SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

CASINO REINVESTMENT DEVELOPMENT AUTHORITY, Plaintiff/Appellant/Cross-Respondent, v. CHARLES BIRNBAUM and LUCINDA BIRNBAUM, Defendants/Respondents/Cross-Appellants,	Docket No. A-000019-16 On Appeal from Order of the Superior Court of New Jersey, Atlantic County Law Division Docket No. ATL-L-589-14 Civil Action

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF DEFENDANTS/RESPONDENTS/CROSS-APPELLANTS, CHARLES BIRNBAUM AND LUCINDA BIRNBAUM

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INTRODUCTION AND SUMMARY OF ARGUMENT

Since before this nation's founding, Anglo-American law has considered property rights near sacrosanct. *See, e.g.*, William Blackstone, *Commentaries on the Laws of England* 2 (1765) ("There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."). A century before the Founding Fathers ratified the U.S. Constitution, John Locke explained "[w]henever the legislators endeavor to take away, and destroy the Property of the People . . . they put themselves into a state of War with the People, who are thereupon absolved from any further obedience." John Locke, *Second Treatise of Civil Government* § 222 (1690).

And so today in Atlantic City we find the great State of New Jersey, under the auspices of the Plaintiff/Appellant/Cross-Appellee Casino Reinvestment Development Authority (CRDA), at war with Charles and Lucinda Birnbaum. New Jersey seeks to take the property of the Birnbaums *via eminent domain* for vague reasons and with no immediate need to use the property.

Eminent domain is the sovereign power to take private property without the owner's consent in certain limited circumstances. *Vanhorne's Lessee v. Dorrance*, 2 U.S. 304, 311 (1795) (noting eminent domain's origin in the "absolute despotic power" of the monarch). Because this awesome power operates in derogation of property rights, the nation's founders placed two key restrictions on its exercise: that government shall not take property unless it is for a valid public use and just compensation is paid. U.S. Const. amend. V. For the reasons set forth in the trial court's two orders denying the taking, as well as the Birnbaums' briefs, the CRDA's purported public use for the Birnbaums' property—a generalized assertion of future economic development—does not legally meet the Fifth Amendment demand that a government have a valid public use for property before

taking it. And for the policy reasons argued herein, economic development reasons alone *should never* allow the government to take private property from Peter to give it to Paul.

A rule allowing the government to expropriate private property for economic development undermines the purpose of the Public Use Clause by endorsing what are effectively prohibited private takings. This point is best exemplified by the United States Supreme Court's decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), which was met with outrage from a vast majority of Americans, spanning the geographic, political, and social spectrum. Ilya Somin, *The Grasping Hand: Kelo v. City of New London & the Limits of Eminent Domain* 135 (The University of Chicago Press, 2015). In that case, the U.S. Supreme Court held that the City of New London could lawfully condemn 115 privately-owned properties and homes in the hopes that private interests would redevelop the neighborhood into an office park with hotels and restaurants, resulting in more property taxes and jobs for the community. In response to that shocking decision, forty-five states —including New Jersey—enacted laws or amended their state constitutions to strengthen protections against that particular type of eminent domain abuse. Dana Berliner, *Looking Back Ten Years After* Kelo, 125 Yale L.J. Forum 82, 84 (2015); *see also* N.J. Rev. Stat. § 40A:12A-5 through -16 (2013). And seven state high courts rejected *Kelo*'s reasoning in interpreting that their state constitutions do not permit the use of eminent domain powers for private development. Berliner, *Looking Back*, 125 Yale L.J. Forum at 88.

In the context of this heightened awareness of eminent domain abuse after *Kelo*, the trial court's decision to reject the proposed taking here because of the CRDA's failure to justify the taking with any actual plan for the property beyond generalized economic development makes sense. As demonstrated by *Kelo* and other similar cases, the government frequently invokes the economic development rationale to circumvent the constitutional prohibition against private takings. This

Court should affirm the lower court's decision to ensure that the Public Use Clause does not allow takings solely for vague economic development purposes. By construing the Public Use Clause narrowly, this Court minimizes the potential for eminent domain abuse.

