefore, it sustained the designation of this property as in need of redevelopment even though the government *never* considered whether the conditions rose to the level of blight and the resolution designating the properties contained only a bare recitation of the statutory criteria and declaration that they were met. *Id.* at **2-3. The appellate division reversed, finding no reason to limit *Gallenthin* to subsection 5(e). *Id.* at **1-2. Having concluded that *Gallenthin* applies, it reversed the trial court's decision.

I

THE LIMITS IMPOSED BY THE BLIGHTED AREAS CLAUSE APPLY WITH EQUAL FORCE TO ALL BLIGHT DESIGNATIONS

Although *Gallenthin* was resolved by construing only subsection 5(e) of the Redevelopment Law in light of the Blighted Areas Clause, its reasoning dictates a similar reading of each of the subsections. *See* 924 A.2d at 458-65. In that case, the Borough of Paulsboro, acting on the suggestion of British Petroleum and Dow Chemical—owners of neighboring parcels—designated a privately owned parcel as in need of redevelopment and subject to the exercise of eminent domain. *Id.* at 451-54. It did so solely on the finding that the parcel, as unimproved land, was "not fully productive" and might be more intensely developed if given to the owners of the

neighboring parcels. *Id.* at 449-50, 452-53. The borough argued that subsection 5(e) authorizes designation of property as in need of development "if not fully productive." *Id.* at 463-64.

This Court invalidated the designation, requiring a showing of constitutional blight before an area could be designated under subsection 5(e). It noted that the legislature's authority to adopt the LHRL stemmed from the Blighted Areas Clause. The purpose of that clause is to permit the clearing of slums and prevent those areas from causing neighboring areas to degrade. Constance N. DeSena, *What the Legislature Giveth the Judiciary Taketh Away: The Power to Take Private Property for Redevelopment in New Jersey and* Gallenthin Realty Development, Inc. v. Borough of Paulsboro, 33 Seton Hall Legis. J. 289, 298 (2008). The clause strikes a "'balance between municipal redevelopment and property owners' rights'" by allowing economic redevelopment takings, but only in blighted areas. *See* Paul Franzese, *Reclaiming the Promise of the Judicial Branch: Toward A More Meaningful Standard of Judicial Review As Applied to New York Eminent Domain Law*, 38 Fordham Urb. L.J. 1091, 1111 (2011) (quoting *Gallenthin*, 924 A.2d at 465).

The Blighted Areas Clause only applies where "deterioration or stagnation . . . negatively affects surrounding properties." *Gallenthin*, 924 A.2d at 458-59. Therefore, *Gallenthin* construed subsection 5(e) narrowly, to keep its operation within the bounds of the Constitution. *Id.* at 463. This meant that the subsection must be limited to those properties which, due to defects of title

and the like, were so stagnant and unproductive that they negatively affect surrounding areas—i.e., are genuinely blighted. *Id.* at 462-63.

Having identified the required showing, this Court proceeded to decide on whom the burden of proof falls and the appropriate standard of review. It held that the municipality bears the burden of establishing a record containing substantial evidence that the property is blighted and satisfies the statutory criteria. *Id.* at 464-65. But once this burden is satisfied, the government's designation is entitled to deference. *Id.* At a minimum, a municipality must "establish a record that contains more than a bland recitation of applicable statutory criteria and a declaration that those criteria are met." *Id.* at 465.

