NO. 24-670

IN THE
Supreme Court of the United States

BOWERS DEVELOPMENT, LLC,
Petitioner,

v.

ONEIDA COUNTY INDUSTRIAL DEVELOPMENT AGENCY, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New York, Appellate Division, Fourth Department

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the taking of land for a public parking lot component of the Integrated Health Campus in the City of Utica violate the Public Use Clause of the Fifth Amendment of the United States Constitution?

CORPORATE DISCLOSURE STATEMENT

Oneida County Industrial Development Agency is a governmental entity formed under Article 18-a of the N.Y. General Municipal Law. Central Utica Building, LLC does not have any parent corporation and no publicly traded corporation owns 10% or more of its stock.

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INTRODUCTION

Oneida County Industrial Development Agency ("OCIDA") and Utica Central Building, LLC ("CUB") jointly submit this Brief in Opposition to the Petition for a Writ of Certiorari. OCIDA's use of eminent domain to acquire land for a public parking lot was for a valid public use. The public parking lot on the acquired property is a component of the comprehensive development plan for the Integrated Health Campus ("IHC") that has been constructed in the downtown core of the City of Utica (the "City" or "Utica"). The parking lot is publicly available because the patients and staff of the IHC use it during business hours, and the broader community uses it on nights and weekends. Accordingly, this case does not present the issue that was before the Court in *Kelo v. City of New London*, 545 U.S. 469 (2005). Further, the Petitioner is a speculator that never owned the condemned property located at 411 Columbia Street in the City (the "O'Brien Property" or the "Property"), and thus lacks standing to pursue this case. The Court should deny the Petition.

COUNTERSTATEMENT OF THE CASE

1. Statement of Facts

Petitioner's statement of the case asserts that the subject condemnation began when CUB asked OCIDA to take the O'Brien Property. *See*, Petition for a Writ of Certiorari (hereinafter referred to as "Pet.") at 2. This is not even remotely accurate. What the extensive administrative record of nine volumes demonstrates is that OCIDA's acquisition was part of

a detailed planning process that began many years earlier. Beginning in 2015, officials of New York State, Oneida County (the "County"), and the City undertook to transform the delivery of health care throughout the Mohawk Valley region. These officials determined that two antiquated hospitals in Utica should be closed and consolidated into one modern hospital as part of the plan for the IHC. In 2015, the State of New York committed $300 million for the development of the IHC (A.896-897)[1]. Multiple locations were evaluated for the IHC, and it was determined that the best location was in the City's long-blighted downtown core area.

On January 28, 2018, the City, the County, their respective economic development agencies and Mohawk Valley Health System ("MVHS") commenced the planning process for the consolidation and closure of the two hospitals and the construction of the new Wynn Hospital (the "Hospital") (R.2[2]). MVHS is a not-for-profit corporation and was the operator of the two antiquated hospitals, and of other health care facilities in the Mohawk Valley region.

The City's Planning Board was the lead agency that conducted the review of the plan for the IHC under the New York State Environmental Quality Review Act ("SEQRA") (R.6402-6452, R.81). OCIDA

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[1] "A" refers to the Appendix filed with the New York State Court of Appeals ("Court of Appeals") followed by the page.

[2] "R" refers to the Administrative Record on Review filed with Appellate Division of the Supreme Court, Fourth Department ("Appellate Division") followed by the page reference.

was an involved party in that review. The IHC plan encompassed construction of the Hospital, a medical office building, a central utility plant, parking, a pedestrian bridge and a helipad.

The proposed IHC plan was also in furtherance of the City's Master Plan and Urban Renewal Plan for the redevelopment of the blighted core (R.5219). The IHC complements other recent economic development projects in the downtown area, including the Utica Memorial Auditorium, the Nexus Center, the Hotel Utica and the entertainment district (R.6409-6410).

As a result of the IHC and other developments, the downtown core has a parking shortage and traffic problem. The acquisition of the O'Brien Property and conversion of that land to public parking is part of the required mitigation for such problems (R.5881). *Bowers Dev., LLC v. Oneida County Indus. Dev. Agency*, 224 A.D.3d 1240, 1242 (4th Dept. 2024). *See also, Truett v. Oneida County*, 200 A.D.3d 1721, 1722 (4th Dept. 2021) *lv. denied* 38 N.Y.3d 907 (2022).

