No. 06-1159

IN THE
Supreme Court of the United States

KAUFMANN'S CAROUSEL, INC. and LORD & TAYLOR CAROUSEL, INC.,

Petitioners,

v.

CITY OF SYRACUSE INDUSTRIAL DEVELOPMENT AGENCY and CAROUSEL CENTER COMPANY, L.P.,

Respondents.

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

BRIEF IN OPPOSITION OF RESPONDENT CITY OF SYRACUSE INDUSTRIAL DEVELOPMENT AGENCY

ERIK S. JAFFE
Counsel of Record
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

Counsel for Respondent City of Syracuse Industrial Development Agency

Dated: March 29, 2007

CORPORATE DISCLOSURE STATEMENT

The City of Syracuse Industrial Development Agency ("SIDA") is a corporate governmental agency constituting a public benefit corporation of the State of New York. It has no parent corporation and no publicly held corporation holds any stock in SIDA. SIDA does, however, issue bonds, as it has done in connection with the DestiNY USA project at issue in this petition.

TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES

Pages

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

The only question presented by petitioners is whether the taking in this case of certain supposedly "financial provisions" of a lease is for *private* use rather than "public use" and hence barred by the Takings Clause. The petition does *not* present any question whether lease provisions in general, or the specific provisions at issue here, are "property" that may be taken; it does *not* present any question whether the development project is a public use for which property may be taken; and it does *not* present any question regarding the amount of compensation set aside as an undertaking to pay for the property taken. The petition instead only presents the narrow and fact-bound question whether a subset of the property rights had a sufficient nexus to the admitted public purpose of the development project for their taking to satisfy the public-use requirement of the federal Takings Clause.

That limited question was neither presented to, nor decided by, any court below. Indeed, petitioners twice *expressly denied* presenting any constitutional questions to New York's highest court, the Court of Appeals. Although they could have appealed as-of-right had they raised any state or federal constitutional issues, they sought leave to appeal only by permission, and affirmatively denied that they were entitled to an appeal as of right, thus representing to the Court of Appeals that no constitutional issues were involved in this case.

This Court thus lacks jurisdiction because petitioners *failed* to present any federal constitutional question to the State's highest court, as required by 28 U.S.C. § 1257(a), and affirmatively represented to the Court of Appeals that they were *not* raising any such issue. Such a representation below waived any hypothetical federal issue that might have been (but was not) raised earlier in the proceedings and abandoned the prospect of a ruling by the highest state court where review was plainly available. Under such circumstances, this

Court does not have jurisdiction to review an intermediate appellate court decision addressing strictly state-law issues.

Furthermore, even assuming, counter-factually, that the question presented was raised and decided below, this case is wholly unworthy of this Court's time and attention. There is no split, this case is a deeply flawed vehicle, and the question presented is ill-conceived and meritless in any event. In short, there is nothing to recommend this case for certiorari.

JURISDICTION

This Court lacks jurisdiction because the petition does not seek review of a judgment of the "highest court of a State in which a decision could be had," as required by 28 U.S.C. § 1257(a). As explained further in Part I, *infra* at 8-11, review of any federal constitutional issue in this case *could* have been had in the New York Court of Appeals as a matter of right, yet petitioners affirmatively declined to seek such review. The decision of the intermediate appellate court, which was subject to further review on any supposed constitutional issues, thus is not reviewable by this Court.

STATUTORY PROVISIONS INVOLVED

In cases arising from state court, this Court's jurisdiction is defined and limited by 28 U.S.C. § 1257(a), which provides, in relevant part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where * * * the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution * * *, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution * * *.

Review in the New York Court of Appeals of any constitutional claim may be had as of right pursuant to N.Y. CIV. PRAC. L. & R. § 5601(b), which provides, in relevant part:

> **(b) Constitutional grounds.** An appeal may be taken to the court of appeals as of right:
>
> 1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States * * *.

Only in cases where there is no appeal as of right, *i.e.*, no constitutional questions, may review be had in the Court of Appeals pursuant to N.Y. CIV. PRAC. L. & R. § 5602(a), which provides, in relevant part:

> **(a) Permission of appellate division or court of appeals.** An appeal may be taken to the court of appeals * * * by permission of the court of appeals * * *. Such appeal may be taken:
>
> 1. * * * (i) from an order of the appellate division which finally determines the action and which is not appealable as of right * * *.