Since *Gallenthin*, lower courts have invalidated blight designations founded on a "bland recitation of applicable statutory criteria and a declaration that those criteria are met." *Id.* at 465. A court declared Newark's blight designation based only on the city's assertion that the property could be put to a more productive and beneficial use as contrary to the Blighted Areas Clause. DeSena, *supra*, at 315-16. Similarly, the Borough of Belmar designated a bakery as in need of redevelopment because it had a faulty layout and excessive coverage for its present use. *Id.* at 316. The appellate division, acknowledging that the bakery's design was not optimal, nevertheless voided the designation on the grounds that the Blighted Areas Clause does not

permit the taking of private property simply because the government asserts that someone else can make it more productive than its current owners. *HJB Assocs. v. Council of Belmar*, No. A-6510-05T5, 2007 WL 2005173 (N.J. Super. Ct. App. Div. July 11, 2007). In *Evans v. Township of Maplewood*, No. ESX-L-6910-06, 2007 WL 2227123, at *2 (N.J. Super. Ct. Law. Div. July 27, 2007), the township included property as part of a broad redevelopment area though it admitted that particular property was not blighted. DeSena, *supra*, at 318. The court nullified the designation because the township failed to provide substantial evidence that the redevelopment of this nonblighted property was necessary to the remediation of the area. *Id.*

These cases correctly held that the logic of *Gallenthin* cannot be limited to subsection 5(e) because a broad reading of these other subsections would permit the condemnation of private property in excess of the Blighted Areas Clause. *Id.* at 320-21. For example, subsection 5(d) contains the vague phrase "or any combination of these or other factors." N.J.S.A. 40A:12A-5(d). Unless the interpretation is constrained by the Blighted Areas Clause, these "other factors" might allow officials to use eminent domain to condemn property that is not blighted. DeSena, *supra*, at 320-21. Likewise, Subsection (f)'s reference to "other casualties" causing the aggregate value of an area to be "materially depreciated" is vague and susceptible to unconstitutional interpretation. N.J.S.A. 40A:12A-5(f). Each of the subsections

identify conditions which *may*, in a particular case, indicate that an area is blighted but will not always satisfy the Blighted Areas Clause's requirements. *See* N.J.S.A. 40A:12A-5. Requiring a meaningful showing of actual blight under *all* of the statutory sections is thus essential to ensuring that government does not condemn property that the Blighted Areas Clause does not allow. Therefore, the logic of *Gallenthin* applies to the entirety of LHRL section 5. *See State v. Mohammad*, 678 A.2d 164, 173 (N.J. 1996) (broad statutory language should be construed narrowly where necessary to avoid casting the constitutionality of the statute into doubt).

II

COURTS MUST REQUIRE SUBSTANTIAL EVIDENCE OF ACTUAL BLIGHT TO PROTECT PROPERTY OWNERS FROM ABUSE

Condemnation has tremendous effects on owners and occupants. They often cannot be fully compensated for the subjective value they attach to their property nor for the indignity inflicted when they are uprooted from their homes or when their small businesses are destroyed. *See Kelo*, 545 U.S. at 521 (Thomas, J., dissenting). Small businesses, for example, usually lack the political clout of large enterprises, and are often undercompensated for their losses. *See, e.g.*, Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 Mich. L. Rev. 101, 106 (2006) (noting that uncompensated losses "work to the particular detriment of small business owners [because] some find that they are unable to reopen

after they are displaced by eminent domain, while others relocate but subsequently fail"). Unless eminent domain is subject to meaningful judicial constraints, "[t]he specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory." *Kelo*, 545 U.S. at 503 (O'Connor, J., dissenting).

A. Local Governments Have Repeatedly Abused the Power to Condemn Blighted Properties

Redevelopment of "blighted" areas was originally conceived as a method to clear and prevent slums. Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 Yale L. & Pol'y Rev. 1, 16-17 (2003). It was the result of a political alliance between progressive housing reformers concerned about slums; politicians hoping to increase tax revenues, jobs, and opportunities for graft; and real estate developers hoping to profit from redevelopment projects. *Id.* at 14.

