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IN THE
INDIANA COURT OF APPEALS

Case No. 10A01-1712-CT-2896

CITY OF CHARLESTOWN, INDIANA, and CHARLESTOWN BOARD OF PUBLIC WORKS AND SAFETY,	)	Appeal from the Clark Superior Court No. 2
Appellants/Defendants	)	Trial Court Cause No. 10C02-1701-CT-010
v.	)	
CHARLESTOWN PLEASANT RIDGE NEIGHBORHOOD ASSOCIATION CORPORATION, JOSHUA CRAVEN, TINA BARNES, DAVID KEITH, ELLEN KEITH, and BOLDER PROPERTIES, LLC,	)	The Hon. Jason M. Mount, Special Judge
Appellees/Plaintiffs	)	

BRIEF OF AMICUS CURIAE THE GOLDWATER INSTITUTE

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TABLE OF CONTENTS

Table of Contents 2

Table of Authorities 3

Statement of Interest of Amicus Curiae 7

Summary of Argument 8

Argument 9

I. Indiana responded to *Kelo v. New London* by reforming its laws to prevent eminent-domain abuse. 9

II. What Charlestown is doing is worse than what happened in *Kelo* and would set a dangerous precedent if allowed to continue. 14

A. Charlestown's scheme would be illegal under Indiana's eminent domain laws. 15

B. Charlestown's scheme would undermine post-*Kelo* reforms and leave homeowners worse off than they would have been under traditional eminent domain. 17

C. At a bare minimum, the City should have the burden of showing that its use of code enforcement is not pretextual. 20

Conclusion 21

Certificate of Word Count 23

Certificate of Service 24

TABLE OF AUTHORITIES

Cases

Armendariz v. Penman, 75 F.3d 1311 (9th Cir. 1996)..... 17, 18

City Chapel Evangelical Free Inc. v. City of S. Bend ex rel. Dep't of Redevelopment, 744 N.E.2d 443 (Ind. 2001)..... 12

City of Toledo v. Kim's Auto & Truck Serv., Inc., 2003-Ohio-5604, 2003 WL 22390102 (Ohio App. 2003) 18

Crown Point Dev. v. City of Sun Valley, 506 F.3d 851 (9th Cir. 2007)..... 18

Daniels v. Area Plan Comm'n of Allen Cnty., 306 F.3d 445 (7th Cir. 2002) 10

Kelo v. City of New London, Conn., 545 U.S. 469 (2005)..... passim

McDonald v. Town of Jerome, No. P1300CV201500853 (Ariz. Super. Ct. for Yavapai Cnty., 2015) 7

Patel v. Penman, 103 F.3d 868 (9th Cir. 1996) 19

Price v. City of Stockton, 390 F.3d 1105 (9th Cir. 2004) 19

Redevelopment Agency of City of Chula Vista v. Rados Bros., 115 Cal. Rptr. 2d 234 (Cal. App. 2001) 16

Sedona Grand, LLC, v. City of Sedona, No. V1300CV820080129 (Ariz. Super. Ct. for Yavapai Cnty., 2015) 7

Wymberley Sanitary Works v. Batliner, 904 N.E.2d 326 (Ind. App. 2009)..... 17

Statutes

26 Pa. Cons. Stat. § 204 14

735 Ill. Comp. Stat. 30/5-5-5 13

Ala. Code § 11-47-170(b) 13

Ala. Code § 11-80-1(b) 13

Alaska Stat. § 09.55.240(d)..... 13

Ariz Rev. Stat. § 12-1132 13

Ariz. Rev. Stat. § 12-1111 13

Colo. Rev. Stat. § 38-1-101(1)(b)(I) 13

Ga. Code § 22-1-1(9) 13

Ga. Code § 22-1-2 13

I.C. § 32-24-1, *et seq.* 15

I.C. § 32-24-4.5 13

I.C. § 36-7-1-3 *et seq.* 13, 16

Idaho Code § 7-701A 13

Iowa Code §§ 6A.21, .22 13

Kan. Stat. § 26-501a 13

Ky. Rev. Stat. § 416.675 13

Me. Rev. Stat. tit. 1, § 816 13

Minn. Stat. § 117.012 14

Mo. Stat. § 523.271 14

Mont. Code § 70-30-102 14

Mont. Code § 70-30-111 14

N.D. Cent. Code § 32-15-02 14

N.H. Rev. Stat. tit. XII, 162-K:2.IX-a 14

Nev. Rev. Stat. § 37.010 14

Ohio Rev. Code tit. 1 § 163.09 14

Or. Rev. Stat. § 35.385 14

S.D. Codified Laws § 11-7-22.1 14

Tenn. Code § 29-17-102 14

Tex. Gov't Code § 2206.001 14

VA Code § 1-219.1 14

W. Va. Code § 16-18-6a 14

Wis. Stat.§ 32.03(6)(b) 14

Wyo. Stat. § 1-26-801(c) 14

Other Authorities

Ballot Measure 39 (Or. 2006) 14

Benjamin Barr and Tim Keller, *This Land is My Land: Reforming Eminent Domain after* Kelo v. City of New London, Goldwater Institute Policy Brief, January 17, 2006, No. 06-01 7