Throughout the SEQRA review of the IHC, the O'Brien Property was shown as part of the parking co-utilization program between the IHC project and community event facilities that will provide critically-needed parking (R.51, R.119, R.187, R.5235, R.5249, R.5899). Although the development plan went through various iterations, each reflected that the area bounded by State, Columbia and Cornelia Streets (the "Block")[3] would host a medical office

[3] The Block consists of four tax parcels being: 601 State Street (SBL 318.041-2-37) (i.e., the location of the medical office building, the Property (SBL 318.041-2-38) and the two adjoining

building with adjacent surface parking, or alternatively, as a surface parking lot (R.51, R.119, R.187, R.5899).[4]

On September 19, 2019, the City's Planning Board issued the final approval of the IHC plan (R.5214-5281). Thereafter MVHS, the City, the County and their respective governmental agencies began acquiring various properties within the IHC by negotiation and/or eminent domain.[5]

On June 18, 2021, two years after the final plan approval, Petitioner entered into an Agreement of Purchase and Sale dated June 18, 2021 (the "Purchase Agreement") with Rome Heating & Plumbing Supply Co., Inc. ("O'Brien") to acquire the O'Brien Property. Petitioner claims it entered into the Purchase Agreement "in the hopes of building a medical office building." Pet. at 2. Petitioner now claims that the medical office building that was approved by the Planning Board, and which was constructed as part of the IHC, was a "competitor" to its proposed medical office building. Petitioner's medical building is fictional. Construction of a medical office building on the O'Brien Property,

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parcels to the east of the Property being 409 Columbia Street (SBL 318.041-2-39) and 401-407 Columbia Street (SBL 318.041-2-40) (R.5511, R.5901)

[4] The O'Brien Property is mid-block Columbia Street with the parking field noted at ±500 spaces (R.119, R.5902, R.5906).

[5] *Truett v. Oneida County*, 200 A.D.3d 1721 (4th Dept. 2021); *Court St. Dev. Project, LLC v. Utica Urban Renewal Agency*, 188 A.D.3d 1601 (4th Dept. 2020); *Utica Urban Renewal Agency v. 500 Columbia St. LLC, et. al.,* Index No. EFCA2022-001299 (N.Y. Sup. Ct. Oneida County 2019).

standing alone, without any right to use the adjoining properties owned by MVHS for parking, was an impossibility. Petitioner's fictional building concept ignored that the "proposed" building was to be built over a right of way that encumbered the south end of the O'Brien Property (R.5511, R.5318-5319).[6] The totality of Petitioner's development "proposal" consisted of a building elevation and an aerial imposition of a building on the Block which lacked any engineering detail or certifications (R.5318-5319). That aerial imposition shows the conceptual building extending over the boundaries of the O'Brien Property, and was constructed over the southerly right of way, relied on surface parking on the adjoining lots without an agreement with the owner, MVHS, and further assumed that the only medical office building that had been approved as part of the IHC did not exist (R.5318, (A.983-984). Moreover, no details on any leases or financing for its concept were ever provided (R.5886, ¶19). Petitioner was unlikely to obtain such leases or financing because it had lost the confidence of both physician groups and MVHS after having failed to consummate several other projects within the City and having failed to create any real plans for a feasible project. In addition, Petitioner defaulted on its contract to acquire the Kennedy Garage from the City so that it had no

[6] Petitioner has a track record of front running governmental projects and acquiring key parcels in advance of public projects in the area of the IHC to generate substantial profits. On June 21, 2017, Petitioner acquired a parcel of land for $575,000 (Instrument No. 2017-008918). Approximately nine months later, Petitioner sold that parcel to the County's public auditorium authority for the sum of $1,220,000 (Instrument No. 2018-003949) for a profit of $645,000.

parking for its conceptual structure which is a significant problem for a medical building which relies on proximate parking to serve the patients. Further, the actual medical office building needed to be completed proximate in time to the opening of the Hospital so as to ensure the continuous delivery of health care services to the community (R.5477). As a result, OCIDA rationally determined that Petitioner's development was not sufficiently feasible to merit any risk to the delivery of health care services for the community (R.5886, ¶19, R.6044-6045).