ARGUMENT

I

THE LOWER COURT'S DECISION CORRECTLY RECOGNIZES THE LIMITATIONS THE PUBLIC USE CLAUSE PLACES ON GOVERNMENT EMINENT DOMAIN POWERS

The Fifth Amendment to the United States Constitution says: "No person . . . shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." U.S. Const. amend. V. In theory, confining the use of eminent domain to those projects that serve a public use, combined with the payment of just compensation, should limit the ability of government actors to abuse the power of eminent domain. James Burling, *Private Property for the Politically Powerful*, presented at the ALI-CLE conference on Eminent Domain and Land Valuation, 1/26/17, San Diego, http://blog.pacificlegal.org/wp/wp-content/uploads/2017/02/Property-for-the-Politically-Powerful.pdf.

But in reality, governments have abused the power of eminent domain to transfer private property from one private party to another in order to promote "economic development," despite the Constitution's command to take property only for "public use." Somin, *The Grasping Hand*, at 1. Here, the State of New Jersey and its CRDA tried to operate outside the Fifth Amendment's strictures before the lower court put a stop to it. In making that effort, New Jersey followed in the footsteps of any number of other governments that transferred private property from one private owner to another, usually with unintended, and disastrous, consequences.

Governments have used eminent domain to make way for everything from automobile factories for General Motors, *see Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981),[1] to undefined support for a pharmaceutical company (Pfizer) plan for others' private property that amounted to nothing but vacant lots a decade later. *See* Somin, *The Grasping Hand, at* 235*; Kelo*, 545 U.S. 469. Both of those examples buttress why the trial court correctly put the constitutional brakes on the State's "plan" for the Birnbaums' property.

A. Government Takings Based on Vague Claims of Economic Improvement Do Not Amount to a Valid Fifth Amendment Public Use, as *Poletown* Illustrates

The argument that economic development is a valid public use rests on the belief that property, once transferred to a new owner, might lead to some economic benefit, like increased employment or tax revenue. Ilya Somin, *The Case Against Economic Development Takings*, 1 N.Y.U. J. L. & Liberty 949, 950 (2005). Without some additional, legitimate public use rationale, nearly any compelled transfer of property from one party to another could be justified as economic development—particularly where property is transferred from a poor owner to a wealthier person. *See* Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of "Public Use"*, 32 Sw. U. L. Rev. 569, 598-99 (2003); Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain*, 170 (Harvard University Press, 1985).

In perhaps the second most infamous example of the misuse of eminent domain for economic development purposes (the most infamous being *Kelo*), the Michigan Supreme Court gave its approval to the City of Detroit's plan to destroy 4,200 private properties (including homes, churches, schools, and businesses) to transfer the land to General Motors for a factory that would purportedly

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

employ more than 6,000 and generate massive economic benefit to the city. *Poletown*, 304 N.W.2d at 455; *see also* Ilya Somin, *Overcoming* Poletown: County of Wayne v. Hathcock, *Economic Development Takings, and the Future of Public Use*, 2004 Mich. St. L. Rev. 1005 (2004).

Did Detroit city leaders have good intentions in taking from 4,200 Peters to give to Paul because they thought it was a good "public use" of the property to transfer it among different private parties without the consent of the original owners of the property? Absolutely. But what ultimately happened to Poletown after the condemnation underscores why the trial court here correctly decided the taking in this case was unconstitutional.

In *Poletown*, the economic development promised by the City and the new owner of the property *never materialized*. "The GM plant opened two years late, and . . . seven years after the Poletown condemnations . . . it employed no more than 2,500 workers. Even in 1998, at the height of the 1990s economic boom, the plant still employed only 3,600 workers, less than 60% of the promised 6,150." Somin, *Overcoming* Poletown, 2004 Mich. St. L. Rev. at 1013. Ultimately, chastened by this concrete example of how the best of intentions can lead to unintended and disastrous consequences, the Michigan Supreme Court overruled *Poletown* in 2004. *See Hathcock*, 684 N.W.2d 765. In *Hathcock*, the Michigan Supreme Court hemmed in the abuse of the public use requirement for takings. The court explained:

> To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain. *Poletown*'s [economic development] rationale would validate practically any exercise of the power of eminent domain on behalf of a private entity. After all, if one's ownership of private property is forever subject to the government's determination that another private party would put one's land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, "megastore," or the like.