Daniel B. Kelly, *Pretextual Takings: Of Private Developers, Local Governments, and Impermissible Favoritism*, 17 SUP. CT. ECON. REV. 173 (2009) 20

H.B. 1458, 2007-2008 Leg., Reg. Sess. (Wash. 2007) 14

H.B. 1567, 2006 Leg., Reg. Sess. (Fla. 2006) 13

H.B. 1965, 2005-2006 Gen. Assemb., Reg. Sess. (N.C. 2006) 14

H.B. 365, 2007 Leg., Gen. Sess. (Utah 2007), S.B. 117, 2006 Leg., Gen. Sess. (Utah 2006) 14

H.B. 393, 2007 Leg., Reg. Sess. (N.M. 2007), S.B. 401, 2007 Leg., Reg. Sess. (N.M. 2007) 14

H.B. 5817, 5818, 5819, 5820, 5821, 93d Leg., Reg. Sess. (Mich. 2006) 14

Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100 (2009) 16

Jason Callicoat, *In General, Hummer Plant Negotiations End Well*, SOUTH BEND TRIBUNE, Aug. 6, 2000 11

Jennifer Wagner, *Man is Latest to Try to Block City Acquisition of Property*, THE INDIANAPOLIS STAR, June 20, 2002 11

Mark Flatten, *Prosecutors Push Jail for Disabled Vietnam Veteran over Zoning Violations*, Oct. 11, 2017 19

Proposition 99 (Cal. 2009) 13

S.B. 167, 2007 Gen. Assemb., Reg. Sess. (Conn. 2007); S.B. 7, 145th Gen. Assemb., Reg. Sess. (Del. 2009) 13

S.B. 246, 2005-2006 Gen. Assemb., Reg. Sess. (Vt. 2006)..... 14

S.B. 2728A, 2008 Gen. Assemb., Jan. Sess. (R.I. 2008) 14

S.B. 3, 2007 Leg., Reg. Sess. (Md. 2007)..... 13

S.B. 53, 1206, 1210, 1650, and 1809, 2005-2006 Leg., Reg. Sess. (Cal. 2006)..... 13

Sam Staley, *Eminent Domain and Property: An Appreciation for Clear Title Brought Indiana the 16th U.S. President and the Indianapolis Colts,* Indiana Policy Review, Summer 2005..... 13

Terrence Bland, *Church Site is One More Piece of the Puzzle*, SOUTH BEND TRIBUNE, Aug. 4, 2001..... 13

TIMOTHY & CHRISTINA SANDEFUR, CORNERSTONE OF LIBERTY: PROPERTY RIGHTS IN 21ST-CENTURY AMERICA 96 (2d ed. 2016)..... 7, 10

Constitutional Provisions

FLA. CONST. art. X, § 6 (2006)..... 13

GA. CONST. art. IX, § II (2006)..... 13

L.B. 924, 99th Leg., 2d Sess. (Neb. 2006)..... 14

La. Const. art. I, § 4 13

Mich. Const. art. X, § 2..... 14

Miss. Const. art. 3, § 17A (2014)..... 14

N.D. CONST. art. I, § 16 14

N.H. Const. Pt. First, art. 12-a (2006)..... 14

Nev. Const. art. 1, § 22 14

S.C. CONST. art. I, § 13 14

TEX. CONST. art. I, § 17 (2009)..... 14

VA CONST. art. I, § 11 (2013)..... 14

STATEMENT OF INTEREST OF AMICUS CURIAE

The Goldwater Institute was established 30 years ago as a nonpartisan public policy and research foundation devoted to advancing the principles of limited government, individual freedom, and constitutional protections through litigation, research, policy briefings and advocacy. Through its Scharf-Norton Center for Constitutional Litigation, the Institute litigates and files amicus briefs when its or its clients' objectives are directly implicated.

The Institute devotes substantial resources to defending the vital constitutional principle of private property rights. Specifically relevant here, GI attorneys successfully represented citizens challenging restrictions on their private-property rights in cases like *Sedona Grand, LLC, v. City of Sedona*, No. V1300CV820080129 (Ariz. Super. Ct. for Yavapai Cnty., 2015), and *McDonald v. Town of Jerome*, No. P1300CV201500853 (Ariz. Super. Ct. for Yavapai Cnty., 2015), and appeared as amicus curiae in *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005).

