PRELIMINARY STATEMENT

Senator Bill Perkins respectfully submits this brief as amicus curiae to urge the Court to uphold the Appellate Division's decision, which held invalid the Empire State Development Corporation's (ESDC's) determination and findings, made pursuant to section 204 of the Eminent Domain Procedure Law, and disallowed ESDC's use of eminent domain to take petitioners' property and transfer it to Columbia University for a private campus expansion project.

INTEREST OF THE AMICUS CURIAE

The amicus represents the 30th Senatorial District of New York, which is part of New York City and encompasses Harlem, the Upper West Side, and Washington Heights. The district encompasses the Manhattanville site of Columbia University's proposed expansion project, and is home to many residents and businesses that would be adversely affected by the project. As their representative, amicus has a very strong interest in ensuring that development within the district proceeds equitably and fairly, especially for the district's minority, elderly, and economically disadvantaged residents. These groups, although marginalized in the project approval process, would be disproportionately impacted by the expansion project.

The amicus also serves as Chair of the Senate Standing Committee on Corporations, Authorities and Commissions, which oversees matters relating to public authorities such as ESDC. As chair of the committee, amicus helped to pass the Public

Authorities Reform Act of 2009,[1] which clarified that public authority boards have a fiduciary duty and which enacted reforms to increase the transparency and accountability of public authorities. Accordingly, amicus has a particular interest in ensuring that ESDC acts lawfully and in the best interests of the public.

STATEMENT OF FACTS

Amicus adopts the Statement of Facts in petitioners' briefs.

SUMMARY OF ARGUMENT

In this case, the Appellate Division plurality held invalid ESDC's attempt to condemn petitioners' property in order to transfer it to Columbia for an essentially private campus development project.[2] This was the correct result, and the decision should be upheld.

Eminent domain, while an inherent and necessary attribute of government, is among the most intrusive governmental powers permitted under the federal and state constitutions. The public use clauses of the New York and federal constitutions were intended to place limits on the scope of this power and thereby safeguard the right to own and use private property—rights that have long been understood to be essential to our system of ordered liberty.[3]

---

[1] 2009 N.Y. Laws 506.
[2] Matter of Kaur v. New York State Urban Dev. Corp., 2009 N.Y. Slip Op. 8976 (1st Dept. 2009).
[3] N.Y. Const. art. 1, § 7; U.S. Const. amend. V. For the importance property rights to our democratic system, *see* The Federalist No. 54, at 370 (Jacob E. Cooke ed., 1961) (James Madison) ("government is

While it is settled law that the task of defining the "public use" is legislative in nature, the courts remain responsible for determining whether a public use actually exists in a particular case, or whether an asserted public use is being put forward in bad faith or as a mere pretext. The judicial function in public use challenges is not only deeply rooted in case law and history; it is a crucial check on the legislative power and necessary to the working of a truly democratic process. Thus, while blight removal may generally be a public use, the court below rightfully accepted its responsibility to review the facts of this case to determine whether blight removal was, in fact, the true purpose of the takings at issue. To do otherwise would have been an abdication of the court's duty.

The petitioners' evidence shows that ESDC and Columbia acted in bad faith to manufacture a pretextual basis for condemning their property, as the true purpose—to transfer the land to an elite private university for a private campus development—is not a public use. Columbia not only designed and funded the development plans; it also disregarded existing community planning objectives and let its own properties in the project footprint decay so as create its own blight. ESDC, moreover, sought no competing proposals for the property, and it hired Columbia's consultant to compile the blight study which would eventually serve as the basis for the condemnation. Upon this record, the Appellate Division plurality correctly held that ESDC acted unreasonably and in bad faith. The plurality's decision and its review of petitioners' evidence of bad faith is

---

instituted no less for the protection of property than of the persons of individuals."); James Madison, Property, National Gazette (Mar. 27, 1792), *reprinted in* 14 The Papers of James Madison 266 (Robert Rutland, et al. eds., 1983) ("Government is instituted to protect property of every sort... This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own."); United States v. James Daniel Good Real Prop., 510 U.S. 43, 61 (1993) ("Individual freedom finds tangible expression in property rights."); Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972) ("The right to enjoy property without unlawful deprivation.., is, in truth a 'personal' right .... In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.").

especially important given the historical abuse of eminent domain for urban redevelopment and the negative impacts that redevelopment has on minority and low income residents who have the least to gain and the most to lose from the process.

This Court should also uphold the plurality's conclusion that the statutes authorizing ESDC to condemn blighted property are unconstitutionally vague and thus invalid. The concept of blight, as this Court has recognized, is extremely flexible. While it may be the legislature's duty to enact specific criteria for blight, this Court nevertheless has a duty to ensure that property deemed blighted conforms to the most basic element of blight, namely, that it is an actual economic or social liability that threatens surrounding property or persons.

Finally, this Court should uphold the lower court's holding that petitioners' due process rights were violated when ESDC closed the record while withholding public documents. This action interfered with the petitioners' ability to present a full record of the facts and to have their arguments meaningfully heard. ESDC's conduct also went against the fundamental purpose of the Freedom of Information Law to facilitate citizen access to agency documents and thereby strengthen the accountability and transparency of government operations.