Hathcock, 684 N.W.2d at 786.

Here, the lower court implicitly recognized that its original decision to allow the taking amounted to its own *Poletown* taking and thus reversed itself in its ruling on the motion for reconsideration before the damage done in *Poletown* could be visited upon the Birnbaums. Indeed, the case before the lower court was *worse* than the case in *Poletown*, because at least in *Poletown* General Motors made promises to improve the property it wanted the government to give it, even if GM failed to live up to its commitment. In this case, on the other hand, there is *nobody* willing to invest in the Birnbaums' property once the government takes it. Indeed, even the government itself admits it does not have the funds to make use of the property after it takes it; rather, the CRDA merely has the funds to acquire and demolish the Birnbaums' property, a fact not lost on the trial court when it reconsidered the case and rejected the taking.

Professor Ilya Somin, in considering the lessons of *Poletown*, explains that in the absence of any binding obligations to deliver on the promised economic benefits, nothing prevents municipalities from using inflated estimates of economic benefit to justify condemnation and then failing to provide any such benefits once courts approve the taking and the property is transferred to its new owners. Somin, *Overcoming* Poletown, 2004 Mich. St. L. Rev. at 1016.

Somin's concern applies here, in that the CRDA cannot do anything more than offer vague promises to improve the South Inlet area—for tourism purposes—once it has the Birnbaum property in its grasping hand. The CRDA simply asks this Court, as it asked the lower court, to presume that economic benefits will flow once it takes the Birnbaum property from the Birnbaums. When the Founding Fathers limited the government's power to take private property from an individual by requiring that the government show it had a valid public use for the private property, those Founders expected more than "trust us; we have a public use in mind." Yet that is what the State is asking this Court to do. The Court should reject the offer, just as the lower court did.

B. *Kelo* Result Is a Warning the Court Should Heed

If *Poletown* is the second-most well-known case of eminent domain gone wrong, then *Kelo* stands alone at the top of this ignominious summit. Like *Poletown* and its implications, the lessons of *Kelo* apply to the instant case.

In *Kelo*, a small group of property owners in Connecticut resisted the condemnation of their homes and other properties as part of a government development plan intended to stimulate economic growth. Somin, *The Grasping Hand* at 11-34. These homeowners lived in the "Fort Trumbull" peninsula of New London, Connecticut, an area once prosperous but facing declining fortunes by the 1990s. Jeff Benedict, *Little Pink House: A True Story of Defiance and Courage* 15-16 (New York: Grand Central Publishing, 2009).

The City of New London created the New London Development Corporation, not unlike New Jersey Casino Reinvestment Development Authority at issue here, ostensibly to stimulate economic development in this depressed area. *Kelo*, 545 U.S. at 473. That agency then recruited Pfizer, a multinational pharmaceutical conglomerate, to move its headquarters to New London. As a *quid pro quo* condition of moving to New London, "Pfizer insisted that the city and state acquire ninety acres of property in Fort Trumbull . . . in order to turn them into upscale housing, office, space, a conference center, a five-star hotel, and other facilities that would be useful to the corporation and its employees who would work in the area." Somin, *The Grasping Hand*, at 16. Pfizer would not own the properties in question, but expected to benefit from this redevelopment. *Id.* These acres included the homes of the individuals who fought the government taking of their private property for the benefit of a larger, more powerful private party.

Ultimately, these homeowners, including Susette Kelo as the lead plaintiff, contested the taking of their homes all the way to the Supreme Court of the United States. In a 5-4 decision, the

Supreme Court allowed this taking, in part because the taking was purportedly based on a "comprehensive redevelopment plan" for the properties in question. *Kelo*, 545 U.S. at 488.