CUB was the developer selected for the medical office building component of the IHC. CUB was formed in 2021. CUB had a financing commitment and leases for 90% of the building (R.5886, ¶17, R.5979). Moreover, CUB's proposal was different than Petitioner's concept because it included an ambulatory surgery center ("ASC"), which facility is acutely needed in the community since such day procedures had been provided at one of the hospitals being closed.

After CUB was chosen as the developer for the medical office building component of the IHC, CUB offered to purchase the O'Brien Property from O'Brien to provide the surface parking on the Block contemplated in the IHC only to learn that O'Brien had executed the Purchase Agreement with the Petitioner (R.5282).

In view of this stalemate, OCIDA initiated proceedings to acquire the O'Brien Property under the New York Eminent Domain Procedure Law ("EDPL") for the public purposes of improving

healthcare services to the residents of Oneida County, creating new and improved job opportunities, reducing unemployment, eliminating blight and promoting urban renewal and redevelopment for the overall betterment of community (R.5892).

2. Course of Proceedings

Petitioner challenged OCIDA's acquisition in the Appellate Division. Its primary argument was that OCIDA lacked the statutory authority to condemn the O'Brien Property under the N.Y. General Municipal Law ("GML").

The Appellate Division, by decision entered on December 23, 2022, initially agreed with Petitioner's statutory objection that a medical office building, and associated parking, was not a "commercial" project. (App. 12a). However, GML §858(4) provides industrial development agencies with broad powers of eminent domain if necessary to fulfill any of the enumerated corporate purposes contained in GML §858 or §852. On December 14, 2023, the Court of Appeals reversed and remitted the case to the Appellate Division to review all other matters not previously addressed (App. 11a).

On February 2, 2024, the Appellate Division dismissed the petition (App. 2a). The Appellate Division specifically found: "Here, the acquisition of the property will serve the public use of mitigating parking and traffic congestion…" (App. 4a).

Notwithstanding its lengthy challenge to the exercise of eminent domain by OCIDA to acquire the O'Brien Property, Petitioner never acquired such parcel. On March 31, 2023, while the case was pending in the Court of Appeals and having delayed approximately two years from the execution of the Purchase Agreement, Petitioner assigned its contract rights under the Purchase Agreement to Utica Med Building, LLC ("UMB"), and UMB then acquired the O'Brien Property. However, the deed for the sale of the O'Brien Property into UMB was not recorded until approximately one year later on February 22, 2024.[7]

On March 18, 2024, OCIDA commenced a proceeding in Oneida County Supreme Court against UMB to vest title in the O'Brien Property pursuant to the EDPL Art. 4. On May 20, 2024, Supreme Court approved the vesting of title in OCIDA, which occurred on June 27, 2024. Immediately thereafter, a Declaration of Restrictive Covenant (the "Declaration") was executed by OCIDA and CUB and

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[7] Petitioner's assignment of its contract with O'Brien to acquire the Property to UMB was not recorded. The year delay in recording the deed to UMB was purposeful to avoid subjecting the acquisition of the Property to the existing liens of Petitioner in the form of two judgment creditors (J2021-000454-$154,765; J2023-007536; $574,041.45 and its companion judgment filed in Onondaga County as Judgment No. 2023-00000267) and the various mechanics lienors. During the pendency of the EDPL Art. 4 vesting proceeding, UMB defaulted on its financing for the acquisition of the O'Brien Property such that a mortgage was recorded on May 16, 2024 as Instrument No. 2024-005456, approximately one year after the purported March 31, 2024 closing.

recorded against the O'Brien Property dedicating its use as public parking. The Declaration states:

> During the business hours of 5:00 AM to 6:00 PM on weekdays, exclusive of holidays (the "Business Hours"), the O'Brien Parking Facility will be available to the members of the public visiting the CUB Building and employees of the tenants on a priority basis. On weekends, holidays and during all times other than the Business Hours, the O'Brien Parking Facility will be available to the general public on a first come first serve basis.[8].

The Declaration confirms the public use of the O'Brien Property as a surface parking lot. The Declaration expressly limits the absolute dominion and control of any fee owner, including OCIDA, to exclude any use of the O'Brien Property other than as a public parking lot. OCIDA now owns the O'Brien Property compelling its use as the public surface parking lot envisioned in the IHC.[9] To date there has been no conveyance of the O'Brien Property by OCIDA. Petitioner's contention that there is no factual dispute that OCIDA condemned the O'Brien

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[8] The Declaration is recorded in the Office of the Oneida County Clerk as Instrument No. 2024-007339.