ARGUMENT

1. THE EXISTENCE OF A "PUBLIC USE" IS A CONSTITUTIONAL ISSUE THAT IS ULTIMATELY A MATTER FOR THE COURTS AND THE PLURALITY CORRECTLY REVIEWED THE RECORD FOR EVIDENCE OF PRETEXT AND BAD FAITH

A. THE DUE PROCESS AND PUBLIC USE CLAUSES OF THE NEW YORK CONSTITUTION PROTECT INDIVIDUAL RIGHTS AND LIMIT THE LEGISLATIVE POWER TO CONDEMN INDIVIDUALS' PROPERTY

While this Court has long recognized that great deference is due to the legislature in defining the public uses for which eminent domain may be used, this Court has also repeatedly explained that "whether or not a proposed condemnation is for a public purpose is a judicial question."[4] Indeed, although the courts must avoid intruding on legislative and executive functions, "it is the province of the Judicial branch to define, and safeguard, rights provided by the New York State Constitution, and order redress for violation of them[.]"[5] Like other constitutional rights, the courts therefore have a duty to protect individuals' rights to own and maintain property—rights which are the subjects of the due process and public use clauses of the New York Constitution[6]—and this requires

[4] Denihan Enterprises, Inc. v. O'Dwyer, 302 N.Y. 451, 457 (1951). *See also* In re Petition of Deansville Cemetery Ass'n, 66 N.Y. 569, 572 (1976) ("Whether the use is of a public or private nature can only be determined by a judicial inquiry"); New York City Housing Authority v. Muller, 270 N.Y. 333, 339 (1936) ("legislative findings and the determination of public use are not conclusive on the courts"); Cannata v. New York, 11 N.Y.2d 210, 215 (1962) (adjudging the constitutionality of the vacant land redevelopment statute on its face and as applied); Yonkers Community Development Agency v. Morris, 37 N.Y.2d 478, 485 (1975) ("courts are required to be more than rubber stamps in the determination of the existence of substandard conditions in urban renewal condemnation cases. The findings of the agency are not self-executing. A determination of public purpose must be made by the courts themselves and they must have a basis upon which to do so.").

[5] Campaign for Fiscal Equity, Inc. v. State of New York, 8 N.Y.3d 14, 28 (2006) (quoting Campaign for Fiscal Equity, Inc. v. State, 100 N.Y.2d 893, 925 (2003)). *See also* Marbury v. Madison, 5 U.S. 137, 176-178 (1803) ("The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.... It is emphatically the province and duty of the judicial department to say what the law is.... So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.").

[6] N.Y. Const. art. I, §§ 6-7.

the courts to invalidate takings that are undertaken in bad faith or premised on merely pretextual public uses.

B. URBAN RENEWAL AND ECONOMIC DEVELOPMENT CONDEMNATIONS ARE PARTICULARLY SUSCEPTIBLE TO ABUSE THROUGH BAD FAITH AND THE ASSERTION OF PRETEXTUAL PUBLIC USES

The New York Constitution conclusively establishes that slum clearance and redevelopment is a public use for which eminent domain may be used.[7] Unfortunately, the redevelopment process provides many opportunities for abuse and rent seeking, and the heightened potential for abuse increases the importance of meaningful judicial review.[8]

The increased risk of eminent domain abuse in redevelopment projects is explained by public choice theory,[9] which suggests that redevelopment agencies will be particularly susceptible to capture by private interests.[10] "In the urban renewal context,

---

[7] N.Y. Const. art. XVIII.

[8] Kelo v. New London, 545 U.S. 469, 491 (2005) (Kennedy, J., concurring) (explaining that the courts should treat plausible allegations of bad faith and pretext seriously and review the record carefully to determine whether they have merit).

[9] Public choice theory rejects the assumption that democratic governments represent the people and strive to serve a body of common public interests. Instead, "the 'public choice' school, argues that there is no such thing as the 'public interest,' only initiatives that help one private interest or the other. Laws adopted ostensibly to help the public are in reality the masked use of government to help one group at the expense of others - be it business interests who are helped by regulation of their competitors or outdoor enthusiasts aided by laws restricting private development in parklands." Paul Boudreaux, *Eminent Domain, Property Rights, and the Solution of Representation Reinforcement*, 83 Denv. U.L. Rev. 1, 18 (2005).

[10] Numerous commentators have concluded that the eminent domain power, especially when used to transfer property to private developers, is liable to be captured by private interests. *See, e.g.*, id.; Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 Cornell L. Rev. 1, 34 (2006); James W. Ely, Jr., *Thomas Cooley, "Public Use," and New Directions in Takings Jurisprudence*, 2004 Mich. St. L. Rev. 845, 857 (2004) (citing Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 Tex. Rev. L. & Pol. 49, 115 (1998)); Steven J. Eagle, *Kelo, Directed Growth, and Municipal Industrial Policy*, 17 S. Ct. Econ. Rev. 63, 83-85 (2009); Ilya Somin and Jonathan H. Adler, *The Green Costs of Kelo: Economic Development Takings and Environmental Protection*, 84 Wash. U. L. Rev. 623, 659-660 (2006); Joseph J. Lazzarotti, *Public Use or Public Abuse*, 68 UMKC L. Rev. 49, 51 (1999); Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 Yale L. &

the interests converging are typically those of city officials and developers in order to accomplish the designated projects. Unfortunately, the city officials and developers' perception of public good often fails to consider the interest of economically marginalized citizens."[11] Moreover, many redevelopment agencies, ESDC included, are run by unelected boards that insulate them from public opinion and allow private interests to more easily influence the eminent domain process to their own advantage.[12] The power dynamics predicted by public choice theory are evident in the case at bar, where Columbia University, with the help of extensive lobbying,[13] pushed its expansion plans through the development approval process over the Community Board's competing 197-a

---

Pol'y Rev. 1, 4 (2003). The condemnation process can of course be captured by private interests in contexts other than redevelopment, as where a property owner seeks to have a road condemned to better facilitate access to its land. *See, e.g.*, Waldos, Inc. v. Village of Johnson City, 74 N.Y.2d 718 (1989); County of Hawaii v. C & J Coupe Family Ltd. P'ship, 119 Haw. 352 (2008). However, this is not typical of road condemnations, whereas redevelopment projects almost always provide substantial benefits to particular private developers.