More than ten years later, Susette Kelo's home, and the others in question are gone; in their place sit vacant lots. Somin, *The Grasping Hand* at 235. Perhaps one day the land will be put to productive use, but it is indisputable that the *Kelo* condemnations did more harm than good. *Id.* The government's "comprehensive redevelopment plan," upon which the High Court majority relied, went for naught. *Id.* The government failed to develop the properties after razing the homes upon them, and private development never occurred. *Id.* Moreover, the justices who ruled for New London can drive through New London and see for themselves that the government of New London fooled them when it asserted it had a "comprehensive" plan for the property. Indeed, Connecticut Supreme Court Justice Richard Palmer—a member of the four judge majority that permitted the condemnation at the state court before the Supreme Court heard the case—*subsequently apologized* to Susette Kelo for voting to allow the taking. *Id.* at 234. Justice Palmer told Kelo that he "would have voted differently" had he known what would happen to her home and community. *Id.*

The Supreme Court approved the condemnation in *Kelo* based in part on the fact that the government had what the Court called a "comprehensive redevelopment plan" for the property. *Kelo*, 545 U.S. at 488. Here, the CRDA has no actual economic development plan in place for the property. The CRDA plans to demolish the Birnbaum family home. After that, the CRDA has no plan. Destroying a man's house is neither a plan for economic development nor, more importantly, a plan for public use. After destroying the house, it is anyone's guess as to what will happen to the property, now or ten years from now. As noted by the trial court, the Birnbaum property is surrounded by empty lots that have sat vacant for years. *Id.* After rejecting the taking because of the lack of a plan, the trial court even offered the CRDA six months to come up with a plan for the

property, and the CRDA failed to take advantage of that generous offer. The CRDA offered the trial court no plan at all, let alone a "comprehensive redevelopment plan" as approved by a slim 5-4 majority in *Kelo*.

The trial court below did not succumb to the empty promises made by the CRDA about its "plan" for the Birnbaum property, because it could see for itself that: 1) the best laid plans in Atlantic City have repeatedly gone for naught; and 2) the CRDA plan offered below was no plan at all other than a plan to raze the Birnbaum property. Destroying private property over the objections of the owner of the private property, without a plan for the property, does not amount to a constitutional public use for the property.

II

"ECONOMIC DEVELOPMENT" TAKINGS FREQUENTLY HARM THE PUBLIC

Beyond the obvious harms resulting from unrestricted eminent domain power, economic development takings are inherently unjust because they encourage private interests to game the government's power to their own benefit, often at the expense of poor and minority communities.

A. The "Economic Development" Rationale Encourages Rent Seeking

In jurisdictions that allow "economic development" takings, state and local governments routinely condemn private property for redistribution to private interests, particularly businesses which use the property for their own profits.[2] Economists call this practice "rent seeking": private interests try to gain control of the eminent domain power and use it for their own benefit at the expense of the public. Thomas W. Merrill, *Rent Seeking & the Compensation Principle*, 80 Nw. U.

[2] For a list of cases where private property has been taken for the benefit of industrial and corporate interests, *see* Gideon Kanner, *Do We Need to Impair or Stengthen Property Rights in Order to "Fulfill their Unique Role"?—A Response to Professor Dyal-Chand*, 31 U. Haw. L. Rev. 423, 467-69, nn.185-203 (2009).

L. Rev. 1561, 1577 (1986) ("If the prior distribution of wealth can be changed by the state, . . . then the resources of society will be consumed in a factional struggle to capture the state apparatus in order to obtain benefits for one faction at the expense of everyone else."). This practice is problematic because once interest groups gain government powers, they may use them to impose burdens on the public—including small homeowners and small businesses. *See* James M. Buchanan & Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy*, 206 (University of Michigan, 1962)[3] ("interest-group activity . . . is a direct function of the 'profits' expected from the political process by functional groups"). In the eminent domain context, interest groups will use their government connections' condemnation power to transfer other people's property to themselves. Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 Tex. Rev. L. & Pol. 49, 85 (1998).

Whenever the government is given unrestrained eminent domain power, the stage is set for rent seeking. Interest groups will often invest money in lobbying the government to condemn private property because it is cheaper to do so than negotiating with property owners for their land. *See* Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 Yale L.J. 149, 173-74 (1971). Also, "[e]minent domain almost always generates a surplus—a resource's value after condemnation is almost always higher than before. The present compensation formula allocates 100% of this surplus to the condemnor, and none to the condemnee." Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61, 85 (1986). Therefore, interest groups have an incentive to use eminent domain because they stand to profit from its use.