Though vague, the word "blight" originally referred to areas that were in such a poor state that they were pushing entire neighborhoods into slums. *See* Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 Fordham Urb. L.J. 305, 315 (2004) ("Through the first half of the twentieth century, [redeveloping blighted areas] meant providing decent homes for urban working families."); Steven J. Eagle, *Urban Revitalization and Eminent Domain: Misinterpreting*

Jane Jacobs, 4 Alb. Gov't L. Rev. 106, 146-47 (2011) (Blight refers to "cases in which the use of the land by its original owner creates a danger to public health and safety."). Consequently, the power to take blighted properties for redevelopment was closely tied to the government's traditional power to demolish dangerously dilapidated houses and serious nuisances. *Id.* at 137-38. Redevelopment was thought to be a way to save a community on its "way to becoming a slum." Pritchett, *supra*, at 18 (quoting Mabel Walker, *Urban Blight and Slums* 4 (1936)).

But from the beginning, political actors' understanding of "blight" has been expansive, if not incoherent. One California legislator has lamented that "'[s]omewhere along the way . . . defining blight became an art form.'" Gordon, *supra*, at 306 (quoting California State Assemblyman Phillip Isenberg). A Philadelphia planner proposed "a district which is not what it should be" as the proper definition of blight. *Id.* (quoting Robert Fogelson, *Downtown: Its Rise and Fall, 1880-1950* at 348 (2001)). In Ohio, blight came to be a malleable term of art meaning "whatever the local government or redevelopment agency wants it to be." Christopher S. Brown, *Blinded by the Blight: A Search for a Workable Definition of "Blight" in Ohio*, 73 U. Cin. L. Rev. 207, 208 (2004).

Because it was poorly defined, "blight" became a useful rhetorical device for real estate interests and political elites to justify taking property from its current owners in order to give it

to more politically influential developers who, it was assumed, could make more intensive and productive use of the property. Pritchett, *supra*, at 18. Though one would have expected properties taken as blighted to be those in the worst condition—causing the greatest risk of slum creation—in practice, developers selected properties based on how profitable they were. *Id.* at 32. "[J]ust as beauty is in the eye of the beholder, 'blight . . . is evidently in the eye of the consultant.'" Kaitlyn L. Piper, *New York's Fight over Blight: The Role of Economic Underutilization in* Kaur, 37 Fordham Urb. L.J. 1149, 1174-75 (2010) (quoting Harold L. Lowenstein, *Redevelopment Condemnations: A Blight or a Blessing upon the Land?*, 74 Mo. L. Rev. 301, 310 (2009)).

Unless these designations are subject to judicial scrutiny, the political branches will be free to construe blight so expansively as to encompass merely unattractive property or land that falls below political leaders' desired level of productivity. *See* Timothy Sandefur, *The "Backlash" So Far: Will Americans Get Meaningful Eminent Domain Reform?*, 2006 Mich. St. L. Rev. 709, 722-23 (2006). So construed, blight requirements cease to function as a check on the government's eminent domain authority because any property could potentially be made more aesthetically pleasing or productive. *See Kelo*, 545 U.S. at 503 (O'Connor, J. dissenting). Examples of abuse of the "blight" standard in the political process abound. *See* Ilya Somin, *Is Post-*Kelo *Eminent Domain Reform Bad for the Poor?*, 101 Nw. U. L. Rev. 1931, 1934-35 (2007). In Coronado,

California—an affluent community near San Diego—local officials declared the entire town blighted in 1985 to manipulate its tax receipts. Gordon, *supra*, at 306. Local officials in a suburb of St. Louis declared a profitable shopping mall "blighted" in 1997 because "it was too small and had too few anchor stores," and did not have a Nordstrom. *See* Josh Reinert, *Tax Increment Financing in Missouri: Is It Time for Blight and But-For to Go?*, 45 St. Louis U. L.J. 1019, 1019-21 (2001). In New York, Times Square was declared blighted so that land could be acquired for a new headquarters for the New York Times. *See In re W. 41st St. Realty v. N.Y. State Urban Dev. Corp.*, 744 N.Y.S.2d 121 (N.Y. App. Div. 2002). And downtown Las Vegas was declared blighted so that properties could be handed over to a consortium of local casinos to construct parking lots. *See City of Las Vegas Downtown Redev. Agency v. Pappas*, 76 P.3d 1, 12-15 (Nev. 2003).