[11] Michele Alexandre, *"Love Don't Live Here Anymore": Economic Incentives for a More Equitable Model of Urban Redevelopment*, 35 B.C. Envtl. Aff. L. Rev. 1, 14 (2008); *see also* Boudreaux, *supra* note 9, at 4.

[12] *See* Gideon Kanner, *"Unequal Justice Under Law": The Invidiously Disparate Treatment of American Property Owners in Takings Cases*, 40 Loy. L.A. L. Rev. 1065, 1082-1083 (2007) (criticizing the Supreme Court for applying an unduly low standard of review to condemnation decisions made by unelected redevelopment agencies); Amy Lavine and Norman Oder, *Urban Redevelopment Policy, Judicial Deference to Unaccountable Agencies, and Reality in Brooklyn's Atlantic Yards Project*, 42 Urb. Law --- (forthcoming Spring 2010). In Georgia, legislation was passed following *Kelo* to eliminate unelected officials' ability to use eminent domain because "[l]awmakers believed there was a need for accountability in the condemnation process". Jody Arogeti, Anita Bhushan, Jill M. Irvin & Jessica Kattula, *Eminent Domain*, 23 Ga. St. U.L. Rev. 157, 182 (2006) (citing Ga. L. 2006, p. 39/HB 1313).

[13] Columbia was the second largest spender on lobbying in the state of New York in 2007, much of its resources likely be used to encourage support for the expansion. Kenneth Lovett, *Teachers 'Buy' Albany – Unions Drop $3M to Lobby*, The New York Post, Apr. 10, 2008, p. 6; *see also* Scott Levi, *Money, Words Fly in Heated Public Relations Battle*, The Columbia Spectator, Jan. 22, 2008, http://www.columbiaspectator.com/2008/01/22/money-words-fly-heated-public-relations-battle (noting that in 2007, Columbia paid more than $300,000 to Bill Lynch Associates to lobby for the Manhattanville expansion); Sheila R. Foster and Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Redevelopment*, 95 Calif. L. Rev. 1999, 2026 (2007) ("their [community groups'] combined resources and capacity were miniscule in comparison to those of [Columbia] University").

plan, a plan that had been crafted through years of inclusive community planning efforts.[14]

Where private interests capture quasi-public redevelopment agencies, the malleability of the concept of blight accrues to their advantage. As this Court recently recognized in *Matter of Goldstein v. Urban Development Corporation*, the threshold for deeming property "blighted" is extremely low.[15] But when nearly any property in an urban area can be deemed "blighted" and therefore subject to condemnation, the motivation for redeveloping a particular area is more likely to be based on its desirability for private development, and not the severity of substandard conditions or the actual existence of market problems necessitating government intervention. As a result, condemnations for urban redevelopment are more susceptible than other uses of eminent domain to be based on pretextual and bad faith "blight" determinations.

C. THE PLURALITY CORRECTLY HELD THAT ESDC'S BLIGHT DETERMINATION WAS MADE IN BAD FAITH

Unlike *Goldstein*, the property involved in this case had never been declared blighted or included in a designated urban renewal area prior to the project's announcement. This case is also distinguished from *Goldstein* because the petitioners have presented clear evidence that ESDC acted in bad faith and colluded with Columbia

[14] Community Board 9 Manhattan 197-a Plan: Hamilton Heights, Manhattanville, Morningside Heights (Sep. 24, 2007), *available at* http://prattcenter.net/sites/default/files/users/images/CB9M_Final_24-Sep-07.pdf. *See also* Miriam Axel-Lute, *Will Columbia Take Manhattanville?*, Shelterforce, Mar. 22, 2008, *available at* http://www.shelterforce.org/article/print/213/ (discussing the process that led up to the city's approval of Columbia's 197-c plan).

[15] Matter of Goldstein v. New York State Urban Dev. Corp., 13 N.Y.3d 511, 527 (2009).

in determining that the petitioners' properties were blighted.[16] The record compiled by the petitioners through the use of New York's Freedom of Information Law (FOIL) demonstrates that ESDC's decision to condemn the project area for Columbia was predetermined and based on no evidence of actual blight. After the decision to go ahead with the project was made in 2002, ESDC bent over backwards to produce evidence of blight. Because the first blight study was inadequate,[17] ESDC hired a second consultant in 2006 to "highlight" blight in Manhattanville,[18] and after the Appellate Division held that consultant to be conflicted because it was working for Columbia at the same time ("serving two masters"),[19] ESDC hired yet another consultant to "replicate" the blight study and substantiate ESDC's prior, unfounded conclusion that the area was blighted.[20] All the while, Columbia purchased or obtained control over most of the properties in the project footprint and manufactured its own blight by forcing out tenants,[21] neglecting to make ordinary and economical repairs,[22] and refusing to fix building code violations or make tenants comply with local regulations.[23]