Unfortunately for property owners, rent seeking is difficult to stop because government bodies are willing to capitulate to interest groups in exchange for money and political support. *See*

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[3] http://files.libertyfund.org/files/1063/Buchanan_0102-03_EBk_v6.0.pdf.

Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 Colum. L. Rev. 223, 230 (1986) ("Interest groups influence the political process by such overt methods as promises of political support, campaign contributions, and outright bribes . . . ."). Moreover, a condemned landowner often lacks the individual stake to mount a counter-lobbying effort against eminent domain abuse because costs are often widely dispersed between many landowners while the benefits are concentrated to favor of the rent seeker. *See* Kochan, 3 Tex. Rev. L. & Pol. at 81.

Rent seeking is inherently unjust because it results in a citizen losing his or her property based on an interest group's success at lobbying. Professor Cass Sunstein has aptly explained that "government action [should] result [] from a legitimate effort to promote the public good rather than from a factional takeover." Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1690-91 (1984). The Constitution's framers were hostile towards naked preferences because they feared "that government power would be usurped solely to distribute wealth or opportunities to one group or person at the expense of another." *Id.*

B. "Economic Development" Takings Often Benefit the Wealthy at the Expense of Poor and Minority Communities

Economic development takings are also harmful to the public interest because they disproportionately impact poor and minority communities—the very people who are the least able to oppose a condemnation action. Writing in dissent in *Kelo*, Justice O'Connor discussed how politically connected groups, including large corporations and development firms, would use their powers to victimize the weak if eminent domain could be used for mere economic development. *Kelo*, 545 U.S. at 505 (O'Connor, J., dissenting). Justice Thomas similarly observed that the poor are the least likely to "put their lands to the highest and best social use [and] are the least politically

powerful." *Id.* at 521 (Thomas, J., dissenting). Accordingly, the poor would be susceptible to condemnation if economic development is a valid public use. Justice Thomas also added that minority communities would be disproportionately harmed by a broad definition of public use, observing that after the Court had first upheld the use of eminent domain to redevelop blighted areas in *Berman v. Parker*, 348 U.S. 26 (1954), cities rushed to draw plans for downtown development. *Id.* at 522. Of the families displaced by the urban renewal rush caused by *Berman* between 1949 and 1963, 63% were racial minorities. *Id.*; *see also* Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 Yale L. & Pol'y Rev. 1, 6 (2003) ("Blight was a facially neutral term infused with racial and ethnic prejudice.").

Considering the demonstrably unfair history of eminent domain use, Justices O'Connor and Thomas's skepticism towards promised economic development was warranted. Indeed, since *Kelo*, new empirical evidence demonstrates that Justices O'Connor and Thomas correctly assessed how eminent domain would devastate poor and minority communities. Dick M. Carpenter & John Ross, *Testing O'Connor and Thomas: Does the Use of Eminent Domain Target Poor and Minority Communities?*, 46 Urb. Studies 2447 (2009). Even if explicit discrimination no longer poses major problems, poor and minority communities still face the brunt of eminent domain use. Communities targeted by eminent domain tend to have more ethnic or racial minorities, have less education, and earn significantly less income than surrounding communities unaffected by condemnations. *Id.* at 2455. Those who are displaced by eminent domain use are also more likely to be renters and live at or below the federal poverty line. *Id.* at 2456.

It is not surprising that poor and minority communities are more vulnerable to eminent domain abuses. To begin, it is cheaper to condemn poor people's property. James Freda, *Note, Does New London Burn Again?: Eminent Domain, Liberty & Populism in the Wake of* Kelo, 15 Cornell

J.L. & Pub. Pol'y 483, 504 (2006). This creates an incentive for local governments to condemn poor and minority communities because if they "are concerned with improving their tax bases, it simply is not economical to pay attention to the needs or desires of the poor." Paul Boudreaux, *Eminent Domain, Property Rights, & the Solution of Representation Reinforcement*, 83 Denv. U. L. Rev. 1, 47 (2005). Planning boards are also typically too smart and savvy to target the middle and upper classes because they are more likely to have the resources to challenge actions to acquire their property. *See* Somin, *Grasping Hand*, at 101. Therefore, planning boards, if given the power to condemn land for economic development purposes, will continue to target poor and minority groups because, lacking resources, they are less likely to challenge eminent domain abuse. *Id.*