Goldwater Institute scholars have also published extensively on the importance of property rights in various contexts, including eminent domain abuse. *See, e.g.*, Benjamin Barr and Tim Keller, *This Land is My Land: Reforming Eminent Domain after* Kelo v. City of New London, Goldwater Institute Policy Brief, January 17, 2006, No. 06-01; TIMOTHY SANDEFUR AND CHRISTINA SANDEFUR, CORNERSTONE OF LIBERTY: PROPERTY RIGHTS IN 21ST CENTURY AMERICA (2d ed. 2016).

Amicus believes its litigation experience and policy expertise will aid this Court in consideration of this case.

SUMMARY OF ARGUMENT

The Indiana legislature sought to protect private property rights from eminent domain abuse in the wake of the U.S. Supreme Court's decision in *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005), and a pattern of eminent domain abuse in Indiana. These reforms—some of the strongest in the country—appear to have been successful. Cities can no longer take private property and give it to a private party for redevelopment using eminent domain. But now, the City of Charlestown has attempted to scheme around the restrictions that the state legislature enacted.

By issuing punishing fines—sometimes into six figures—for minor violations of the City's Property Maintenance Code, the City is forcing homeowners in the Pleasant Ridge neighborhood to sell their homes to a private developer for pennies on the dollar. (If homeowners sell, they are no longer liable for the fines.) If Charlestown is successful, the developer will acquire hundreds of homes, all of which will be razed to make way for redevelopment. But, as the record shows, these homes are not blighted or dangerous—they are simply modest. They are exactly the kinds of homes the state legislature sought to protect by reforming Indiana's eminent domain laws.

What the City is attempting to do in Pleasant Ridge is worse than what happened in *Kelo*, because property owners are not even receiving just compensation for losing their homes. Charlestown could not acquire these homes using eminent domain thanks to the 2006 reforms. If the City is allowed to circumvent those reforms through its fine-and-sell scheme, the entire legacy of Indiana's post-*Kelo* reforms will be at risk, and property owners in the state will once again have to fear that their homes could be taken—this time for almost no compensation—to make way for redevelopment.

ARGUMENT

Within months of the Supreme Court's landmark decision in *Kelo*, 545 US. 469, the Indiana legislature made it illegal for cities to use eminent domain to take homes for private redevelopment. Now, the City of Charlestown seeks to evade those reforms by forcing the sale of homes to a private developer—for pennies on the dollar—by abusing the city's code-enforcement authority. This scheme is unlawful because it results in homes being transferred from one private party to another through the exercise of government power—the exact harm the Indiana legislature sought to prevent. If it is illegal to take homes for private redevelopment *while* paying just compensation, then it is also illegal to take them *without* compensation.

I. Indiana responded to *Kelo v. New London* by reforming its laws to prevent eminent-domain abuse.

In the summer of 2005, the U.S. Supreme Court shocked the nation by allowing a city to take Susette Kelo's home and give it to a private developer. The Court held that the forced transfer of property from one private party to another could be a "public use" if the purpose of the transfer was general improvement of the local economy. Recognizing that its decision would be unpopular, the Court "emphasize[d] that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power." 545 U.S. at 489. Indiana immediately took the Court's hint by reforming its eminent domain laws to better protect property owners, as discussed below.

The situation in *Kelo* was emblematic of a growing trend around the county. The New London Development Corporation ("NLDC") was tasked by the City of New London with acquiring private homes, using eminent domain, and razing them so that Pfizer Pharmaceutical could use the land for a new $300 million mixed-use project that would include a new Pfizer headquarters. *Id*. at 473. "[L]ocal planners hoped that Pfizer would draw new business to the

area, thereby serving as a catalyst to the area's rejuvenation." *Id*. Many homes were acquired through private negotiations, but Susette Kelo and a group of neighbors refused to sell. *Id*. at 475. They did not want increased compensation. *Id*. at 495-96 (O'Connor, J., dissenting). They simply wanted to keep their homes, and asked that Pfizer build around them. But the NLDC refused. It instituted eminent domain proceedings against the homes which were ultimately acquired by the NLDC and demolished. (Despite all of this, Pfizer's headquarters was never built and the land has sat fallow for over a decade. TIMOTHY & CHRISTINA SANDEFUR, CORNERSTONE OF LIBERTY: PROPERTY RIGHTS IN 21ST-CENTURY AMERICA 96 (2d ed. 2016).)

