No. 10-402

IN THE

Supreme Court of the United States

TUCK-IT-AWAY, INC., et al.,

Petitioners,

v.

NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals properly concluded, after a careful review of the record, (1) that the proposed exercise of eminent domain would serve a "public use" by removing longstanding blight in a deteriorated neighborhood and promoting higher education through the construction of academic and research facilities at a non-profit university and (2) that Petitioners' allegations of "bad faith" and "pretext" were "unsubstantiated"?

2. Whether the Court of Appeals properly concluded that Petitioners were afforded due process where they (1) had "unfettered access" to all of the documents that formed the basis for the decision to use eminent domain, (2) appeared at the public hearing and submitted 10,000 pages of materials into the administrative record before the final decision to acquire their properties was made, and (3) failed to demonstrate the materiality of the additional documents obtained after the administrative record was closed?

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INTRODUCTION

Petitioners seek review of a unanimous decision of the New York Court of Appeals that applied well-established principles in upholding the decision of New York State Urban Development Corporation d/b/a Empire State Development Corporation ("ESDC") to exercise its power of eminent domain. ESDC authorized the use of eminent domain to facilitate the Columbia Educational Mixed Use Land Use Improvement and Civic Project (the "Project"). The Project will replace dilapidated and substandard buildings in the Project Site with new educational and academic research facilities and publicly accessible open space to be owned and operated by Columbia University ("Columbia"), a non-profit educational institution.

The Court of Appeals held that the Project will serve two independent public purposes. First, the Project will eliminate longstanding blighted conditions in the area, which the Court of Appeals found were "extensively documented photographically and otherwise on a lot-by-lot basis." Second, the Project will promote education, academic research and the expansion of knowledge, which the Court described as "pivotal government interests." The Court further concluded that the Project will provide numerous other public benefits to the community, including two acres of publicly-accessible open space, upgrades in transit infrastructure, thousands of jobs, and a financial commitment to a local park.

Petitioners argue that ESDC's determination that the Project will eradicate blight and promote education was pretextual, and that ESDC acted in bad faith in approving the Project. But as the Court of Appeals concluded, the record refutes that contention. Petitioners' submission to the contrary is no more than a challenge to that factbound determination and thus does not warrant review by this Court.

The Court of Appeals also rejected Petitioners' claim that they were denied due process when ESDC closed its administrative record and approved the Project while a few of Petitioners' New York State Freedom of Information Law lawsuits were still pending. The Court of Appeals noted that Petitioners (1) participated fully in the public process, both during the two-day public hearing and during the subsequent comment period during which time they submitted more than 10,000 pages of documents into the record; (2) had "unfettered access to" the entirety of the administrative record, including the documents that formed the basis for ESDC's decision; and (3) had failed to establish the materiality of any of the documents at issue in their Freedom of Information Law requests. Petitioners challenge that determination as well, but that challenge is also unworthy of this Court's review, as it has no implications beyond this particular case. Indeed, Petitioners scarcely suggest otherwise, as they concur with the legal standard that the Court of Appeals applied to determine whether they received due process.

In sum, this case raises no issue of takings law of general importance warranting this Court's review.

STATEMENT

A. The Proposed Project

Despite Petitioners' assertions to the contrary, the Manhattanville area of West Harlem in New York City has been plagued for decades by depressed conditions. Numerous urban renewal initiatives have been proposed since the 1950s, but none has been successfully implemented. Only three new buildings have been erected in the area of the Project Site since 1961– a government-owned bus depot, a gas station and a now-vacant U-Haul Truck rental structure – and the area is afflicted by deteriorating structures and other substandard and insanitary conditions.[1]

The Project at issue in this case will transform 17 blighted acres in Manhattanville into a modern, gateless, open, urban campus of Columbia.[2] The Project calls for the creation of new academic facilities to replace blighted parcels in a bleak, long-stagnant, industrial area with outmoded manufacturing buildings. Those new facilities – classrooms, academic research facilities, faculty offices, libraries, university housing, and study and performance spaces – are essential to the

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[1] A-5403.

[2] The Project is described more fully in ESDC's General Project Plan. A-2520-93.

academic research, teaching, learning, and discourse at the core of higher education.

The Project includes buildings to be dedicated to advanced academic research. Among the first buildings to be constructed as part of the Project will be the Jerome L. Greene Science Center for Columbia's Mind, Brain and Behavior Initiative for the study of neurological diseases, such as Alzheimer's, Parkinson's, autism, dementia and schizophrenia. Restrictive declarations will prohibit Columbia, a non-profit educational institution, from using the Project Site to conduct scientific research as a commercial enterprise.

An essential component of the Project is a nearly two million gross square-foot, continuous, multi-level below-grade facility, which will extend from West 129th Street to West 133rd Street between Broadway and 12th Avenues (the "Below-Grade Facility"). The Below-Grade Facility will provide integrated space for all of the new buildings to be constructed on the main portion of the Project Site – 13 of the total 16 new buildings that will comprise the Project. By providing below-grade space for central energy facilities, science support, mechanical operations, and loading, freight and parking facilities that service most of the Project's new construction, the Below-Grade Facility will minimize street congestion and its attendant mobile source emissions and reduce the density of above-grade development, thereby making room for new public open spaces, wider sidewalks and improved sight lines.