C. Redevelopment Plans Frequently Fail

As a practical matter, government involvement in economic development plans shifts undue risk onto the public because redevelopment plans frequently fail. Gideon Kanner, *We Don't Have to Follow Any Stinkin' Planning—Sorry About That, Justice Stevens*, 39 Urb. Law. 529, 536 (2007). Quite often, government officials sell their redevelopment visions by overestimating the benefits of such projects—sometimes, they do so because they do not understand how certain plans will affect the economy. *Cf.* Garrett Johnson, *The Economic Impact of New Stadiums and Arenas on Cities*, 2011 U. Denv. Sports & Ent. L.J. 1, 14-15 (2011) (explaining how local officials are often overly optimistic that sporting events will increase revenue for local economy because they do not consider how spending money on sporting events is usually offset by reduced spending in other areas of entertainment). Moreover, redevelopment plans do not necessarily lead to the benefits they promise because there is no legal mechanism to require condemnors to follow their redevelopment plans. Kanner, *supra*, at 539. After governments or other parties acquire condemned land, they own it in fee simple and "are free to resell it or put it to any lawful use they choose." *Id.* at 540.

Beyond the failed projects in *Poletown* and *Kelo* discussed *supra*, Steve Anthony's story also shows how eminent domain projects ultimately come down to brute government force, even without a corresponding public benefit. Steve Anthony owned a home across the street from the Hollywood Bowl in California. Wendy Horowitz, *Here Lies Liberty: Steve Anthony and his fight against eminent domain*, Central Library Blog (Apr. 2, 2014).[4] Motion picture industry heavyweights—like Gregory Peck, Mary Pickford, and Walt Disney—wanted Anthony's home for land to build a museum showcasing the history of movies, radios, and television. *Id.* Accordingly, Los Angeles County condemned Steve Anthony's home to give it to the A-list stars. *Id.* After the California Court of Appeal held that condemnation was legal and the United States Supreme Court denied certiorari, *County of Los Angeles v. Anthony*, 224 Cal. App. 2d 103 (1964), *cert. denied*, 376 U.S. 963 (1964), Los Angeles County sheriffs sought to remove Anthony from his home. Horowitz, *supra*. The sheriffs and Anthony were locked in a multiple-week standoff that attracted the surrounding community and media attention. Once the sheriffs were able to make their way into Anthony's home, they arrested him, removed him from his home, and tore down his quaint "storybook cottage"-style house. *Id.* But like so many public purpose redevelopment projects, the motion picture museum plans fell through and nothing was ever built on the property. *Id.*

Charles and Lucinda Birnbaum's property sits in a similar position as the *Poletown* properties, Susette Kelo's home, and Steve Anthony's home. There is no guarantee that the economic benefits that the CRDA cites for taking the Birnbaums' property will ever materialize.

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[4] http://www.lapl.org/collections-resources/blogs/central-library/here-lies-liberty-steven-anthonys-fight-against-eminent.

CONCLUSION

The constitutional limitations on the government's power of eminent domain, when adhered to, redound to the benefit of all classes of Americans. The lower court properly exercised the central purpose of government—to act as the protector of private rights and liberties, including and especially their rights in property. *See, e.g.*, James Madison, *The Federalist No. 10* ("The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government."). *See also* James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* (1998). From the time of our founding to today, our leaders have recognized the primary importance of property rights in our Constitution. As President Obama wrote: "Our Constitution places the ownership of private property at the very heart of our system of liberty." Barack Obama, *The Audacity of Hope: Thoughts on Reclaiming the American Dream* 149 (Crown, 2006). To be sure, the Fifth Amendment to the U.S. Constitution allows the government to take property *for public use* if the government pays just compensation. But here, the State failed to proffer a constitutionally defensible public use for the Birnbaums' property, and for that reason—and the other reasons articulated by the Birnbaums' counsel in their principal brief—the trial court correctly rejected the State's effort to take their property. This Court should affirm.

DATED: March 1, 2017.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that on this date, an original and five (5) copies of the BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF DEFENDANTS/ RESPONDENTS, were sent via Federal Express to be filed with the following:

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