Prior to *Gallenthin*, New Jersey municipalities routinely declared areas to be blighted based upon mere assertions that the statutory criteria were met without any serious analysis of the properties designated or any effort to connect the conditions of the area to blight. DeSena, *supra*, at 307. Courts often found targeted properties to be "'detriment[s] to the safety, health, morals, or welfare of the community'" so long as there was any negative condition in the area—a hurdle so low that every community could meet it. *See* Brian N. Biglin, *Mandate or Myth: Is There a "Heightened Standard" for Redevelopment Area Designations, and If*

So, from Where Does It Come?, 39 Rutgers L. Rec. 116, 120-21 (2012) (quoting N.J.S.A. § 40A:12A-5(d)).

For example, Lodi designated a trailer home community as "in need of redevelopment" based entirely on "tax records, public information, aerial topography, and exterior inspections." DeSena, *supra*, at 307. When this designation was challenged, Lodi could not point to a single safety or health hazard, nor any factual support for its blight designation. *See id.* Similarly, in *ERETC, LLC v. City of Perth Amboy*, a city designated a manufacturing facility for redevelopment despite an absence of code violations, even though the building was occupied by several commercial tenants employing more than 300 people and the owner had invested over $300,000 worth of improvements in the five years preceding the designation. 885 A.2d 512, 516 (N.J. Super. Ct. App. Div. 2005). The city never inspected the building and the city's expert's testimony offered no specific facts to support her conclusions of blight. *Id.* at 520.

B. Meaningful Judicial Scrutiny of Blight Designations Is Necessary to Check This Abuse

Government engages in widespread abuse of blight takings despite widespread popular opposition to such practices. A 2006 poll of New Jersey residents found that 86% disapproved of "'[t]ak[ing] low value homes from people in order to build higher value homes'" compared to only 7% who approved of this practice. Somin, *supra*, at 1941 (quoting Janice Nadler, et al., *Government Takings of Private Property:* Kelo *and the Perfect Storm, in Public*

Opinion and Constitutional Controversy 23 tbl. 4 (Nathan Persily, et al., eds. 2007)).[1] The disconnect can be explained by a failure of the political process and public ignorance of how frequently the government engages in this abuse. Somin, *supra*, at 1941. Given this failure of the political process, it is all the more important that courts carefully scrutinize blight designations and condemnations.

Tragically, courts across the country have long neglected their role in scrutinizing blight designations. Perhaps the worst violators are New York courts, which have deferred to such an extent that blight has ceased to be an effective limit on the eminent domain power. Trent L. Pepper, *Blight Elimination Takings As Eminent Domain Abuse: The Great Lakes States in* Kelo*'s Public Use Paradigms*, 5 Ave Maria L. Rev. 299, 321-22 (2007). In *Kaur v. New York State Urban Development Corp.*, for instance, the Court of Appeals of New York approved the designation and condemnation of seventeen acres in West Harlem to be given to Columbia University for a new campus. 15 N.Y.3d 235, 254-55 (2010); *see also* Eagle, *Urban Revitalization*, *supra*, at 147-48. However, the trial and intermediate courts—which actually scrutinized the evidence that the city relied upon—noted that the state's blight study found it was not a depressed area and that it was being redeveloped not "to remediate an area that was 'blighted' . . . but rather solely for the expansion of Columbia itself." *See Kaur v. New York State*

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[1] *Available at* http://ssrn.com/abstract=962170.