Prior to *Kelo*, Indiana also saw numerous instances of eminent domain used to take the property of one private owner and give that property to a different private owner. The following is a non-exhaustive list of the most egregious abuses:

- *Fort Wayne* (2000): HNS Enterprises wished to convert three unoccupied homes in the Broadmore Addition subdivision in Fort Wayne into a shopping center. However, since its founding, the subdivision had a restrictive covenant limiting the subdivision to single family homes. *Daniels v. Area Plan Comm'n of Allen Cnty.*, 306 F.3d 445, 450 (7th Cir. 2002). HNS Enterprise thus petitioned the Allen County Area Planning Commission to rezone the subdivision, alleging a public benefit because of an increase in value of the lots. The Planning Commission approved the rezoning petition. William and Judy Daniels filed a federal case for a declaratory judgment as well as a permanent injunction against the removal of the restrictive covenants. The district court granted Daniels summary judgment. The Seventh Circuit further stated that a speculative public benefit is at best incidental. *Id*. at 465.

- *Mishawaka* (2000): In January 2000, AM General announced plans to build a $200 million plant expansion to produce the Hummer vehicle in Mishawaka. However, the land where AM General wished to expand was already the home to fifty-one residences. Three months later, the redevelopment commission of St. Joseph County announced that the land would be deemed blighted so as to allow for its condemnation and transfer to AM General. The residents were outraged because blighting normally occurs on rundown landscapes, not well-maintained neighborhoods. Later, AM General did end up reaching agreements with all property owners, negating the need for the County to condemn the neighborhood, but the residents were forced in the interim to negotiate under the Damoclean sword of eminent domain.[1]
- *Indianapolis* (2000): In 2000 the City of Indianapolis began acquiring and refurbishing homes in the Fall Creek Place neighborhood and selling them to private owners in an urban redevelopment project. Lucian Anderson owned an unoccupied home in the neighborhood and refused to sell his property. After he refused, the City condemned his property. Anderson claimed he never received the official letter condemning his property, or see any of the tiny eminent domain notices that ran in the *Indianapolis Star*. He later attempted to challenge this notice, but a trial judge denied this claim and forced him to accept damages based on the low $40,000 appraisal.[2]
- *Indianapolis* (2001): In the early 2000s, Indianapolis decided to convert an area of the Martindale-Brightwood neighborhood into an industrial park. However, Bob Parker, a local businessman, had already purchased land with plans to create an industrial park.

[1] Jason Callicoat, *In General, Hummer Plant Negotiations End Well*, SOUTH BEND TRIBUNE, Aug. 6, 2000.
[2] Jennifer Wagner, *Man is Latest to Try to Block City Acquisition of Property*, THE INDIANAPOLIS STAR, June 20, 2002.

Because the City's designs were grander than Parker's plans, the City condemned his and others' land, rather than incorporate the lots. The City reached agreements with many landowners, but Parker refused the City's $349,950 offer, alleging the land was worth $3.8 million. In a September 2001 decision, a judge sided with the City.[3]

- *South Bend* (2001): The City of South Bend tried to acquire three buildings to begin redevelopment. However, one of the buildings housed the City Chapel Evangelical Free Church, a religious group with around 100 members. The City condemned the building. City Chapel appealed, stating that the taking violated state and federal constitutional provisions regarding free exercise of religion and assembly. In *City Chapel Evangelical Free Inc. v. City of S. Bend ex rel. Dep't of Redevelopment,* 744 N.E.2d 443, 444 (Ind. 2001), the Indiana Supreme Court agreed and reversed the trial court's order. The case settled on the eve of trial as the City decided to negotiate with City Chapel.[4]
- *Indianapolis* (2002): In May 2002, the City of Indianapolis condemned Elizabeth Fernando's privately-owned Plaza Parking Garage after four years of failed negotiations. The City alleged that the Garage was located between two apartment buildings and was "the missing piece of a plan that will breathe life back into the neglected block." Bland, *supra* at 7. The City's plan was to sell her property to private developers.

Following this string of abuses, and spurred by the *Kelo* decision, the Indiana legislature took decisive action. House Bill 1010 passed unanimously in both houses, and became effective March 24, 2006.

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[3] Sam Staley, *Eminent Domain and Property: An Appreciation for Clear Title Brought Indiana the 16th U.S. President and the Indianapolis Colts,* Indiana Policy Review, Summer 2005. Available at https://reason.org/wp-content/uploads/files/5dc341cb5a45585473a9decf21abccd1.pdf

[4] Terrence Bland, *Church Site is One More Piece of the Puzzle,* SOUTH BEND TRIBUNE, Aug. 4, 2001, at A4.

Indiana now prohibits cities from using eminent domain for private redevelopment, effectively barring almost all involuntary private-party-to-private-party transfers of property. Under the reforms, public use specifically "does not include the public benefit of economic development, including an increase in a tax base, tax revenues, employment, or general economic health." I.C. § 32-24-4.5-1. This was part of a nationwide reform effort. Since *Kelo*, a total of 44 states have changed their laws to better protect private property rights and curb eminent domain abuse.[5] Those reforms stand as a bulwark protecting the property rights of Indiana homeowners and other property owners.