COUNTERSTATEMENT OF THE CASE

1. Respondent SIDA has the statutory purposes "to promote, develop, encourage and assist in the acquiring, constructing, reconstructing, improving, maintaining, equipping and furnishing industrial, manufacturing, warehousing, commercial, research and recreation facilities" for the purposes of advancing "the job opportunities, health, general prosperity and economic welfare of the people of the state of New York and to improve their recreation opportunities, prosperity and standard of living." N.Y. GEN. MUN. LAW § 858. It fulfills its purposes by, *inter alia*, acquiring "real property or rights or easements therein" via eminent domain or otherwise, selling, conveying, or otherwise disposing of such property and

rights in its discretion, borrowing money or issuing bonds, and providing tax incentives. *Id*. §§ 858(4), (12) & (15).

In this case, SIDA was promoting a public benefit well within its statutory purposes by facilitating a development project known as DestiNY USA through use of its eminent domain power and by issuing bonds to finance that project. The various property rights condemned in this case stood as impediments to the development of that project and would have interfered, *inter alia*, with the overall construction, operation, and financing of that project.

2. The DestiNY USA project was an outgrowth and expansion of the earlier SIDA-supported project that created the Carousel Center. After SIDA tentatively determined that the DestiNY USA project had the potential to bring numerous public benefits to the city and the region, and recognizing that the implementation of the project would require the taking of certain property interests, SIDA held a public hearing. Pet. App. 27a. After that hearing, at which public input was invited and received, SIDA issued specific findings that the proposed takings would "help achieve the public purposes, uses and benefits expected to be derived from the DestiNY USA Project." *Id*. at 28a.

3. On June 3, 2002, petitioners brought a so-called Article 2 action in the Appellate Division pursuant to N.Y. EM. DOM. PROC. LAW § 207, to challenge SIDA's findings.[1] Petitioners did not assert a single constitutional claim, but instead

---

[1] The scope of review in such a proceeding is limited to whether:

> (1) the proceeding is in conformity with the federal and state constitutions, (2) the proposed acquisition is within the condemnor's statutory jurisdiction or authority, (3) the condemnor's determination and findings were made in accordance with procedures set forth in this article and with article eight of the environmental conservation law, and (4) a public use, benefit or purpose will be served by the proposed acquisition.

N.Y. EM. DOM. PROC. LAW § 207(C).

raised a variety of arguments alleging non-compliance with state-law requirements and supposed limits on SIDA's *statutory* authority. Not once did petitioners assert any claims under the federal or state Constitutions.[2] Furthermore, petitioners acknowledged that the DestiNY USA project would convert the existing mall into "a tourist destination and entertainment venue and include, among other things, an International Tourism/Exposition Center, over 4,000 hotel rooms, a recreational park, an aquarium, and a miscellany of other entertainment, lifestyle, recreation, dining and hospitality attractions." Verified Petition, at 8 (June 3, 2002). They thus conceded that the project involved a "public use." *Id*. at 11 (taking would "permit SIDA to devote its property to a qualitatively different public use [and] would leave [petitioners] with their stores as a portal for a far different public use").

4. On November 15, 2002, the Appellate Division rejected all of petitioners' state-law arguments. Pet. App. 25a-40a. Interpreting SIDA's statutory authority under N.Y. GEN. MUN. LAW § 858(4), the court held that "the leasehold interests [at issue] constitute interests in real property that may be acquired by SIDA under its power of eminent domain." Pet. App. 33a. Addressing several public-purpose arguments raised by the various parties, and analyzing public purpose exclusively as a state-law question under N.Y. EM. DOM. PROC. LAW § 207(C)(4), the court concluded that "SIDA's stated purposes for the acquisition of petitioners' property support the determination that the DestiNY USA project serves a legitimate public purpose, and that the public purpose is dominant." Pet. App. 37a-38a. The court rejected the argument by petitioners that SIDA lacked authority to condemn their interests in "property that is already devoted to a public

---

[2] The only references by petitioners to public use involved SIDA's asserted lack of "Statutory Authority and Jurisdiction" to take "land already devoted to a public use for a different public use" or to take property without establishing whether petitioners might *consent* to the proposed plans, rendering a taking unnecessary. Verified Petition, at 14-17.

purpose," finding instead that "here the initial public purpose would be furthered." Pet. App. 38a.[3]

5. On December 18, 2002, petitioners sought leave to appeal to the New York Court of Appeals. Motion for Leave to Appeal (Dec. 18, 2002). Petitioners expressly conceded that the matter was not appealable as of right, thus representing that they were not raising any constitutional issues. N.Y. CIV. PRAC. L. & R. § 5601(b). They instead invoked the discretionary appeal procedure applicable where, at a minimum, no constitutional issues are involved. N.Y. CIV. PRAC. L. & R. § 5602(a).