Urban Development Corp., 72 A.D.3d 1, 14 (Sup. Ct. App. Div. 2009). In fact, the 2002 Master Plan for the area found no blight or blighted conditions. Justin B. Kamen, *A Standardless Standard: How a Misapplication of* Kelo *Enabled Columbia University to Benefit from Eminent Domain Abuse*, 77 Brook L. Rev. 1217, 1238 (2012). Evidence of blight only began to appear as Columbia University increased its holdings in the area and allowed its properties to fall into disrepair and forced tenants to vacate. *Id.* Nevertheless, the New York Court of Appeals upheld the designation, affording strong deference to the condemning authority. *See Kaur*, 15 N.Y.3d at 254-55. Its decision has been derided as an example of judicial abdication. *See* Franzese, *supra*, at 1104; Kamen, *supra*, at 1236-45; Martin E. Gold & Lynne B. Sagalyn, *The Use and Abuse of Blight in Eminent Domain*, 38 Fordham Urb. L.J. 1119, 1169 (2011).

Recognizing this serious problem, some states have subjected blight designations to higher levels of scrutiny. Although no panacea, judicial review has prevented some of the most egregious abuses. For instance, in *County of Riverside v. City of Murrieta*, a California court of appeal invalidated a designation of 3,588 acres as blighted based on conclusory findings and assertions that tax receipts would be higher after redevelopment. 76 Cal. Rptr. 2d 606, 607-12 (Ct. App. 1998).

In the wake of the U.S. Supreme Court's much derided *Kelo* decision, the Ohio Supreme Court reinvigorated restrictions on the

eminent domain power, limiting its use to cases of actual blight. *Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006). The City of Norwood sought to condemn property to transfer it to a developer to construct apartments, condominiums, and commercial spaces on the grounds that after redevelopment the area would contribute more to the local economy and tax base. Pepper, *supra*, at 333-34. However, the court held that pure economic development takings violate the Ohio Constitution, which only permits such takings to eliminate blight. *See Horney*, 853 N.E.2d at 1141-42. The court went on to explain that judges owe no deference to legislative assertions that a redevelopment project will provide financial benefits to a community. *See id.*

Like California and Ohio, New Jersey law limits the exercise of eminent domain for economic redevelopment to areas that are blighted. N.J. Const. art. VIII, § 3, ¶ 1. The judiciary must enforce this restriction; the political branches have repeatedly demonstrated that they are not up to the task. As this Court counseled in *Gallenthin*, reliance on the political branches to police themselves in this area is "too slender a reed" on which to place the constitutional rights of New Jersey property owners. 924 A.2d at 465. At a minimum, the courts must ensure that there is substantial evidence supporting the governments assertion that it is exercising this despotic power within constitutional bounds. *Id.*

Affirming the court of appeals' decision imposes no obstacle to legitimate redevelopment projects aimed at curing blight. *See* James R. Zazzali & Jonathan L. Marshfield, *Providing Meaningful Judicial Review of Municipal Redevelopment Designations: Redevelopment in New Jersey Before and After* Gallenthin Realty Development, Inc. v. Borough of Paulsboro, 40 Rutgers L.J. 451, 492-94 (2009). Although *Gallenthin* added rigor to the substantial evidence standard in two respects–it limited the application of deference to a municipality's findings of fact and imposed a burden on municipalities to obtain meaningful and quantitative evidence showing that the statutory criteria and the constitutional requirement of blight are satisfied–local governments can meet this burden in cases of actual blight. *See id.* at 495-96. Thus the standard balances the needs of redevelopment with the need to protect the constitutional rights of property owners.

III

THE BURDENS OF BLIGHT ABUSE WILL FALL MOST HEAVILY ON THE POOR, RACIAL MINORITIES, AND THE POLITICALLY POWERLESS

If the judiciary fails to enforce the Blighted Areas Clause's limits, it "guarantees that these losses will fall disproportionately on poor communities." *See Kelo*, 545 U.S. at 521 (Thomas, J., dissenting); *see* Kamen, *supra*, at 1221-22 (residents displaced by redevelopment projects are disproportionately poorer and likely to be racial minorities who will face greater difficulties finding adequate replacement housing); Piper, *supra*,