---

[16] While bad faith underlay many of the *Goldstein* petitioners' claims, they did not expressly state allegations of bad faith in either their state or federal eminent domain lawsuit. Had they raised bad faith, they may have been more successful. *See* Lavine and Oder, *supra* note 12.
[17] R. 21 at 2342.
[18] R. 21 at 2965.
[19] Matter of Tuck-It-Away Assoc., LP v. Empire State Dev. Corp., 54 A.D.3d 154, 165 (2d Dept. 2008).
[20] Matter of Kaur v. New York State Urban Dev. Corp., 2009 N.Y. Slip Op. 8976, *21 (1st Dept. 2009) (Richter, J., concurring) (explaining that "[t]he contract retaining Earth Tech does not require it to do a de novo study, but rather it was retained to examine the information in the AKRF study. If AKRF, due to its preexisting relationship with Columbia, used a flawed or biased methodology to evaluate neighborhood conditions in order to reach the result Columbia wanted, any such flaws or biases would necessarily have been carried over to the Earth Tech study. Furthermore, ESDC's Determination and Findings explicitly acknowledge that it 'relied upon the facts and analyses set forth in the [AKRF study]' in exercising its condemnation power.").
[21] V.P. ¶ 72, ¶ 87; R. 27; *No Blight* study, Table J between 66 and 67.
[22] V.P. ¶¶ 73 - 74.
[23] R. 29; *No Blight* study at 49-51; *see also* individual building reports, Appendix A, Block 1986 Lot 1, Block 1996 Lot 14.

Other aspects of this case reinforce the evidence that ESDC acted in bad faith to produce a blight determination so that it could carry out its predetermined plan to transfer petitioners' property to Columbia. The factors set out in Justice Kennedy's concurrence in *Kelo v. New London* and discussed by the First Department below are illustrative.[24] No city or state agency had ever intimated that Manhattanville might be blighted prior to Columbia's interest in the area; existing planning documents suggested rezoning the area given its development potential, not engaging in clearance and redevelopment; and once Columbia made its intentions known, no other developers or alternative plans were given meaningful consideration—even the community-based 197-a plan.[25] As the plurality explained, "[t]he record shows no evidence that ESDC placed any constraints upon Columbia's plans, required any accommodation of existing, or competing uses, or any limitations on the scale or configuration of Columbia's scheme.... [T]he ultimate private beneficiary of the scheme for the private annexation of Manhattanville was the progenitor of its own benefit."[26]

Because petitioners challenge not only the existence of a general public use for the project, but the propriety and reliability of ESDC's blight determination, as well as the process that led up to it, the plurality was correct in applying what may be considered

[24] Kelo v. New London, 545 U.S. 469, 490-493 (2005) (Kennedy, J., concurring); Matter of Kaur v. New York State Urban Dev. Corp., 2009 N.Y. Slip Op. 8976, *8-10 (1st Dept. 2009).

[25] Although the City Planning Commission ostensibly reviewed the 197-a plan and Columbia's 197-c plan concurrently, Columbia's stature as an elite educational institution played an overriding role in the decision to approve its plan. (Columbia also spent massive amounts of money lobbying to have its plan passed. *See supra* note 13.) The planning commission did not give serious consideration to the possibility that Columbia could expand without holding a monopoly over land in Manhattanville. That option, which was presented by the 197-a plan, was dismissed because it would not serve "Columbia's long term growth" interests. New York City Planning Commission, In the Matter of a Plan concerning Community District 9 in Manhattan, N. 060047 NPM, Nov. 26, 2007, at 22, *available at* http://www.cb9m.org/docs/197-A-Plan-Brief.pdf. ESDC similarly rejected this plan, explaining that "it '*does not meet Columbia's needs as Columbia had defined them.*'" Matter of Kaur v. New York State Urban Dev. Corp., 2009 N.Y. Slip Op. 8976, *10 (1st Dept. 2009) (emphasis in original).

[26] Matter of Kaur v. New York State Urban Dev. Corp., 2009 N.Y. Slip Op. 8976, *10 (1st Dept. 2009).

a more searching standard of review than the exceptionally deferential rational basis test applied in typical public use cases. To do otherwise would have been an abdication of the court's duty to safeguard the petitioners' constitutional rights and to act as a check on otherwise virtually limitless agency discretion.[27]

2. THE DEFINITION OF "SUBSTANDARD AND INSANITARY" IN THE URBAN DEVELOPMENT CORPORATION ACT IS UNCONSTITUTIONALLY VAGUE ON ITS FACE AND AS APPLIED

ESDC's enabling legislation, the Urban Development Corporation Act (UDCA) contains only a circular definition of "substandard and insanitary," defining those terms to mean "slum, blighted, deteriorated or deteriorating area, or an area which has a blighting influence on the surrounding area".[28] While this definition may have been upheld in the past,[29] it has become unmoored from the historical contexts that once informed its meaning,[30] and this Court should acknowledge that more exacting standards are necessary today. Indeed, this Court admitted in *Goldstein* that "[i]t may be that the bar has now been set too low".[31] Although the Court explained that this was a matter for the legislature to remedy, *Goldstein*, unlike this case, did not raise the question of unconstitutional vagueness.

---

[27] Since ESDC was created in 1968, its vast powers and seemingly unchecked discretion have been noted by a variety of commentators. *See, e.g.*, New York Moreland Act Commission on the Urban Development Corporation and Other State Financing Agencies, Restoring Credit and Confidence: A Reform Program for New York State and its Public Authorities (Mar. 1976), *available at* http://www.publicauthority.org/files/Restoring_Credit_&_Confidence.pdf (recommending the creation of an Authorities Control Board to increase the accountability and transparency of authority finances, and concentrating on the Urban Development Corporation, which nearly defaulted on hundreds of millions of bonds in 1975); John E. Osborn, *New York's Urban Development Corporation: A Study on the Unchecked Power of a Public Authority*, 43 Brooklyn L. Rev. 237 (1977); Lavine and Oder, *supra* note 12.

[28] N.Y. Unconsol. ch. 252, § 3 (12).

[29] *See, e.g.,* Yonkers Community Development Agency v. Morris, 37 N.Y.2d 478 (1975).

[30] For a thorough historical account of the meaning of "blight," *see* Pritchett, *supra* note 10; No Blight Study, 13-21.