[9] Petitioner's contention at p.5 of the Petition that the public parking requirement was a belated creation is erroneous since the public hearing comment period was extended to March 30, 2022 (R.5849 *compare* R.5476). Thereafter, Petitioner did not object to the public parking use of the O'Brien Property (R.5870-5874).

Property to give it to CUB is thus completely false. (Pet. at 2).

JURISDICTIONAL OBJECTIONS

I. Petitioner Lacks Standing to Pursue this Case.

To have standing, a plaintiff must have an injury in fact attributable to the defendant's conduct, and such injury must be capable of redress by the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). And "[w]hen the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred… in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action … at issue …" *Id.* at 561–2.

Here, Petitioner lacks standing because it never acquired the O'Brien Property. Further, UMB, although formed on October 19, 2021, never became a party to the underlying EDPL Art. 2 proceeding. Neither O'Brien nor UMB joined in the Petition to this Court. The fact that Petitioner was a contract vendee when OCIDA commenced proceedings under the EDPL is irrelevant since it elected to not acquire the O'Brien Property and assigned all of its contract rights to UMB. Following Petitioner's relinquishment of all contract rights in the O'Brien Property to UMB, Petitioner has relegated itself to being a member of the public having no discernible interest or harm different than the balance of the community. Thus, Petitioner lacks any injury in fact redressable by this Court.

II. The Petition is Moot.

"[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." (*Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979) *quoting Powell v. McCormack*, 395 U.S. 486, 496 (1969). An actual controversy must be present at all stages of the litigation not merely at the commencement. *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71 (2013). If any intervening circumstance deprives the plaintiff of a personal stake in the outcome, the action cannot proceed and must be dismissed as moot. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-478 (1990). Here, as described in OCIDA's first jurisdictional objection, Petitioner has no legally cognizable interest in the outcome of this case, because it assigned all of its rights in the O'Brien Property to UMB making the Petition moot.

Further, UMB is not a Petitioner nor was it a petitioner in the underlying EDPL proceedings. Moreover, prior to OCIDA's filing of the vesting map, UMB did not seek any temporary relief and it willingly accepted the advance payment. Title to the O'Brien Property is currently vested in OCIDA, the building thereon was razed, and a parking lot has been constructed thereon. Consequently, this Petition is moot.

III. The Fifth Amendment Claim Was Not Preserved For Federal Review.

The original petition challenging the acquisition in the Appellate Division did not adequately challenge the taking under the United States Constitution. *See Winous Point Shooting Club v. Caspersen*, 193 U.S. 189, 189–190 (1904). Instead, Petitioner's federal constitutional claims were conclusory, wholly-mingled with the State constitutional claims, and limited to assertions that the acquisition was in bad faith, violative of the State anti-pirating laws and a pretext with a dominant private benefit (¶¶84-98, A.20-21). Petitioner's briefs to the Appellate Division did not reference *Kelo*, and their only constitutional objections again mingled the state and federal questions (A.763, A.788-793). Before the Court of Appeals, *Kelo* was again not referenced, and Petitioner's brief limited its federal constitutional claims to lack of due process, lack of assurance of just compensation, excessive taking and bad faith. Finally, before the Court of Appeals, Counsel to Petitioner made a judicial admission that the public parking use of the O'Brien Property satisfied the public use requirements of the Fifth Amendment having limited its contentions to the statutory authority of OCIDA only. *Transcript of Oral Argument* at 26. For all these reasons, Petitioner has not adequately preserved or presented a federal question for this Court's review.