[5] Ala. Code § 11-47-170(b) (municipalities cannot condemn for private development or "primarily" to increase tax revenue); id. § 11-80-1(b) (same); Alaska Stat. § 09.55.240(d) (prohibits transfer of condemned property to private persons for economic development absent legislative authorization); Ariz. Rev. Stat. § 12-1111 (economic development not a permissible public use); Ariz. Rev. Stat. § 12-1132 (public use is question for the judiciary; blight can be shown only by clear and convincing evidence); S.B. 53, 1206, 1210, 1650, and 1809, 2005-2006 Leg., Reg. Sess. (Cal. 2006), Proposition 99 (Cal. 2009); Colo. Rev. Stat. § 38-1-101(1)(b)(I) ("'[P]ublic use' shall not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenue."); S.B. 167, 2007 Gen. Assemb., Reg. Sess. (Conn. 2007); S.B. 7, 145th Gen. Assemb., Reg. Sess. (Del. 2009); FLA. CONST. art. X, § 6 (2006) (private property taken by eminent domain may not be given to a private entity except by three-fifths vote of the legislature); H.B. 1567, 2006 Leg., Reg. Sess. (Fla. 2006); GA. CONST. art. IX, § II, para. V, VII (2006) (takings for redevelopment must be approved by vote of elected governing authority, redevelopment takings for elimination of harm only); Ga. Code § 22-1-2 (condemnor has burden of proving public use); Ga. Code § 22-1-1(9) (excluding "economic development" from definition of public use); Idaho Code § 7-701A (prohibiting takings for economic development and private use); 735 Ill. Comp. Stat. 30/5-5-5 (placing limits and conditions on acquired property being in private ownership or control); I.C. § 32-24-4.5-1 (property must be used for thirty years for public use, economic development is not a public use); Iowa Code §§ 6A.21, .22 (prohibiting taking of property for private use without owner's consent); Kan. Stat. § 26-501a (prohibiting takings for the purpose of selling, leasing, or otherwise transferring to a private entity); *id.* § 26-501b (allowing taking for economic development if expressly authorized by the legislature and if the legislature "consider[s] requiring compensation of at least 200% of fair market value to property owners."); Ky. Rev. Stat. § 416.675 (prohibiting takings for economic development); La. Const. art. I, § 4 (only allowing takings for narrowly defined public purposes, prohibiting takings for "predominant[ly]" private use, for transfers to 25 private entities, or solely economic development, and restricting sale and lease of property for thirty years); Me. Rev. Stat. tit. 1, § 816 (no takings for economic development, increases in tax revenue, or transfers to private parties); S.B. 3, 2007 Leg., Reg.

II. What Charlestown is doing is worse than what happened in *Kelo* and would set a dangerous precedent if allowed to continue.

Charlestown now seeks to circumvent Indiana's eminent domain reforms by issuing exorbitant code-enforcement fines to force homeowners to sell to a private developer for pennies on the dollar. Charlestown's scheme fits the pattern of eminent domain abuse that preceded *Kelo* and Indiana's 2006 reforms: (1) a developer wants land for new construction, but existing property owners do not wish to sell; (2) the developer convinces the city that the new