[31] Matter of Goldstein v. New York State Urban Dev. Corp., 13 N.Y.3d 511, 526 (2009).

The concept of blight has been compared to the concept of obscenity, often with reference to Justice Stewart's famous statement that "I know it when I see it".[32] Indeed, at a public hearing arranged by amicus in January, counsel to ESDC admitted that blight, like obscenity, is a nontechnical concept that can be identified by laypersons as easily as by experts.[33] While the Supreme Court has not had an opportunity to revisit the meaning of "blight" since its 1954 decision in *Berman v. Parker*,[34] it has enunciated some guidance to help protect individuals' First Amendment rights from overly vague definitions of obscenity.[35] Other courts that have considered the vagueness of blight definitions have similarly sought to identify core limitations on the meaning of blight, and they have generally held that blight must be based on some actual economic or social liability that threatens life or property.[36]

The UDCA itself alludes to this sort of limitation, stating in the purposes section that blighted conditions "hamper or impede proper and economic development of such areas and [] impair or arrest the sound growth of the area, community or municipality,

---

[32] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). *See* Nicholas Confessore, *Blight, Like Beauty, Can Be in the Eye of the Beholder*, The New York Times, Jul. 25, 2006, http://www.nytimes.com/2006/07/25/nyregion/25blight.html (discussing the blight determination for Atlantic Yards and quoting Justice Stewart's comment about obscenity).

[33] Public Hearing: Unconstitutional: What the Appellate Division's Eminent Domain Ruling Means for the Columbia Expansion, Jan. 5, 2010, video excerpt available at http://www.youtube.com/watch?v=a_xYGGYt_4E (starting at about 3:30, explaining that laypeople, including people who live in the neighborhood, would be qualified to make a blight determination if they were on ESDC's board of directors). ESDC's counsel also admitted that the authority maintains no written standards for blight, and that blight is a flexible concept constantly changing in response to changing socially conditions. Id.

[34] 348 U.S. 26 (1954). The Supreme Court's resolution of the vagueness question raised in *Berman* was not particularly satisfying. *See* Amy Lavine, *Urban Renewal and the Story of* Berman v. Parker, 42 Urb. Law --- (forthcoming, Spring 2010).

[35] Miller v. California, 413 U.S. 15, 24 (1973) ("The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.") (internal citations omitted).

[36] *See, e.g.*, Norwood v. Horney, 110 Ohio St.3d 353 (2006); Gallenthin Realty v. Borough of Paulsboro, 191 N.J. 344 (2007); Sweetwater Valley Civic Association v. National City, 18 Cal.3d 270 (1976).

and the state as a whole."[37] ESDC has not considered it necessary to follow this guidance (which is not included in the formal definition of "substandard and insanitary"), as is demonstrated by the fact that no market analysis was conducted as part of the study that deemed Manhattanville blighted, even though the contract for the blight study originally included this as a requirement.[38] While the enumeration of specific and objective standards defining blight is a task that should be left to the legislature,[39] it is well within the purview of this Court to hold that the UDCA's definition of blight is unconstitutionally vague on its face, unless read with the limitation that blight must impose a real and present threat to surrounding property or persons. And because ESDC failed to make any such determination that conditions in Manhattanville constituted a threat to the community or were actively impeding development, the UDCA's definition of blight should also be held void as applied in this case.

3. THE BURDENS OF BLIGHT AND ECONOMIC DEVELOPMENT CONDEMNATIONS HAVE AND WILL CONTINUE TO FALL DISPROPORTIONATELY UPON RACIAL AND ETHNIC MINORITIES AND THE ECONOMICALLY DISADVANTAGED

There can be little doubt that the use of blight as a justification for condemnation disproportionately affects and harms the economically disadvantaged and, in particular, tenants, the elderly, and racial and ethnic minorities. Condemnees who belong to "discrete and insular minorities," as well as other disadvantaged groups, are not only

[37] N.Y. Unconsol. ch. 252, § 2.
[38] V.P. ¶ 81. ESDC similarly included a market study requirement in its contract for the Atlantic Yards blight study, and then later failed to require its completion. That blight study, like the blight study primarily relied on in this case, was completed by AKRF. *See* Lavine and Oder, *supra* note 12.
[39] Amicus, in fact, has introduced legislation to narrow the availability of eminent domain for blighted area redevelopment. S.B. 6791 (2010).

marginalized in the political processes surrounding redevelopment projects,[40] they are also confronted with particular and more severe impacts from displacement than are other demographic groups. And even if blight is not used to intentionally target racial minorities and maintain segregated housing patterns, as it was during the mid-twentieth century, the benefits and burdens of blighted area redevelopment remain inequitably distributed.

A. BLIGHT CONDEMNATIONS HAVE HISTORICALLY BEEN USED TO TARGET RACIAL AND ETHNIC MINORITIES

Local urban renewal programs were popularized in the 1950s and 60s following passage of federal legislation that provided funding for slum clearance and redevelopment[41] and the Supreme Court's broad approval of the program in *Berman v. Parker*.[42] While many urban renewal programs did alleviate truly squalid and economically depressing conditions, they were often motivated as much by the interests of business elites and local governments in increasing central city tax revenues and luring wealthy residents back to urban areas.[43] They were also used to perpetuate racial segregation and limit the mobility of African Americans and other minorities. As the legal scholar and urban historian Wendell Pritchett has explained:

> Blight was a facially neutral term infused with racial and ethnic prejudice. While it purportedly assessed the state of urban infrastructure, blight was often used to describe

[40] Kelo v. New London, 545 U.S. 469, 521 (O'Connor, J., dissenting) (citing United States v. Carolene Products Co., 304 U.S. 144, 152, n. 4 (1938)).
[41] Housing Act of 1949, 63 Stat. 413; Housing Act of 1954, 68 Stat. 590. *See generally* Lavine, *supra* note 34 (discussing the social and legal history of national urban renewal policies).
[42] 348 U.S. 26 (1954).
[43] *See, e.g.*, Pritchett, *supra* note 10 (discussing how "blight" was abused to benefit business and commercial interests); Lavine, *supra* note 34 (providing a historical account of the condemnation at issue in *Berman v. Parker* and concluding that an overriding purpose of the project was to replace low-income families with wealthier households).