In their motion for leave to appeal, petitioners specifically averred that:

> (1) the decision and order of the Appellate Division "constitute a final judgment and determined all issues on the merits within the meaning of CPLR §§ 5611 and 5602(a)," Motion for Leave to Appeal, at 3;[4]
>
> (2) the "decision and order is not appealable as of right," *id*., as would otherwise have been the case had the appeal asserted constitutional issues; and
>
> (3) the Court of Appeals thus had "jurisdiction of the proposed appeal under CPLR § 5602(a)(1)(i)," the permissive appeals provision applicable in cases not raising constitutional issues, *id*.

Consistent with those representations, petitioners presented no federal or state constitutional questions to the Court of

---

[3] J.C. Penney, not a petitioner here, also asserted claims under the Due Process and Contracts Clauses, which the court rejected. Pet. App. 38a. Petitioners here neither joined in such claims then nor raise them now.

[4] New York law defines finality as follows: "If the appellate division disposes of all the issues in the action its order shall be considered a final one, and a subsequent appeal may be taken only from that order and not from any judgment or order entered pursuant to it. * * *." N.Y. CIV. PRAC. L. & R. § 5611.

Appeals and accordingly received no review or decision on any constitutional questions from the Court of Appeals.

6. On February 25, 2003, the Court of Appeals denied petitioners' motion for leave to appeal. *See* Pet. App. 11a, 19a.

7. On December 29, 2005, respondent SIDA initiated so-called Article 4 proceedings in the trial division of the New York Supreme Court, pursuant to N.Y. EM. DOM. PROC. LAW § 401, *et seq.*, to condemn the specific property interests of petitioners. Pet. App. 10a, 19a. In those proceedings, petitioners again raised only state-law objections, and asserted no federal or state constitutional claims.

8. On March 16, 2006, the trial court rejected all of petitioners' challenges and approved the condemnations. Pet. App. 12a-16a, 20a-24a. The trial court specifically found that SIDA was not "taking any more than is necessary for the DestiNY USA project." Pet. App. 15a, 23a. Petitioners then appealed to the Appellate Division.

9. On September 29, 2006, the Appellate Division affirmed, Pet. App. 7a-8a, relying upon its contemporaneous decision in the Article 4 condemnation proceeding involving another tenant, J.C. Penney, Pet. App. 2a-6a. Once again, the only claims raised in opposition to the condemnations were based on state law and they were rejected. Pet. App. 3a-5a.[5]

10. On October 4, 2006, petitioners again sought leave to appeal by permission in the Court of Appeals. As they had in 2002, they again represented, *inter alia*, that the "Memoranda and Orders are not appealable as of right," Motion for Leave to Appeal, at 5 (Oct. 4, 2006), as would otherwise have been

---

[5] Indeed, the only state-law challenge to public use was based upon the suggestion that the City might "be unable to undertake the Carousel project for which the condemnation is sought," Pet. App. 4a, an argument not renewed before this Court and that is now irrelevant in light of the progression of the project. Similarly, while petitioners at the time disputed the amount of compensation put aside by SIDA as security to pay for the takings at issue, *id*., they do not pursue that argument in this Court.

the case had the appeal raised any constitutional issues. Again, consistent with that representation, petitioners presented no constitutional questions to the Court of Appeals.[6]

11. On October 24, 2006, the Court of Appeals denied petitioners' motion for leave to appeal. Pet. App. 1a.

This petition for certiorari followed.

REASONS FOR DENYING THE WRIT

Certiorari should be denied because this Court lacks jurisdiction in that the federal constitutional question herein was not presented below, the petition is not from a decision of "the highest court of a State in which a decision could be had," as required by 28 U.S.C. § 1257(a), there is no split, the case is a poor and fact-bound vehicle for addressing the question presented, and the petition is meritless in any event.

I. THIS COURT LACKS JURISDICTION.

Under 28 U.S.C. § 1257(a), this Court has certiorari jurisdiction over cases arising in state court only from "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had" where "any title, right, privilege, or immunity is specially set up or claimed under the Constitution." The petition here fails to satisfy those mandatory jurisdictional prerequisites.