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Sess. (Md. 2007); Mich. Const. art. X, § 2 (public use does not include economic development or increasing tax revenue); H.B. 5817, 5818, 5819, 5820, 5821, 93d Leg., Reg. Sess. (Mich. 2006); Minn. Stat. § 117.012 ("Eminent domain may only be used for a public use or public purpose."); Miss. Const. art. 3, § 17A (2014) (prohibiting transfer of taken property to others for ten years after taking); Mo. Stat. § 523.271 (prohibiting takings solely for economic development); Mont. Code § 70-30-102 (economic development is not a public use); Mont. Code § 70-30-111(government must show by preponderance of the evidence that public interest requires the taking); L.B. 924, 99th Leg., 2d Sess. (Neb. 2006); Nev. Const. art. 1, § 22 (2008) (public use excludes transfer from one private party to another, government must prove public use); Nev. Rev. Stat. § 37.010 (listing permissible public uses, greatly restricting transfers to private parties, and placing burden on the condemnor to prove public use); N.H. Const. Pt. First, art. 12-a (2006) (prohibiting takings for private development or other private use); N.H. Rev. Stat. tit. XII, 162-K:2.IX-a (excluding economic development as a public use); H.B. 393, 2007 Leg., Reg. Sess. (N.M. 2007), S.B. 401, 2007 Leg., Reg. Sess. (N.M. 2007); H.B. 1965, 2005-2006 Gen. Assemb., Reg. Sess. (N.C. 2006); N.D. CONST. art. I, § 16 (economic development not a public use); N.D. Cent. Code § 32-15-02 (economic development not a public use); Ohio Rev. Code tit. 1 § 163.09 (government must show by preponderance of evidence to show that taking is necessary and for public use); Ballot Measure 39 (Or. 2006) (voter initiative); Or. Rev. Stat. § 35.385 (condemned property must be used for a public purpose for at least a reasonable amount of time); 26 Pa. Cons. Stat. § 204 (limiting circumstances in which property can be used for economic development); S.B. 2728A, 2008 Gen. Assemb., Jan. Sess. (R.I. 2008); S.C. CONST. art. I, § 13 (restricting takings for economic development); S.D. Codified Laws § 11-7-22.1 (prohibiting takings for the primary purpose of increased tax revenue); Tenn. Code § 29-17-102 (limiting takings for economic development); TEX. CONST. art. I, § 17 (2009) (prohibiting taking of property for transfer to private entities for the primary purpose of economic development or tax revenue); Tex. Gov't Code § 2206.001 (limiting takings for economic development); H.B. 365, 2007 Leg., Gen. Sess. (Utah 2007), S.B. 117, 2006 Leg., Gen. Sess. (Utah 2006); S.B. 246, 2005-2006 Gen. Assemb., Reg. Sess. (Vt. 2006); VA CONST. art. I, § 11 (2013) (no public use of taking is for private purposes or economic development); VA Code § 1-219.1 (economic development is not a public use); H.B. 1458, 2007-2008 Leg., Reg. Sess. (Wash. 2007); W. Va. Code § 16-18-6a (government has burden of showing property is blighted); Wis. Stat.§ 32.03(6)(b) (prohibiting takings when the condemnor "intends to convey or lease the acquired property to a private entity"); Wyo. Stat. § 1-26-801(c) ("'[P]ublic purpose' means the possession, occupation and enjoyment of the land by a public entity.").

construction will benefit the public with increased taxes and economic activity; (3) the city agrees to help the developer acquire the property it desires; (4) the city exercises its sovereign power to force out existing property owners so that the developer can acquire the land.

As the record shows, Charlestown sends its inspectors into homes to identify any and every violation of the City's property maintenance code, no matter how picayune. *See, e.g.,* Tr. Vol. II, p. 150; Tr. Vol. V, pp. 22-28. This produces a long list of "violations" for each property, which allows the City to levy massive fines in short order. *See, e.g.*, Appellants' App. Vol. II, p. 31 ¶ 46; Tr. Vol. V, p. 10 (some owners received fines of tens-of-thousands-of-dollars per day). Appellants' App. Vol. II, p. 30 ¶ 42; Tr. Vol II, pp. 118-27. Confronted with these fines, the homeowner is offered an "out" if he will sell to the City's chosen developer. Appellants' App. Vol. II, pp. 27-30 ¶¶ 26, 31, 39-40, 44; Tr. Vol. II, p. 33; Tr. Vol. IV, p. 55. The developer offers $10,000 per home. Appellants' App. Vol. II, p. 30 ¶ 44; Tr. Vol. II, p. 33. Given a Hobson's choice between paying massive fines or selling the home for $10,000, property owners rationally choose the latter. The property owner has thus been forced out of his home more easily—and much more cheaply—than the use of eminent domain would ever allow. The developer has already acquired over 150 houses through this technique. Appellants' App. Vol. II, p. 30 ¶ 44; Tr. Vol. II, p. 71.

A. Charlestown's scheme would be illegal under Indiana's eminent domain laws.

Under Indiana law, it would be illegal for Charlestown to acquire the homes in Pleasant Ridge using eminent domain. I.C. § 32-24-1, *et seq.* prescribes rules for how the state and political subdivisions may exercise their power to condemn and acquire private property. As noted above, redevelopment is not considered a public use and private-party to private-party transfers are essentially prohibited. The one exception is eliminating blight. Under the post-

Kelo reforms, the government may acquire a parcel of real property through eminent domain and transfer it to a private party *only* if the parcel to be acquired is blighted. I.C. § 36-7-1-3 *et seq.*

That is no minor matter. Unlike many states, Indiana requires blight determinations to be made on a parcel-by-parcel basis. *See, e.g.*, I.C. 32-24-4.5-7(1) (listing blight conditions that must exist "on the *parcel* of real property") (emphasis added). And, unlike most state laws, Indiana carefully defines blight—as a fire hazard or otherwise unfit for human habitation, I.C. § 32-24-4.5-7. Where many state laws allow the government to define property as "blight" based on loosely-defined factors, Indiana's post-*Kelo* reform was carefully designed to avoid creating such a "blight loophole." *See* Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2139–41 (2009).