> the negative impact of certain residents on city neighborhoods. This "scientific" method of understanding urban decline was used to justify the removal of blacks and other minorities from certain parts of the city. By selecting racially changing neighborhoods as blighted areas and designating them for redevelopment, the urban renewal program enabled institutional and political elites to relocate minority populations and entrench racial segregation.[44]

Reflecting on the extensive discrimination fostered by urban renewal, the author and civil rights activist James Baldwin explained in 1963 that urban renewal "means moving the Negroes out. It means Negro removal.... The federal government is an accomplice to this fact."[45] The impacts of urban renewal on racial minorities, whether intentional or not, were exacerbated by discriminatory lending practices, discrimination in public housing, and restrictive covenants.[46] And although urban renewal agencies were technically required to ensure that adequate housing would be available for displaced residents, relocation assistance was "ruthless" in its inadequacy.[47] The overall effect, in many cities, was to create new slums and to exacerbate existing racial tensions.[48] Indeed, while not technically an urban renewal project, Columbia's 1968 plans to build a gym in Morningside Park with one door for the predominantly white student body and a separate door for the predominantly black Harlem community—the project was derisively referred to as "gym crow"—touched off violent and disruptive protests.[49]

---

[44] Pritchett, *supra* note 10, at 6; *see also* Kevin Douglas Kuswa, *Suburbification, Segregation, and the Consolidation of the Highway Machine*, 3 J.L. Soc'y 31, 53 (2002) (describing "a governing apparatus operating through housing and the highway machine [that] implemented policies to segregate and maintain the isolation of poor, minority, and otherwise outcast populations.").

[45] A video of this interview with James Baldwin is available on the PBS website, http://www.pbs.org/wgbh/amex/mlk/sfeature/sf_video_pop_04b_qt.html. The transcript is available at http://www.pbs.org/wgbh/amex/mlk/sfeature/sf_video_pop_04b_tr_qry.html.

[46] Lavine, *supra* note 34.

[47] Herbert J. Gans, *The Failure of Urban Renewal: A Critique and Some Proposals*, at 467-468, in Urban Renewal (Bellush, ed.) (noting that between 1949 and 1964, only .05% of federal urban renewal funding was spent on relocation).

[48] *See, e.g.,* Arnold R. Hirsch, Making the Second Ghetto: Race and Housing in Chicago 1940-1960 (University of Chicago Press 1998).

[49] George Keller, *Six Weeks that Shook Morningside*, Columbia College Today (Spring 1968),

Even if federal housing and slum clearance policies were originally intended to improve the living conditions of low income families,[50] by the mid 1960s consensus had formed that urban renewal was a social and governmental failure. It had become clear that when an area was designated for redevelopment, it usually had less to do with improving housing conditions than it did with opening prime real estate for higher value uses and wealthier people, and neither liberals nor conservatives were happy with the results. The economist Martin Anderson typified the conservative view, recommending the repeal of the program in order to allow free enterprise to address the country's housing needs without subsidies or the use of eminent domain.[51] On the other side of the political spectrum, the liberal urban theorist Jane Jacobs offered a scathing indictment of the urban renewal program in her 1961 book *The Death and Life of Great American Cities.*[52]

B. BLIGHT AND ECONOMIC DEVELOPMENT CONDEMNATIONS CONTINUE TO HAVE DISPROPORTIONATE IMPACTS ON MINORITIES AND THE ECONOMICALLY DISADVANTAGED

Federal funding for urban renewal programs was discontinued in the 1970s, leading local redevelopment agencies to increasingly rely on private capital to fund redevelopment projects.[53] The growing influence of private developers and employers

[50] By some accounts, federal housing policies, many of which grew out of New Deal programs, were intended more to stimulate the economy than to aid poor persons directly. *See* Kenneth Jackson, Crabgrass Frontier, at Chapter 11 (Oxford University Press 1987). It is also clear that federal mortgage policies were implemented in a discriminatory manner until the mid 1960s, casting doubt on the intended purposes of the early United States Housing Acts. *Id.*

[51] Martin Anderson, The Federal Bulldozer (McGraw-Hill 1967).

[52] Jane Jacobs, The Death and Life of Great American Cities 4 (Vintage Books 1992).

[53] Foster and Glick, *supra* note 13, at 2019-2021

fostered competition among local governments to retain and attract businesses, leading to the increased use of development subsidies, including eminent domain. Eventually, many jurisdictions came to see the use of eminent domain to foster industrial and commercial development as a public use in itself, with or without the presence of blight.[54]

Whether called economic development or blight removal, however, "[t]here is ample evidence that localities across the nation are using eminent domain to discourage poor residents and to encourage the affluent, either through attractive (and high-priced) housing stock or retail facilities that both pay high taxes and attract an affluent clientele."[55] For many of the same reasons that these redevelopment programs are especially susceptible to abuse, as discussed above,[56] blight and economic development takings inherently tend to impose disproportionate burdens on low income and minority communities, even if they are not motivated by the invidious discrimination that

[54] *See, e.g.,* Levin v. Township of Bridgewater, 57 N.J. 506 (1971) (upholding the condemnation of underutilized property for a shopping mall development); Karesh v. City Council, 247 S.E.2d 342 (S.C. 1978) (upholding condemnation for convention center); Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981) (upholding the condemnation of a neighborhood to give the land to General Motors for a new plant); Yonkers Community Development Agency v. Morris, 37 N.Y.2d 478 (1975) (upholding condemnation of underdeveloped, and hence "substandard' land for the Otis Elevator Company to build a new plant); Kelo v. New London, 545 U.S. 469 (2005) (upholding condemnation of nonblighted land for development as a riverfront commercial/entertainment/residential project); *see also* Boudreaux, *supra* note 9, at 18-19 (discussing contemporary eminent domain controversies).