---

[6] Petitioners' passing mention, in their Motion for Leave to Appeal, at 15-16, of *Kelo* v. *City of New London*, 545 U.S. 469 (2005), raised no federal claim, but merely described that case as a "high water mark" for the use of eminent domain power and cited the *dissent* in *Kelo* as the impetus for many States to amend their own statutes to provide greater limits than does the federal Constitution. Petitioners' unfavorable comparison of the takings here with those in *Kelo* never argues that the takings here violate the federal Constitution, but rather is an aesthetic point intended to encourage more restrictive *state* jurisprudence, as in the other state examples petitioners cite. Such reference to *Kelo* not only is insufficient to present a federal claim, it seems to concede the lack of a federal claim post-*Kelo*.

First, as the counterstatement of the case amply illustrates, petitioners at no point below "specially set up or claimed" any rights under the Constitution, much less asserted the particular rights they now seek in the question presented.

While petitioners claim that in the 2002 Article 2 action they argued "that no public purpose would be served" by the condemnations here, Pet. 7, that claim is made without citation to the record, does not identify the basis for their allegation of no public purpose, and does not even assert that their argument was based on the federal or state Constitution, as opposed to on narrower statutory grounds.[7] And the only state-law public-purpose argument petitioners appear to have raised in that proceeding was that their property was already devoted to a public purpose and hence could not be taken for a *different* public purpose, Pet. App. 38a, an argument they do not renew in this Court. Petitioners' further contention that they challenged the public purpose of the takings in the 2005 Article 4 proceedings, Pet. 10, refers at most to a dispute over the "necessit[y]" for taking one of the several lease provisions and similarly fails to identify any constitutional basis for their arguments. Such disputes over the proper scope of a taking, or the "necessity" to acquire particular property interests, are state-law questions. *See infra* at 11-12 & n. 11.

Second, aside from their failure *ever* to raise a federal constitutional question, petitioners now seek review from the decision of an *intermediate* appellate court, not from any

---

[7] Indeed, this Court in *Kelo* recognized that States may impose and have already imposed "'public-use' requirements that are stricter than the federal baseline," either as a matter of state constitutional law or "state eminent domain statutes that carefully limit the grounds upon which takings may be exercised." 545 U.S. at 489. Precisely because federalism allows for such differing public-use standards, it is essential for parties to *specifically* invoke the federal Constitution if that, rather than state law, is the basis for their claim. A bare discussion of "public use" is insufficient. *Webb* v. *Webb*, 451 U.S. 493, 495-98 (1981) (bare mention of "full faith and credit" insufficient to present federal, rather than state, issue).

judgment of the "highest court" in which a constitutional ruling "could [have been] had," but was never sought.

As set forth in the counterstatement of the case, petitioners could have "had" review and a ruling in the Court of Appeals on any supposed constitutional issues via appeals as of right, in either the Article 2 or Article 4 proceedings. They elected not to seek such appeals, thereby either conceding that no constitutional issues were presented or waiving any such issues as they might have imagined were presented in the lower courts. Indeed, they affirmatively represented to the Court of Appeals, in both of their motions, that an appeal as of right was *not* available, thus admitting that they were not presenting any constitutional issues. Such admissions were effective to preclude further review in the highest court as of right, and are equally effective at negating this Court's jurisdiction. *Parker* v. *Illinois*, 333 U.S. 571, 574-75 (1948).

Assuming that there was ever a constitutional issue presented to the lower courts in this case, petitioners' failure to take an appeal as of right means *there is no decision* on any constitutional issue from the "highest court of a State in which a decision *could be* had."[8] This petition from the decision of the *lower* Appellate Division, which could have been but was not appealed as of right to the Court of Appeals, therefore is outside the scope of this Court's jurisdiction.[9]

Third, even ignoring petitioners' failure to raise *federal* constitutional issues below, any petition to this Court on public-use issues arguably should have been taken from the final

---

[8] The denial of motions for leave to appeal that flatly denied presenting any constitutional question of course could not resolve any such question.

[9] *Gotthilf* v. *Sills*, 375 U.S. 79, 80 (1963) (failure to utilize available New York procedure for appeal to the Court of Appeals renders judgment of Appellate Division" non-reviewable); Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, SUPREME COURT PRACTICE 115 (7th Ed. 1993) ("Stern & Gressman") ("Where there is a review as of right of intermediate court decisions, of course, such review must be sought.").

judgment in the 2002 Article 2 proceeding. It is that proceeding where constitutional issues should have been raised, N.Y. EM. DOM. PROC. LAW § 207(C), and petitioners themselves have represented that the resolution of that proceeding "constitute[d] a final judgment and determined all issues on the merits." Motion for Leave to Appeal at 3.[10]

II. THERE IS NO SPLIT ON THE QUESTION PRESENTED.

Disregarding the nature of a "conflict" among courts of appeals or highest state courts as referred to in this Court's rules, S. CT. R. 10(b), petitioners assert generic conflict and confusion among courts, often over issues not even presented by the question in their petition.