at 1176-77 (economic underutilization takings perpetuates the problem of the burdens of eminent domain abuse falling disproportionately on racial minorities). These communities are not only more likely to make their homes in older and less expensive areas of a city, but they are also the least politically powerful. *Kelo*, 545 U.S. at 521 (Thomas, J., dissenting). Courts have a responsibility to protect these communities from the political process by enforcing the boundaries—like the Blighted Areas Clause—that the Constitution imposes on the political branches. *See id.; see also United States v. Carolene Products*, 304 U.S. 144, 152-53 n.4 (1938) (holding that more searching review is necessary to protect "discrete and insular minorities" from abuse in the political process). Deference "encourages 'those citizens with disproportionate influence and power in the political process, including large corporations and development firms' to victimize the weak." *Kelo*, 545 U.S. at 521-22 (Thomas, J., dissenting) (citation omitted); *cf. Hettinga v. United States*, 677 F.3d 471, 482-83 (D.C. Cir. 2012) (Brown, J., concurring) ("The practical effect of rational basis review of economic regulation is the absence of any check on the group interests that all too often control the democratic process. It allows the legislature free rein to subjugate the common good and individual liberty to the electoral calculus of politicians, the whim of majorities, or the self-interest of factions.").

Historically, blight designations have been tied to the growth of a community's immigrant or racial minority population, particularly black residents emigrating from the Jim Crow south. Pritchett, *supra*, at 17 ("'[T]he great influx of southern Negroes' into [Chicago] . . . caused a 'speeding up of the junking process in the area of deterioration.'" (quoting Ernest Burgess, *The Growth of the City: An Introduction to a Research Project*, in *The City* 54 (Robert E. Park, et al., eds. 1925)). As Justice Clarence Thomas noted in his dissent in *Kelo*, "[u]rban renewal projects have long been associated with the displacement of blacks; '[i]n cities across the country, urban renewal came to be known as "Negro removal."'" 545 U.S. at 522 (quoting Pritchett, *supra*, at 47); *see also* Eagle, *Urban Revitalization*, *supra*, at 138-39 (explaining that politicians often used the term "blight" euphemistically to refer to expanding racial minority communities). Although the limited housing within reach of these communities was often older and less expensive, that did not mean that there was no community, the housing was indecent, or the streets unsafe. *See* Jane Jacobs, *The Death and Life of Great American Cities* 8-13 (Modern Library, 50th Anniv. Ed. 2011) (describing the vibrant poor and immigrant West End community of Boston which was cleared for redevelopment by the city).

During the mid-twentieth century, communities that housed black and Latino residents were the main target of redevelopment. Pritchett, *supra*, at 33; Janet Thompson Jackson, *What is Property?*

Property is Theft: The Lack of Social Justice in U.S. Eminent Domain Law, 84 St. John's L. Rev. 63, 100-01 (2010) (explaining that mid-century redevelopment advocates had two goals: identifying properties with untapped profit potential, regardless of whether they were dilapidated; and relocating people of color). From 1949 to 1963, 63% of families displaced by redevelopment were minority, and of those 56% had incomes low enough to qualify for public housing—which was seldom available in sufficient quantities to compensate for the affordable housing destroyed through redevelopment. *Kelo*, 545 U.S. at 522 (Thomas, J., dissenting) (quoting Bernard J. Frieden & Lynne B. Sagalyn, *Downtown, Inc.: How America Rebuilds Cities* 28 (1989)). For instance, Los Angeles designated eleven areas as blighted in 1950; all but one of them had a population that was predominately Mexican-American and African-American. Pritchett, *supra*, at 33-34.