In short, Indiana's law is uncommonly protective of private-property rights. It prevents situations where pockets of vaguely defined "blight" are used to justify condemning an entire neighborhood—as occurs routinely in places such as California. *See, e.g., Redevelopment Agency of City of Chula Vista v. Rados Bros*., 115 Cal. Rptr. 2d 234 (Cal. App. 2001). In Indiana, unless an individual parcel is *itself* blighted, eminent domain cannot be used to take it for private redevelopment. This allows cities to eliminate parcels of land that are *actually* blighted, while protecting the property rights of owners of adjacent, non-blighted parcels.

The parcel requirement prohibits Charlestown from using a blight finding to redevelop Pleasant Ridge. Most of the homes in Pleasant Ridge are modest, but well-kept. Even for the small number of dilapidated homes that the developer has already acquired, the City has allowed renters to remain in the structures. Appellants' App. Vol. II, pp. 31-32 ¶ 48, 52); Tr. Vol. II pp. 34-35, 131. This demonstrates that even the worst homes in Pleasant Ridge are not unfit for human habitation—to say nothing of the numerous homes that are in excellent condition.

In fact, the record does not show that *any* home in Pleasant Ridge is blighted. And even if a home were blighted, the City could only acquire that individual home—not neighboring homes—and would be required to pay market value as compensation. Thus limited, Charlestown plainly cannot use eminent domain to give its chosen developer what it wants—a bulldozed neighborhood and a clean slate for fresh development. *See, e.g.*, Appellants' App. Vol. II, p. 25 ¶ 14; Tr. Vol. II, p. 62 (City's 2014 application to demolish and redevelop Pleasant Ridge). Indiana's post-*Kelo* eminent domain reforms therefore worked as intended: to protect private property rights against *Kelo*-style abuses.

B. Charlestown's scheme would undermine post-*Kelo* reforms and leave homeowners worse off than they would have been under traditional eminent domain.

The state-law prohibition on using eminent domain for private redevelopment should have protected the Pleasant Ridge neighborhood. Indeed, even prior to *Kelo* and the 2006 reforms, Indiana would not stand for governments transparently abusing their power to take private property. The Indiana Supreme Court has "cautioned that every Hoosier landowner has a right constitutionally to defend against subterfuge and bad faith in the seizure of his property, and may show that it is not to be applied to the public purpose and use as alleged." *Wymberley Sanitary Works v. Batliner*, 904 N.E.2d 326, 335 (Ind. App. 2009) (internal quotation marks omitted).

Unfortunately, it is not unheard-of for local governments to seek to acquire property without eminent domain by abusing their code-enforcement powers. Courts have ruled that this is unconstitutional. For example, in *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996), property owners sued city officials because the city, "want[ing] to deflate the value of the plaintiffs' properties so they could be replaced with commercial development," targeted the properties for "over-enforcement" of the housing code. *Id*. at 1326. The court was particularly

attentive to the danger of officials "using the cloak of their official positions to effect their private ends," *id*. at 1321, and warned that

> [i]f officials could take private property … simply by deciding behind closed doors that some other use of the property would be a "public use", and if those officials could later justify their decisions in court merely by positing "a conceivable public purpose" to which the taking is rationally related, the "public use" provision of the Takings Clause would lose all power.

Id. Finding that "a city cannot make land-use decisions based simply on its own desire to acquire a private owner's property for purposes unrelated to [public safety]," *id.* at 1327, the court concluded that the government officials were stripped of official immunity because they "should have known that the equal protection clause prohibited them from targeting the plaintiffs for overzealous enforcement of the housing code so that the plaintiffs' properties could be acquired below market value." *Id*. at 1328.[6]

In other cases, city governments have taken similar actions to reduce the value of property in neighborhoods targeted for condemnation so as to make the property cheaper to acquire. In *City of Toledo v. Kim's Auto & Truck Serv., Inc.*, 2003-Ohio-5604, ¶¶ 11-13, 2003 WL 22390102, *2 (Ohio App. 2003), for instance, city officials in Ohio bought up dozens of properties in the targeted neighborhood, then demolished some and allowed others to deteriorate—only to use the vacant lots and dilapidated houses as proof that the area was "blighted." A court later allowed this, on the grounds that there were "other factors such as 'inadequate street layouts' … and conditions that impede 'the community's ability to generate or preserve jobs,'" that justified the blight determination. *Id.* at ¶ 13. And in *Price v. City of Stockton*, 390 F.3d 1105 (9th Cir. 2004), officials in Stockton, California, drafted a list of