For example, petitioners assert a conflict between courts that supposedly ignore "any concern about the possibility of self-dealing" and other courts that "have required the government to demonstrate a causal connection between the taking and the alleged public use." Pet. at 22-23.

To begin with, the Appellate Division's brief discussion of the state-law public-use issue correctly observed that the mere presence of some private benefit does preclude a public purpose where the public benefit outweighs the incidental private benefit. Pet. App. 37a-38a. That state-law standard by no means *ignores* concerns over incidental private benefits from a taking, and is entirely consistent with this Court's decision in *Kelo* v. *City of New London*, 545 U.S. 469, 485-87 (2005) (finding public use despite significant private benefit).

Similarly, the court in *HTK Management, L.L.C.* v. *Seattle Popular Monorail Authority* did not ignore concerns over incidental private benefits and addressed a situation where pub-

---

[10] Furthermore, petitioners' failure to raise any constitutional issues on appeal from the 2002 Article 2 proceeding seems also to represent a procedural default that constitutes an adequate and independent ground for not considering such issues in subsequent proceedings, even had petitioners later raised such issues, which they did not. Stern & Gressman, at 126.

lic use was "undisputed." 121 P.3d 1166, 1175 (Wash. 2005). Indeed, the portion of *HTK* cited by petitioners addresses the *state*-law requirement of "necessity," without mentioning the federal Constitution or citing a federal case. *Id*. at 1176-77.[11] The only similarity between *HTK* and the decisions below is that none of them address the Fifth Amendment or involve the question presented here.

As for the sole supposedly conflicting appellate case, *Rhode Island Economic Development Corp.* v. *The Parking Co.*, 892 A.2d 87 (R.I. 2006), Pet. 23, the court there rejected the taking of a temporary easement because it deprived the property owner of *all* possession and benefit of its parking garage without even a colorable claim to a public purpose. *Id*. at 105-07. Indeed, the primary asserted purpose for the taking – "increased parking" – was found to be pretextual based on particular facts belying such interest. And, the holding was driven in large part by the agency's failure to disclose in the *ex parte* proceedings below that it had a purchase option for the same property at a pre-agreed price, thus misleading the lower court into setting just compensation far below that agreed purchase price. *Id*. at 104-05. Under such fact-bound circumstances, it is no wonder that the alleged public purpose was deemed a pretext. But such circumstances bear no resemblance to the present case – where the "public" purpose of the DestiNY USA project as a whole is conceded and is in no way pretextual – and demonstrate mere differences in *facts*, not in legal principles, between the two cases.[12]

---

[11] *See also Rhode Island Econ. Dev. Corp.* v. *The Parking Co.*, 892 A.2d 87, 96 (R.I. 2006) ("[W]hether a taking constitutes a public use is a judicial question. * * * [I]n contrast to establishing the nature of the use, the necessity and expediency of the taking to further the public use is purely a legislative question in which the courts do not engage.").

[12] *MHC Fin. Ltd. Partnership* v. *City of San Raphael*, No. 00-3785, 2006 WL 3507937, at *14 (N.D. Cal. Dec. 5, 2006), cited by petitioners, at 23, is a district court case not meaningful to any claimed split and held only that there needs to be some evidence of public purpose, and that the City

Petitioners' further assertion, at 23-24, that there is confusion over the *standard* to be applied to claims of private favoritism likewise does not present a "conflict."

As a preliminary matter, none of the cases cited by petitioners are precedential decisions from a federal court of appeals or a highest state court. *Cf.* S. CT. R. 10(b). *Western Seafood Co.* v. *United States*, 202 Fed. Appx. 670 (CA5 2006) is an unpublished opinion and *Diddien* v. *Village of Port Chester*, 173 F. Appx. 931 (CA2 2006), *cert. denied*, 127 S. Ct. 1127 (2007), is a summary order, neither of which is considered precedent by their respective circuits. *99 Cents Only Stores* v. *Lancaster Redevelopment Agency*, 237 F. Supp.2d 1123 (C.D. Cal. 2001), *appeal dismissed as moot*, 60 F. Appx. 123 (CA9 2003), and *In re Redevelopment Authority of City of Philadelphia*, 891 A.2d 820 (Pa. Commw. Ct.), *appeal granted*, 903 A.2d 539 (Pa. 2006), are both trial court decisions of no precedential significance, with the former having been dismissed as moot and the latter being on appeal to the Pennsylvania Supreme Court.[13]