Chicago designated more than twenty-square miles of the city as blighted, including almost all of the African-American communities in the Southside and many areas on the Westside where African-Americans and other racial minorities were making inroads. Pritchett, *supra*, at 34. As the president of the Illinois Institute of Technology explained when black Chicagoans began residing near campus: "We have two choices, either to run away from the blight or to stand and fight." *Id.* at 34. In 1947, Chicago razed what redevelopment advocates conceded was "a well-kept Negro area where the bulk of property is resident owned, its

taxes paid, and its maintenance above par" in order to make way for New York Life Insurance Company's "Lake Meadows" development. *Id.* (quoting Arnold R. Hirsch, *Making the Second Ghetto: Race and Housing in Chicago, 1940-1960* at 125 (1983)). Because of the properties chosen, residents and activists characterized this as "'Negro clearance' rather than slum clearance." *Id.* (quoting *Housing Project Hangs Fire: Charges 'Clearance' of Negroes Is Aim*, Chi. Defender, at 4 (May 7, 1949)).

In 1952, the District of Columbia began to clear the southwest quadrant of the city. *Id.* at 41. This project dislocated over 20,000 impoverished black residents in order to replace their community with office buildings, stores, and middle-income housing which was out of reach of the former residents. *See id.* at 46-47 (explaining that only 310 of the 5,900 units of housing created by the project could be afforded by the former residents). Over 97% of the individuals dislocated were black. *Berman v. Parker*, 348 U.S. 26, 30 (1954). By the 1960s, this formerly black neighborhood had been destroyed and replaced by a majority white one. Pritchett, *supra*, at 47.

That the burdens of blight designations fall disproportionately on minorities and the poor is no relic of history. Today, these communities continue to bear the brunt of redevelopment projects. For example, the victims of the redevelopment of West Harlem for the Columbia University expansion were disproportionately minority residents. The displaced

residents were 29.4% African-American and 52.3% Latino. Kamen, *supra*, at 1222. In 2000, the Township of Mount Holly designated a community known as the Gardens as in need of redevelopment and began the process of acquiring and condemning properties for redevelopment. *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mt. Holly*, 658 F.3d 375, 379 (3d Cir. 2011). This community was the only neighborhood in the entire township that predominately consisted of racial minorities, and almost all of its residents were poor. *Id.* at 377-78. Throughout the process of designating and demolishing this neighborhood, the residents objected to the destruction of their community and expressed fear that they would be displaced with nowhere else to go in the township. *Id.* at 379.

In *Southern Burlington County N.A.A.C.P. v. Mount Laurel Township*, this Court recognized that, perhaps due to prejudice, local governments may not adequately provide housing opportunities for the poor and disfavored racial minorities. 336 A.2d at 731-32; *id.* at 736-37 (Pashman, J., concurring) (explaining that exclusionary zoning practices are often motivated by fear and prejudice against social, economic, and racial groups). Although exclusionary zoning is one means by which a municipality can exclude the poor and disfavored minorities, it is not the only way. These groups can also be excluded by the destruction of non-blighted neighborhoods which are within financial reach. This has all too often been the result of blight abuse which counsels heavily in favor of judicial vigilance in redevelopment cases.

CONCLUSION

The long, sordid history of abuse of blight designations across the country demonstrates that the political process provides insufficient protection to the poor and politically vulnerable minorities. *Cf. Carolene Products*, 304 U.S. at 152-53 n.4; *Mt. Laurel*, 336 A.2d at 729-31. Judicial scrutiny of whether there is substantial evidence to support a blight designation is compelled by this Court's reasoning in *Gallenthin* and the Blighted Areas Clause. Because the court below faithfully applied this precedent, its decision should be affirmed.

DATED: December 16, 2013.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that on this date, an original and nine (9) copies of the BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, INSTITUTE FOR JUSTICE, AND ILYA SOMIN IN SUPPORT OF PLAINTIFF-APPELLEE 62-64 MAIN STREET, L.L.C., were sent via Federal Express to be filed with the following:

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Hughes Justice Complex
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I further certify that on this date, two (2) copies of the BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESSES, INSTITUTE FOR JUSTICE, AND ILYA SOMIN IN SUPPORT OF PLAINTIFF-APPELLEE 62-64 MAIN STREET, L.L.C., were sent via first-class mail via the United States Postal Service to each of the following:

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