[6] The *Armendariz* court ruled that the plaintiffs could not sue for a violation of their due process rights; that they were limited to an equal protection and takings cause of action. That portion of *Armendariz* was later abrogated, so that property owners can now bring due process challenges, as well. *See Crown Point Dev. v. City of Sun Valley*, 506 F.3d 851 (9th Cir. 2007).

properties they wanted to acquire for purposes of redevelopment, and then "instituted [a] 'zero tolerance' code enforcement policy against [the properties] two days after drawing up its acquisition list." *Id*. at 1116. The City pursued this plan because by devoting funds to code enforcement rather than using the state's redevelopment laws, it could avoid having to comply with requirements of the latter statutes, such as relocation assistance to those displaced by the City's property acquisitions. The Ninth Circuit called this "form over substance." *Id.*

Developers, too, have sometimes abused code enforcement requirements to push property owners into selling. To cite just one example, Phoenix, Arizona, property owner Robert Stapleton was targeted for zoning violations in 2005 which resulted in a criminal conviction for having a five-foot tall fence in front of his yard and violating "vegetation standards" (even though the property was zoned for farming). It later turned out that the complaints by neighbors had been orchestrated by a local developer who wanted the property—and who had previously been the city's mayor. Mark Flatten, *Prosecutors Push Jail for Disabled Vietnam Veteran over Zoning Violations*, Oct. 11, 2017.[7]

Such tactics are aimed at nullifying the legal protections that were designed to ensure that property owners are not deprived of property for the benefit of other private owners. Such a "pretextual rationale" is plainly unconstitutional. *Patel v. Penman*, 103 F.3d 868, 876 (9th Cir. 1996). Indeed, it is worse than what happened to Susette Kelo. Even when it gets abused, traditional eminent domain requires the condemnor to pay fair market value for the property. Instead, Charlestown homes that would be worth between $20,000 and $50,000 on the open market are being sold for $10,000 each, Appellant's App. Vol. 2, p. 137, because the only alternative is paying specious code-enforcement fines—amounting in some cases to hundreds of

[7] Available at https://goldwaterinstitute.org/article/prosecutors-push-jail-for-disabled-vietnam-veteran-over-zoning-violations/

thousands of dollars—fines that the City has pursued *in order to force the sale to the developer*, who never pays the fines because the City waives them once the home is demolished. App. Vol. II, p. 30 ¶ 45; Tr. Vol. V, p. 10. The City is not using code enforcement to make Pleasant Ridge safer—it is using it to leverage homeowners into selling to the City's chosen developer.

This is flatly contrary to Indiana's decision, in enacting its post-*Kelo* reform, to strengthen property rights and curb eminent domain abuse. If allowed, this scheme will become the model for circumventing that reform in the future. Property owners will then be *worse* off than if cities were required to use eminent domain. This cannot have been the intention of the Indiana legislature when it passed House Bill 1010 in 2006. Charlestown's attempt to exploit a perceived loophole in the law should not be allowed to stand.

C. At a bare minimum, the City should have the burden of showing that its use of code enforcement is not pretextual.

Courts are sometimes reluctant to conclude that the government is taking property on the basis of a pretext if any possibility exists that the government's actions could be justified. Therefore, Professor Daniel Kelly has recommended that courts use a "burden-shifting" test that echoes the test used in federal civil rights laws. Daniel B. Kelly, *Pretextual Takings: Of Private Developers, Local Governments, and Impermissible Favoritism*, 17 SUP. CT. ECON. REV. 173, 215–20 (2009). Under this approach, a property owner would first bear the burden of "provid[ing] direct evidence of favoritism"—meaning, evidence that the taking of the property is really meant to benefit a private party. *Id.* at 217. If the property owner does so, the burden would then shift to the government to "articulate a legitimate justification for private involvement in the taking"—although that justification must be something more than eliminating blight, creating jobs, etc.; it must "a specific justification for why a particular type of private involvement is necessary for the project at issue." *Id*. at 218-19. Finally, even if the government

can make such a justification, the property owner would still prevail if she "demonstrate[s] that the condemnor's proffered justification for private involvement is pretextual." *Id*. at 219.

In this case, the property owners plainly meet this standard. The process is plainly oriented toward favoritism, in that the city drops code-enforcement fines if the owner sells to a private developer. Appellant's App. Vol. 2, pp. 47–48 ¶¶ 123–129. The city cannot demonstrate a specific need for private involvement here, and there is plain evidence that the code-enforcement process being used is a pretext designed to circumvent the state law prohibiting private takings.

CONCLUSION

Charlestown's attempt to circumvent the 2006 reforms of the Indiana legislature would set a dangerous precedent, leading to abuses worse than those that prompted 44 states to reform their laws after *Kelo*. Amicus curiae respectfully requests that the Court affirm the trial court's entry of a preliminary injunction.

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