Furthermore, *Western Seafood* affirmatively *declined* to reach the issue on which petitioners assert a split. 202 F. Appx. at 675. If anything, the case illustrates why the decision to deal with a particular private party for a development project is a fact-bound matter not especially probative of favoritism. *Id*. at 675 & n. 9 (city had ample reasons to deal with a pre-existing party with an obviously compatible interest in the development; source of idea for development was irrelevant to accusations of favoritism). Similarly, *Diddien* was resolved on statute-of-limitations grounds, not on the tak-

---

proffered "no such evidence." In this case there is ample evidence of, and petitioners do not dispute, the public benefits of the DestiNY USA project.

[13] The passing citation to *99 Cents* by this Court in *Kelo* is not even remotely the approval suggested by petitioners, Pet. 24, but merely an observation attached to this Court's statement that bare one-to-one transfers were "not presented in this case," and that it was *not* going to address such hypotheticals until "they arise." *Kelo*, 545 U.S. at 487 & n. 17.

ings issue, mentions private use only in *dicta*, and even then quotes this Court's decision in *Kelo* for the proposition that "'[j]ust as we decline to second-guess the City's considered judgments about the efficacy of its development plan, we also decline to second-guess the City's determinations as to what lands it needs to acquire in order to effectuate the project.'" 173 F. Appx. at 933 (quoting 545 U.S. at 488-89).[14] Thus, not only do such cases not *conflict* with the decisions below here, their *dicta* actually would support the result below if a constitutional claim actually *had* been raised.

Lastly, petitioners suggest a generic conflict of some sort on the need for a "reasoned justification" for takings. Pet. 24-25. Such generic conflicts, of course, are the last resort of litigants who cannot find an *actual* split and, in any event, the cases cited do not support any conflict.

Petitioners' reliance on *Daniels* v. *Area Plan Commission*, 306 F.3d 445 (CA7 2002), is wildly misplaced. The Seventh Circuit only refused to apply the ordinary substantial deference to a stated public purpose because the Commission in that case lacked specific statutory authority to take property and had no *legislatively* set purposes against which to measure its actions. *Id*. at 460-61, 464. Indeed, Indiana law, unlike New York law, precluded the Commission from taking property for "economic development" and determined that such development "does not constitute a public purpose sufficient to satisfy the public use requirement * * * under Indiana

---

[14] Even the case on which petitioners primarily rely, *Rhode Island Economic Development Corp.*, applies the lenient standard that petitioners eschew. *See* 892 A.2d at 101 ("'[W]here the legislature declares a particular use or purpose to be a "public use" such a declaration will control unless the use or purpose in question is obviously of a private character.'") (citation omitted); *id*. at 103 ("[I]t is not for this Court to question whether a taking authorized by the General Assembly will accomplish its intended goals because the constitution is satisfied if the Legislature '*rationally could have believed* that the enactment would promote its objective.'") (citation omitted; emphasis in original).

law." *Id*. at 463. Here, of course, the New York legislature has expressly defined the public purposes for which SIDA may condemn property, N.Y. GEN. MUN. LAW § 858, the taking is based precisely on such purposes, and even the Seventh Circuit would give SIDA's determination of public purpose the substantial deference it withheld in *Daniels*.

Petitioners' citation to *South West Illinois Development Authority* v. *National City Environmental, L.L.C.*, 768 N.E.2d 1 (Ill.) ("*SWIDA*"), *cert. denied*, 537 U.S. 880 (2002), Pet. 25, is similarly misleading. In *SWIDA*, the Illinois Supreme Court based its holding on the supposedly "essential" notion that "public use" is somehow different and narrower than a "public purpose." 768 N.E.2d at 8, 9. That notion and the added scrutiny imposed in *SWIDA*, if they were ever good law at all, are now plainly rejected as expressions of *federal* constitutional law. *See Kelo*, 545 U.S. at 479-480 (public use coextensive with public purpose); *id*. at 480 (noting "longstanding policy of deference to legislative judgments" of public purpose); *id*. at 488-89 (refusing to "second-guess" determinations about "the amount and character" of property needed to further a public purpose). Furthermore, aside from being superseded by *Kelo*, *SWIDA* dealt with a transfer of property that was far more clearly designed to benefit an individual business rather than the public, whereas this case involves an extensive development project with public benefits easily equaling or exceeding those proffered in *Kelo* itself.[15]

In sum, the notion that there is a split, a conflict, or anything else that would warrant this Court's present attention is, at best, wishful thinking.