REASONS FOR DENYING THE PETITION

I. THIS CASE PRESENTS NO REASON FOR THE COURT TO REVISIT *KELO v. CITY OF NEW LONDON*

The Takings Clause of the Fifth Amendment requires that any acquisition must be for a "public use" and that "just compensation" be paid. Public use has been broadly construed by this Court. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984). The requirement of "public use" for eminent domain turns on whether the acquisition serves a public purpose. *Kelo v. City of New London*, 545 U.S. 469, 480 (2005); *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1014-1015 (1984). The term "public purpose" has been broadly defined by this Court with a doctrine of deference to the legislative judgment. *Kelo,* 545 U.S. at 480. Consistent with the decisions of this Court, the inquiry under N.Y.'s EDPL is whether "a public use, benefit or purpose will be served by the proposed acquisition." EDPL §207(C)(4). Based on the precedents of this Court, the public use requirement has been consistently interpreted by New York's Court of Appeals to require a showing that the exercise of eminent domain be "rationally related to a conceivable public purpose." *Matter of Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 425 (1986) *citing Hawaii Hous. Auth. v. Midkiff*, 467 U.S. at 241)).

This Court's long-standing jurisprudence holds that the judiciary should not substitute its judgment for the legislature's judgment as to what constitutes a public use "unless the use be palpably without reasonable foundation." *Hawaii Hous. Auth.*, 467 U.S. at 241. New York has a stricter standard of: "[I]f an adequate basis is shown, and the objector cannot show that the determination was 'without foundation', the agency's determination should be confirmed." *Jackson*, 67 N.Y.2d at 425. This was the exact standard employed by the Appellate Division when it found that the exercise of eminent domain by OCIDA was "rationally related to a conceivable public purpose of mitigating parking and traffic issues" (App. 4a).

Eminent domain for a public parking lot has been long held to be a public use under the New York and United States Constitutions. *Matter of Incorporated Vil. of Garden City (Lorentzen)*, 15 A.D.2d 513 (2d Dept. 1961); *Matter of Truett v. Oneida County*, 200 A.D.3d 1721, 1722 (4th Dept. 2021). *Matter of Molly, Inc. v. County of Onondaga*, 2 A.D.3d 1418 (4th Dept. 2003).

Petitioner repeatedly states that New York courts "rubber stamp" exercises of eminent domain, and that judicial review of determinations that a proposed condemnation serves a public purpose in New York are "meaningless." In support of this assertion, Petitioner cites *Syracuse Univ. v. Project Orange Assoc. Servs. Corp.*, 71 A.D.3d 1432 (4th Dept. 2010). In that case, however, the Appellate Division invalidated the proposed taking, holding that the landowner had established that the proposed taking

was not for a public purpose, but was for the private benefit of the condemnor's affiliated business. The case refutes, rather than supports, Petitioner's assertion that the New York judiciary does not scrutinize the asserted public purpose of challenged condemnations.

A. This case is distinguishable from *Kelo v. City of New London*.

The current case presents no reason for the Court to revisit *Kelo v. City of New London*, 545 U.S. 469 (2005). In *Kelo,* the City of New London, Connecticut approved an economic development plan to be implemented by its local development corporation. The economic development plan required the acquisition of 115 privately owned properties. The development was divided into seven parcels. The petitioners in *Kelo* owned properties within one of the parcels that was adjacent to a site upon which Pfizer, Inc. planned to build a large research facility. The New London economic development plan called for the development of research and development office space on the parcel adjacent to the new Pfizer facility.

The *Kelo* majority recognized that the case presented a difficult question because "this is not a case in which the City is planning to open the condemned land – at least not in its entirety – to use by the general public." 545 U.S. at 478. Obviously, the general public of New London would not be able to use privately developed and privately leased office space.

Here, the issue before the Court in *Kelo* is not present because the parking lot constructed on the O'Brien Property is presently open to and used by the general public. The Hospital and the medical office building serve the health care needs of the region and are staffed by and used by the public. The public users of these facilities can park on the new parking lot when accessing vital health care, and at night the general public may use the parking when attending events in the newly redeveloped downtown of Utica. Thus, the issue before the Court in *Kelo* is not present here. This is confirmed by the fact that no private party may exclude the public from using the parking lot pursuant to the Declaration.