[55] Boudreaux, *supra* note 9, at 20; *see also* David A. Dana, *Exclusionary Eminent Domain*, 17 S. Ct. Econ. Rev. 7, 40-47 (2009) (explaining how under-valuation in the redevelopment context leads to "exclusionary eminent domain"); Charles Toutant, *Alleging Race-Based Condemnation*, New Jersey Law Journal, Aug. 2, 2004 (discussing litigation alleging that cities and towns target minority areas in an attempt to force them from the community in favor of those the local government considers more desirable); Erik Schwartz, *Progress or Discrimination? Facing Displacement, Minorities Battle Towns' Eminent Domain*, Courier Post (New Jersey), Jul. 30, 2004; David Firestone, *Black Families Resist Mississippi Land Push*, N.Y. Times, Sep. 10, 2001.

[56] *See supra* Argument Pt. I.B. Additionally, economically disadvantaged and minority neighborhoods are disproportionately affected by blight and redevelopment takings because they are politically palatable and economic targets. Condemnations are likely to be easier and less drawn out because these groups are less likely, or in many cases unable, to mount opposition campaigns or judicial challenges. Redevelopment agencies also target areas with low property values because the cost of acquisition is less (as market value is the measure of just compensation) and the opportunity to maximize development windfalls is higher.

pervaded earlier urban renewal projects.[57] According to a 2007 study, "[e]minent domain project areas include a significantly greater percentage of minority residents (58%) compared to their surrounding communities (45%). Median incomes in project areas are significantly less ($18,935.71) than the surrounding communities ($23,113.46), and a significantly greater percentage of those in project areas (25%) live at or below poverty levels compared to surrounding cities (16%)."[58] Similar disparities were found regarding education levels.[59]

Exacerbating the inequitable impacts of urban redevelopment, the same circumstances that put minority and low income populations at an increased risk of being displaced also leave them less able to cope with displacement than less marginalized groups. To begin with, underprivileged condemnees are typically displaced in order to build housing and amenities for wealthier residents, making it difficult if not impossible for them to remain in their neighborhoods. And because the neighborhoods chosen for economic development and blight removal projects are generally selected because of their low property values, redevelopment projects also tend to decrease net affordable housing stocks such that displaced residents will often have a difficult time in securing adequate replacement housing in other neighborhoods.[60] Even when affordable housing is included in redevelopment projects, it may still take years for those units to be built,

---

[57] *See* Alexandre, *supra* note 11.
[58] Dick M. Carpenter II, Ph.D. & John K. Ross, Victimizing the Vulnerable: The Demographics of Eminent Domain at 6 (Institute for Justice, June 2007), *available at* http://www.ij.org/images/pdf_folder/other_pubs/Victimizing_the_Vulnerable.pdf.
[59] Id.
[60] see e.g., Herbert J. Gans, The Urban Villagers: Group and Class in the Life of Italian-Americans 380 (2d ed. 1982) (indicating that 86% of the displaced residents in one redevelopment were paying higher rents at their new residences, with median rents almost doubling); Scott A. Greer, Urban Renewal and American Cities: The Dilemma of Democratic Intervention 3 (1965) (citing multiple studies and concluding that "[a]ll ten...indicate substantial increases in housing costs").

leaving large interim affordable housing shortages.[61] Subjective impacts may also be especially severe for the groups displaced by redevelopment projects. The elderly, for example, are particularly susceptible to psychological stress from being dislocated from their homes. And racial and ethnic minorities will suffer special harm from takings that disturb organized minority communities. The dispersion of these communities damages established community support mechanisms and limits these groups' ability to exercise what little political power they may have established as a community.[62]

C. THE USE OF EMINENT DOMAIN TO BENEFIT COLUMBIA WILL FOLLOW HISTORICAL PATTERNS AND DISPROPORTIONATELY IMPACT LOW INCOME AND MINORITY FAMILIES, WHILE PROVIDING SPECIAL BENEFITS TO AN ELITE AND WELL-CONNECTED INSTITUTION

Redeveloping Manhattanville as an exclusive Columbia campus, unsurprisingly, would follow the pattern of disproportionately burdening economically disadvantaged and minority groups, while concurrently providing special benefits to a distinct group of wealthier and more educated people affiliated with Columbia University.

Although only a relatively small number of residents would be directly displaced by the project—about 300, according to the environmental impact statement (EIS)[63]—between 3,000 and 5,000 Harlem residents will be indirectly displaced.[64] Displacement, moreover, will disproportionately affect low income and minority households: the EIS

[61] *See, e.g.*, Lavine and Oder, *supra* note 12.
[62] Mindy Fullilove, Root Shock: How Tearing Up City Neighborhoods Hurts America, and What We Can Do About It (One World/Ballantine 2004).
[63] New York City Dept. of City Planning, Manhattanville Final Environmental Impact Statement, at 4-2, *available at* http://www.nyc.gov/html/dcp/pdf/env_review/manhattanville/04.pdf.
[64] Although opponents have cited 5,000 as the number of Harlem residents threatened by indirect displacement, the environmental impact statement places that number at 3,293. Id. at 4-89. Accurate predictions of displacement effects are difficult to make, and Columbia is not the sole driver of gentrification,

estimated that the primary study area was composed of 29.4% African-Americans and 52.3% Latinos, compared with 15.3% and 27.2%, respectively, for Manhattan, and 24.5% and 27.2% for New York City as a whole. When juxtaposed with the members of Columbia's elite and traditionally white Ivy League community, questions of class and race simply cannot be avoided. This is especially true in Harlem, one of the country's most important centers of black culture.