---

[15] The other two cases cited by petitioners, Pet. 25, are similarly irrelevant. *MHC Financial*, 2006 WL 3507937, at *14, is, again, a district court case that does not conflict with the decisions below. *See supra* at 12-13 n. 12. And this Court's decision in *City of Cincinnati* v. *Vester*, was decided on state-law grounds, specifically "refrain[ed] from expressing an opinion" on the constitutional questions argued, and thus does not even remotely conflict with the present case. 281 U.S. 439, 449 (1930).

III. THIS CASE IS A POOR VEHICLE FOR ADDRESSING THE QUESTION PRESENTED.

Even were this Court to assume that federal issues were presented, *sub silentio*, at some undefined point below, this case would still be an exceedingly poor vehicle for addressing the question presented in the petition.

First, the decisions below do not *discuss* or *decide* any federal questions, much less the question presented, and thus provide this Court no baseline for its own analysis of this case. This Court thus would find itself in the awkward position of "reviewing" a hypothetical decision, based on hypothetical reasoning, and then being asked to criticize the courts below for not providing a different (indeed, any) answer to a question they were never asked to address. That not only would burden this Court, it would deny the state courts the respect they are due as independent interpreters of the federal Constitution in the first instance, subject to *review*, but not disregard, by this Court. Stern & Gressman, at 117.

Second, this case is exceedingly fact-bound. The operation of the lease provisions in question are not shown to be typical, their interaction with the development project is quite situation specific, and petitioners' charges of favoritism turn on numerous facts surrounding the ample reasons for sticking with the developer from the original Carousel Center project. Furthermore, because the question presented here was not litigated below, those facts and others are largely absent from the record, giving this Court no foundation for evaluating petitioners' now-asserted lack of necessity for taking the so-called "financial" provisions of the leases or whether such provisions stood as an impediment to the development project. Petitioners cite no record evidence in support of such distinctly factual claims. Pet. 10, 12, 18.[16]

---

[16] Petitioners' erroneous assertion that SIDA was "goaded" into the takings at issue in this case, Pet. 6, though of uncertain relevance, is similarly

Third, because the Court of Appeals has never opined on the rulings of the Appellate Division in this case, the petition here is premature in that any (hypothetical) rulings of law regarding the Takings Clause are not even a final description of the law in New York State, and hence could easily be altered when a party finally presents such issues to the Court of Appeals. It is presumptuous for petitioners to ask *this* Court to expend its limited time and resources on this case when petitioners did not bother even *informing* the Court of Appeals of the issues they now raise.

Fourth, the mere presence of jurisdictional problems here at a minimum would divert time and attention from the merits and makes this case a poor vehicle. Even assuming the hypothetical possibility that petitioners could overcome the plain jurisdictional defects here, it would be preferable for this Court to await a less problematic vehicle.[17]

Fifth, given petitioners' own characterization of this case as the supposedly novel "herald[]" of a "'new era in condemnation strategy,'" Pet. 2, 13, this Court has ample reason to avoid swimming in unknown waters and should allow any issues supposedly raised by this case to percolate. Indeed, if

---

fact-bound and lacking in record support. The bare and meaningless opinions of a commentator on leases hardly compensate for petitioners' failure to make their record below.

[17] Another problem here is petitioner Lord & Taylor Carousel, Inc.'s recent disclosure that it has not, since October 2, 2006, had any interest in the current dispute, which raises considerable doubt whether the petition is effective regarding the former Lord & Taylor interests. *See* Letter from Daniel J. Moore to William K. Suter, March 21, 2007 (on file with the Court). When the petition was filed, the named petitioner seems to have lacked any legal interest, and hence standing, to file the petition. There is likewise no suggestion that Lord & Taylor was authorized to act on behalf of the new owner of such interests, LT Propco, LLC, which did not itself timely seek certiorari. It seems at least highly debatable whether the new owner now simply can adopt the petition filed by the then-legally-disinterested Lord & Taylor. Whatever the proper resolution of that issue, it injects further difficulty and distraction into an already doubtful vehicle.

petitioners are correct in their predictions of a "new era" of similar takings cases, then one can certainly expect sufficient future opportunities to review any issues if and when a split arises and a case properly presents such issues.

IV. THE PETITION IS WITHOUT MERIT IN ANY EVENT.

The narrow question presented in the petition – whether the taking of so-called "financial" lease rights fails to serve a public use – has no merit and bears little relationship to many of the arguments raised in the petition.