Even if this case were somehow analogous to *Kelo*, there is no reason for this Court to review it. The *Kelo* majority upheld the exercise of eminent domain in the New London project because the acquisition was undertaken pursuant to an established economic development plan. The lower courts had found that there was no evidence that the economic development plan was "intended to serve the interests of Pfizer, Inc., or any other private entity." *Kelo*, 545 U.S. at 478 n.6. The Court further noted that although the City of New London intended to transfer the acquired parcels to a private developer who would develop the office space and lease it to private tenants, the identity of these private transferees was not known at the time of the approval of the plan. *Kelo*, 545 U.S. at 478 n.6. Justice Stevens stated: "It is, of course, difficult to accuse the government of having taken A's property to benefit the private interests of B when the identity of B was unknown." *Id.*

The same facts apply here. The taking of the O'Brien Property was undertaken pursuant to a "carefully formulated" development plan intended to transform the delivery of health care in the Mohawk Valley, alleviate long-recognized blight in downtown Utica, and rejuvenate the economy of downtown Utica (R.5259). The IHC was constructed pursuant to a carefully considered development plan which at all times showed the O'Brien Property as a parking lot. The plan for the IHC was developed and approved long before CUB was selected as the developer of the medical office building component of the IHC, and years before Petitioner became a contract vendee for the O'Brien Property. Further, Petitioner's assertion that there was no comprehensive development plan similar to *Kelo* is another falsehood since the plan for the IHC occupies the 5,281 pages of the record before the Appellate Division. Pet. at 19. In addition, Petitioner's assertion that this huge transformative project, vital to the entire Mohawk Valley, was a pretext to transfer the O'Brien Property to CUB lacks any support in the existing record and is absurd.

Nor would the acquisition of the O'Brien Property for parking be questionable under the analysis in the concurring opinion of Justice Kennedy in *Kelo*. Justice Kennedy's concurrence states that a "court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party…" 545 U.S. at 491. Justice Kennedy stated that the lower courts had conducted a serious review of the assertion that the economic development plan had been adopted to benefit Pfizer, and had rejected this assertion. Justice Kennedy

noted that the lower courts had relied on the presence of the economic development plan coupled with the commitment of public funds before the private beneficiaries were known, that no private developer had been designated and that the other private beneficiaries were also unknown since the office space had not been rented. *Id.* at 491-492. The identical facts are present here.

Here, the IHC was approved and constructed pursuant to a detailed economic development plan pursuant to which New York State had committed $300 million for the IHC (A.896). The ultimate developer of the medical office building had not been designated on April 18, 2019, when the Planning Board approved the IHC including the medical office building and associated parking (R.6402, R.5214-5261). CUB was formed approximately two years later on May 3, 2021. Petitioner likewise entered into the Purchase Agreement to acquire the O'Brien Property two years after the final plan approval of the IHC which showed the use of the O'Brien Property as a parking lot component of the IHC.

Even under the analysis in Justice O'Connor's dissent in *Kelo*, the acquisition of the O'Brien Property would withstand scrutiny. Justice O'Connor posited two types of takings that comply with the public use clause. The first is the transfer of private property to public ownership. 545 U.S. at 497-498. The second is the transfer of private property to private parties who make the property available for the public's use "such as with a railroad, a public utility, or a stadium." *Id.* Here, the acquisition meets either test. The O'Brien Property was acquired and

is still owned by OCIDA. Even if the O'Brien Property were considered to have been transferred to CUB, it is still "available for the public's use." The parking use is analogous to a stadium parking lot where the public can park to attend stadium events. Here, IHC contemplated parking for the public on the O'Brien Property, so the public use requirement under the dissent of Justice O'Connor has been satisfied.

Nor would the acquisition of the O'Brien Property be unlawful under the analysis in Justice Thomas' dissent in *Kelo*. Justice Thomas stated that the "most natural reading of the Clause is that it allows the government to take property only if the government owns, or the public has a legal right to use, the property…" *Kelo*, 545 U.S at 508-509. Again, here the public has the right to use the parking lot to access the health care facilities of the IHC and community event facilities nearby, and the O'Brien Property is owned by OCIDA.

B. There Is No Private-to-Private Transfer or Pretext for Private Benefit.

1. No Private Transfer.

Despite the repetitious assertions in the Petition, no private transfer by OCIDA has occurred since its acquisition of the O'Brien Property on June 27, 2024. OCIDA remains the record owner of the O'Brien Property, and the Declaration governs the right of the public to park on the O'Brien Property.