The displacement and gentrification that would result from Columbia's expansion would also affect businesses and workers. Unlike Columbia's plan, the Community Board's 197-a plan recognized the importance of maintaining industrial and manufacturing space. As the plan explained, "Given the combined factors of race, ethnicity, unemployment, limited educational attainment and concentration of such persons within specific areas of CD9, it is important to note that industrial employment is an important economic sector to strengthen in order to elevate the socio-economic well being of these residents and the city as a whole."[65] As a result, even though the university expansion would create jobs, many of the academic and institutional positions would be unavailable to existing neighborhood residents and employees.[66]

Other aspects of the development project offend basic principles of Environmental Justice, which seeks to ensure "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws,

---

[65] Community Board 9 Manhattan197-a Plan, *supra* note 14, at 29.
[66] *See* Timothy Williams, *In West Harlem Land Dispute, It's Columbia vs. Residents*, The New York Times, Nov. 20, 2006, http://www.nytimes.com/2006/11/20/nyregion/20columbia.html?pagewanted=all (quoting Jordi Reyes-Montblanc); Jarrett Murphy, *History Lesson: Three decades after the drama of '68, will Harlem make room for Columbia?*, The Village Voice, May 16, 2006, http://www.villagevoice.com/2006-05-16/news/history-lesson/1 (quoting Nellie Bailey).

regulations, and policies."[67] To begin with, the top-down, Columbia-driven planning process failed to provide opportunities for the meaningful involvement of existing community members. The project will also produce inequitable distributions of both environmental goods and environmental burdens. The Harlem Piers Park, for example, which was built only after years of insistence from the community, will be effectively cut off from the rest of Harlem by Columbia's campus.[68] And while Columbia contends that the campus will be open to the public and will create publicly accessible open space rather than obscuring it, it will nevertheless be privately-owned open space patrolled by a private security staff and controlled by Columbia policies.[69] Moreover, the project will actually result in a net decrease in per capita open space due to the additional population it will bring to the area,[70] and pollution from the project's construction will burden the existing residents and workers in nearby neighborhoods, rather than those who would eventually benefit from the redevelopment.

4. THE DETERMINATION AND FINDINGS SHOULD BE REJECTED BECAUSE ESDC DENIED PETTIONERS THEIR RIGHT TO DUE PROCESS BY CLOSING THE RECORD WHILE WITHHOLDING DOCUMENTS WHICH WERE ORDERED TO BE RELEASED

The Appellate Division was correct in ruling that the petitioners' due process rights were violated by ESDC's attempt to prevent the petitioners from entering into the

[67] U.S. Environmental Protection Agency, Environmental Justice, Basic Information, http://www.epa.gov/compliance/ej/basics/index.html.
[68] A City Planning Department official acknowledged that "the open green space... could be perceived as an interruption of access to the river and as an enclave for Columbia." R. 19 at 628. *See also* Daphne Eviatar, *The Manhattanville Project*, The New York Times Magazine, May 21, 2006, http://www.nytimes.com/2006/05/21/magazine/21wwln.essay.html.
[69] Kaur Petition to the Appellate Court at 20 (explaining that the campus would only be open to the public until 8:00 PM between November and April, unlike city parks, most of which are open until 11:00 PM); Axel-Lute, *supra* note 14.
[70] Kaur Petition to the Appellate Court at 16; R. 2 at 6-35 to 6-37.

record documents that the authority was legally obligated to release. Because the Appellate Division has original jurisdiction in public use cases and property owners do not get an opportunity to go through discovery, examine witnesses, or introduce evidence after the close of the record, it is crucial for any meaningful opportunity to be heard that property owners be able to use the one evidentiary tool available to them, the Freedom of Information Law (FOIL). The increased risk of eminent domain abuse in the redevelopment context and the petitioners' allegations of bad faith, as well as ESDC's strenuous but ultimately baseless opposition to the petitioners' repeated FOIL requests, make ESDC's closing of the record even more objectionable.

Allowing ESDC to prematurely close the record, in addition to violating the petitioners' due process rights, offends the principles and policies that underlie New York's Freedom of Information Law. FOIL was enacted with the recognition that "[t]he people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society."[71] This Court explained in *Fink v. Lefkowitz* that "the statute affords the public the means to attain information concerning the day-to-day operations of State government.... [J]udicious use of the provisions of the law can be a remarkably effective device in exposing waste, negligence and abuses on the part of government; in short, 'to hold the governors accountable to the governed'".[72] The petitioners in this case sought just this sort of accountability, but were met with only resistance and obfuscation from ESDC. To condone the authority's conduct and permit it to close the record while withholding

[71] N.Y. Pub. O. § 84.
[72] 47 N.Y. 2d 567, 571 (1979) (quoting NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214).

public information that the petitioners were entitled to receive would interfere with the clear intent of the law to facilitate honest and transparent government.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court should uphold the judgment of the Appellate Division, First Department, which held invalid respondent's determination and findings made pursuant to section 204 of the Eminent Domain Procedure Law.