First, the petition's extended discussion of vested rights and retroactive abrogation of rights, Pet. 14-17, has *nothing* to do with the question presented given that all takings, by definition, retroactively take or void vested rights. Saying that a right is *vested* is no more than saying that it is a *property* right, which is not in dispute before this Court. Indeed, that is why petitioners are receiving compensation at all. Similarly, saying that their rights were retroactively voided – aside from being inaccurate as only the prospective operation of the lease provisions was affected – says nothing more than that they were "taken."

And, while petitioners hand-wring over the fact that the takings here involved only "selected contract rights" in leases appurtenant to real property, Pet. 2, 10, they ignore that such rights are indeed "property" under New York law, Pet. App. 33a, they ignore that government plainly may take only some of the twigs in the bundle of rights that is property, Pet. App. 34a, the question presented does not challenge the categorization of such lease provisions as "property," Pet. i, and, if petitioners *did* dispute the categorization of such lease rights as property, they simply would be denying the very *applicability* of the Takings Clause at all.

Likewise, petitioners' citation to cases regarding the unequal imposition of the burden of public activities, Pet. 16, is both misleading and irrelevant in the context of a takings case where petitioners do not challenge in this Court the undertak-

ing for just compensation set by the courts below. Indeed, arguments regarding spreading the cost of government action are the very reason why compensation is provided in such instances, as it is being provided here. Petitioners' suggestion, therefore, that they are unfairly being forced to bear more of the cost or risk associated with the development project, Pet. 18-19, entirely ignores that they are being *compensated* for the takings.[18] To the extent they claim that the lease provisions at issue insulated them from greater costs and risks, that is an argument going to the *amount* of compensation, which they do not challenge here, not to the legitimacy of the public purpose in taking those provisions.

Second, petitioners' claim, at 11, 18-21, that takings to decrease the *cost* of a public-purpose development project inure only to the private benefit of a developer, is badly misconceived. It is SIDA, after all, that is financing the project by issuing bonds, and removing impediments that would hinder or increase the expense of such financing plainly benefits SIDA and the development project as a whole, thus furthering the public purpose of that project. So long as the public, through SIDA, pays compensation for the removal of such impediments, the Takings Clause is satisfied and the benefits of lower-cost financing properly inure to the public.

Furthermore, the very point of development assistance provided by entities such as SIDA, whether through tax incentives, subsidies, infrastructure improvements, or takings, is to reduce the *cost* of development and thereby encourage such publicly beneficial projects. Petitioners' arguments characterizing cost-reduction as a purely private benefit thus would

---

[18] Such unchallenged compensation renders the taking an economic wash, and does not impose any net costs on, or take wealth from, petitioners. *See Kelo*, 545 U.S. at 487 n. 19 ("A parade of horribles is especially unpersuasive in this context, since the Takings Clause largely 'operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge.'") (citation omitted).

indict all development assistance as lacking a public purpose, a position squarely rejected by this Court in *Kelo*. 545 U.S. at 484-86 (rejecting proposed "rule that economic development does not qualify as a public use" notwithstanding the fact that "government's pursuit of a public purpose will often benefit individual private parties"); *id*. at 481-82 (recognizing "'monetary'" and "cost" components to promoting public welfare) (citation omitted).

Third, petitioners' attempt, at 17-18, to apply its public-use analysis at the retail level – to individual takings or to mere subsets of the property taken – confuses the federal question of public use with the state question of the necessity and scope of a particular taking. *See supra*, at 11-12 & n. 11. Once again, *Kelo* expressly rejected such a particularization of the public-use inquiry. 545 U.S. at 481 (rejecting "'piecemeal'" analysis of a taking) (citation omitted); *id*. at 484 (Court should "resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan * * * [which] unquestionably serves a public purpose").

In the end, petitioners merely seek to revisit and relitigate issues that have already been recently resolved by this Court in *Kelo*, and cite numerous irrelevant and inapplicable cases to create the illusion, but not the reality, of a problem where none exists. Their property interests have been taken in the service of a large development project having a plainly public purpose and petitioners are being justly compensated for those takings. The scope and necessity of the takings here, as opposed to the public purpose of the project as a whole, are not judicial questions and thus the petition lacks merit.

CONCLUSION

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

Respectfully submitted,

ERIK S. JAFFE
Counsel of Record
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

Counsel for Petitioner
City of Syracuse Industrial
Development Agency

Dated: March 29, 2007