2. There is No Pretext or Predominant Private Interest.

Nor does the record contain any evidence that the stated public purpose of the acquisition, to provide vitally needed parking for the IHC, was a pretext. The public parking use of the O'Brien Property was continuously shown in every iteration of the IHC starting 2018 (R.51, R.119; R.187, R.5899). The approved plans for the IHC clearly told the community and Petitioner that acquisition of the O'Brien Property for a surface parking facility was necessary to provide required parking for the IHC since there was a need to create "±1100 parking spaces" (R.157; R.119). There can be no finding that the need to provide public parking was a pretext when the use of the O'Brien Property as a parking lot was shown as a part of the IHC years prior to Petitioner becoming a contract vendee, and years prior to the designation of CUB as developer of the medical office building. That use never changed during the Planning Board's review.

OCIDA appropriately concluded that the acquisition of the O'Brien Property served a public use, purpose and benefit of providing a public parking lot so that the members of the public can access their needed health care services (R.5892, ¶1)[10]. Before the

[10] The medical office building is occupied by an ambulatory surgery center, physician offices, hospital practice groups like the Cardiac and Thoracic Surgery, Endoscopy, Neuro-interventional and stroke and Imaging facilities (R.5368-5370). Contrary to the Petition, the public is the primary users of the O'Brien Property since they access their health care needs from the O'Brien Property and the balance of the parking field on the

Appellate Division, Petitioner did not challenge or dispute that such public parking use was the actual use of the O'Brien Property. Instead of addressing the issue of whether parking by the public on the O'Brien Property for access to core community facilities is a public use, Petitioner continues to make conclusory statements that the taking has a dominant private benefit without citing any evidence in the record to support its assertion.

The record establishes that the public parking use of the O'Brien Property is dominant since members of the public are the actual users of the parking lot. This case is nowhere close to *Eychaner* since the parking use by public is predominate since it is where the public is able to access medical services, the Hospital and the community event center. *Eychaner v. City of Chicago, Illinois*, 141 S.Ct. 2422 (2021). The O'Brien Property has been committed to the use by the public pursuant to the Declaration. The Court should deny the Petition since the public use has not been disputed and deference should be accorded to the determination of OCIDA under this Court's precedent given the magnitude of the IHC and its obvious importance to the health care of the entire community. (R.7, ¶6(a), R.697, R.5217-5218, R.5245-5246, R.5891, ¶¶34-37,

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Block. The benefit to CUB is incidental to the overall public benefit of providing proximate access to health care services, the Hospital and the community event facilities. There is no purely private benefit since the use by the public is cemented by the Declaration. A conclusion that a pretext exists is not possible since the Declaration restricts the use of the O'Brien Property to a public parking lot which runs with the land and binds any successors or assigns.

R.5893, ¶3(b)-(c)). Despite the repetitious assertions in the Petition, no private transfer by OCIDA has occurred since its acquisition of the O'Brien Property on June 27, 2024. OCIDA remains the record owner of the O'Brien Property, and the Declaration governs the right of the public to park on the O'Brien Property.

II. THERE IS NO SPLIT BETWEEN NEW YORK AND OTHER HIGH STATE COURTS.

Petitioner asserts that "this case would have come out differently" had it been in three other states, somehow claiming that there is a split between the New York Court of Appeals and the highest courts of these other states. Pet. at 11-13. However, the cases cited by Petitioner do not support the existence of any split with other high state courts on a question of federal importance.

Petitioner cites *Middletown Tp. v. Lands of Stone*, 595 Pa. 607 (2007), for the proposition that in Pennsylvania a condemning agency "is not free to give mere lip service to its authorized purpose." 595 Pa. at 618. *Middletown Tp.* involved the acquisition of a large farm. The record showed that the town officials were clearly motivated by a desire to maintain open space by preventing the subdivision and development of the farm. The town officials nevertheless proposed to take the farm for an unspecified future recreational project. The Pennsylvania Supreme Court concluded, based on the applicable state statute, that the findings of fact did "not support the legal conclusion that the true purpose of the taking was for

recreational use." 595 Pa. at 618. The applicable statute authorized the exercise of eminent domain to acquire land for recreational purposes, but did not allow its use to create open space. As a result, the Pennsylvania Supreme Court held that the township lacked statutory authority to take the land. 595 Pa. at 617-618.

Petitioner does not cite any New York case that conflicts with the holding of the Pennsylvania Supreme Court in *Middletown Tp.* The assertion that this case would come out differently under the analysis in *Middletown Tp.* is unsupported. In *Middletown Tp.* the court found that although the condemning authority cited recreational use as the purpose for the condemnation, the record failed to support that use, and showed that the actual intended use was to maintain open space. Here, OCIDA condemned the O'Brien Property for the real and undisputed use as a parking lot for the public, and that is how the O'Brien Property is now being used.

Petitioner cites *Rhode Island Econ. Dev. Corp. v. The Parking Co.*, 892 A.2d 87 (2006). In that case, a private company had constructed a parking garage at an airport, in exchange for a twenty-year agreement to operate all parking facilities at the airport. The airport was operated by a subsidiary of the Rhode Island Economic Development Corporation. In the midst of negotiations to amend the agreement, the Rhode Island Economic Development Corporation undertook to acquire the right to operate the parking garage by granting itself an easement through condemnation. The Rhode Island Supreme Court invalidated the action. The

court specifically distinguished the taking of the parking garage easement from the condemnation at issue in *Kelo* on the ground that the taking in *Kelo* was undertaken pursuant to an established economic development plan. The Rhode Island Supreme Court stated: "The City of New London's exhaustive preparatory efforts that preceded the takings in *Kelo,* stand in stark contrast to EDC's approach in the case before us." 892 A.2d at 104. Here, of course, the IHC as a whole, including the parking lot on the O'Brien Property, was the result of years of careful planning.

Petitioner offers no explanation of how the holding in *Rhode Island Econ. Dev. Corp*. conflicts with any New York law. In fact, the case is consistent with the case cited by Petitioner, *Syracuse Univ. v. Project Orange Assoc. Servs. Corp.*, 71 A.D.3d 1432 (4th Dept. 2010), in which the Appellate Division found that a proposed condemnation of a steam system was not for a public purpose, but was intended to allow the condemnor's affiliate to escape from an unfavorable contract and which the affiliate had unsuccessfully attempted to renegotiate such contract. 71 A.D.3d at 1434. This is exactly what the Rhode Island Supreme Court held in *Rhode Island Econ. Dev. Corp.*, i.e., that the taking was not for a public purpose, but was undertaken to eliminate an unfavorable contract under which the condemnee had exclusive possession of the parking garage.

Finally, Petitioner cites *County of Hawaii v. C&J Coupe Fam. Ltd. P'ship*, 119 Haw. 352 (2008). In that case, the court held only that *Kelo* allows a reviewing court to "look behind" the condemner's stated purpose in certain circumstances. Upon remand and subsequent appeals, the Hawaii Supreme Court concluded that the use of eminent domain for a road was not pretextual and was a public use under the public use clause of the Hawaii Constitution. *County of Hawaii v. C&J Coupe Fam. Ltd. P'ship*, 124 Haw. 281 (2010).

Petitioner's assertion that this case would have come out differently under the decisions of the highest courts in other states is wholly unsupported. Pet. at 11. No New York Court has declined to consider an assertion that a taking for a public use was a pretext to benefit one private party over another. In fact, *Syracuse Univ. v. Project Orange Assoc. Servs. Corp.,* 71 A.D.3d 1432 (4th Dept. 2010), shows that New York courts will look behind the condemnor's stated purpose and will set aside the findings of a condemnor on public purpose.

The problem with Petitioner's assertion is that Petitioner introduced no evidence in the extensive proceedings below that the taking of the O'Brien Property was undertaken to benefit a private party. Instead, the record shows that the development plan for the IHC was prepared years prior to the time Petitioner was a contract vendee to acquire the O'Brien Property. The development plan for the IHC was not a subterfuge to benefit parties who were in no way known during the years that plan was developed. Initially, O'Brien challenged the final approval of the

parking use of the O'Brien Property in its SEQR challenge. Thereafter, O'Brien did not appeal from the dismissal of the challenge which necessarily bound Petitioner, a party in direct privity with O'Brien, pursuant to the doctrine of res judicata and/or collateral estoppel. *Bain v. Buechel*, 97 N.Y.2d 295, 305 (2001) *cert. denied* 122 S.Ct. 2293 (2002). Accordingly, the parking use of the O'Brien Property is for a public use and rational. Thereafter, Petitioner had every opportunity in the courts below, and before OCIDA, to create a record that the taking of the O'Brien Property to provide parking for the IHC was "illegitimate." Petitioner failed to do so.

CONCLUSION

For the reasons set forth herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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