The Below-Grade Facility makes necessary the acquisition of substantially all of the parcels within the Project Site, either by negotiation or (if necessary) by eminent domain.[3] Four of the six properties owned by Petitioners are situated diagonally across the main portion of the Project Site.[4] As a result, the Below-Grade Facility and its benefits – and indeed the Project itself – cannot be realized unless those properties are acquired.

The Project will benefit the City and State of New York and the area of West Harlem by (1) eliminating blighted conditions at the Project Site, (2) furthering higher education and academic research and enhancing the City and State as centers for these activities, (3) creating much-needed, park-like open space in the area, and (4) creating new employment opportunities. The Project is estimated to cost $6.28 billion, and will be funded by Columbia without taxpayer subsidies.[5]

In connection with the Project, Columbia will also provide other civic benefits, including (1) a community benefits fund of $76 million, (2) $20 million of support for affordable housing, (3) $20

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[3] The only private property owners subject to ESDC's exercise of eminent domain in this case are Petitioners, who own four self-storage facilities and two gas stations.

[4] A-87a (identifying Tuck-It-Away, Inc. as the owner of Block 1997, Lot 44 and Block 1998, Lot 29 and Tuck-It-Away Bridgeport, Inc. as the owner of Block 1996, Lot 56); A-198a (identifying P.G. Singh Enterprises, LLC as the owner of Block 1996, Lot 35).

[5] Pet. 4a.

million in contributions to the Harlem Community Development Corporation (an ESDC subsidiary) to support initiatives benefiting the greater Harlem community, and (4) support valued at $30 million in connection with a New York City public school to be operated in partnership with Columbia's Teachers College.[6]

B. ESDC And The Eminent Domain Process

In 1968, the New York State legislature created New York State Urban Development Corporation, a public benefit corporation which does business as ESDC. *See* Urban Development Corporation Act (the "UDC Act") (codified at N.Y. Unconsol. Laws §§ 6251-87). One of ESDC's primary roles is to foster revitalization of distressed areas by eliminating blight and facilitating industrial, residential and civic projects. Among ESDC's important revitalization tools is its power of eminent domain. *See* N.Y. Unconsol. Laws §§ 6254-55, 6263.

Under the UDC Act, ESDC is authorized to carry out specified types of projects, including Land Use Improvement Projects and Civic Projects. The UDC Act defines a Land Use Improvement Project as a "plan or undertaking for clearance, replanning, reconstruction and rehabilitation ... of a substandard and insanitary area, and for recreational or other facilities incidental or attendant thereto...." *Id.* §§ 6253(6)(c) and 6260(c). A Civic Project is defined as a "project ... designed and intended for the purpose of providing facilities

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[6] A-2567, A-2571.

for *educational*, cultural, recreational, community, municipal, public service or other civic purposes." *Id.* § 6253(6)(d) (emphasis added). Unlike a Land Use Improvement Project, a Civic Project is not predicated upon a determination by ESDC that the area is "substandard or insanitary."

To exercise its power of eminent domain, ESDC must comply with New York's Eminent Domain Procedure Law ("EDPL"), which establishes comprehensive procedures for extensive up-front public review and input followed by judicial review. Under the EDPL, a condemning authority must first notice and conduct a public hearing to solicit public comment on the proposed project. EDPL § 201; *see also* EDPL §§ 202-203. The condemning authority must then issue and publish its "determination and findings" specifying, among other things, "the public use, benefit or purpose to be served by the proposed public project." EDPL § 204(A), (B)(1).

Any "aggrieved" person may challenge the determination and findings by filing a petition directly in the Appellate Division of State Supreme Court. EDPL §§ 207(A), (B), 208. The Appellate Division "shall either confirm or reject the condemnor's determination and findings" after reviewing the record and considering the public use, benefit or purpose to be served by the project, the constitutionality of the proposed taking, the statutory authority of the condemnor to acquire the property, and the condemnor's compliance with the EDPL and New York State's Environmental Conservation Law. EDPL § 207(C). Upon the acquisition of property by eminent domain, the

property owner is entitled to receive just compensation, which is determined in an adversarial proceeding. *See* EDPL Art. 5.

The EDPL's procedures have been held to satisfy due process requirements. *See Brody v. Vill. of Port Chester*, 434 F.3d 121,134-36 (2d Cir. 2005); *Goldstein v. Pataki*, 516 F.3d 50, 55 (2d Cir.), *cert. den.*, 128 S. Ct. 2964 (2008).

C. *The Public Process For The Project Conducted By The City Of New York And ESDC*

The public process for the Project was extensive and spanned over four years. It began when the New York City Planning Commission ("CPC") first considered rezoning 35 acres of West Harlem, including the 17-acre Project Site (the "Rezoning"). This triggered an extensive public review pursuant to the City's Uniform Land Use Review Procedure ("ULURP"). CPC considered the potential environmental impacts of the Rezoning in an Environmental Impact Statement ("EIS"), which evaluated nine alternatives to the Project.[7] A draft EIS was published for public review, comment and hearings before being revised as a Final EIS ("FEIS").

On November 26, 2007, CPC approved the Rezoning for the Project to facilitate the construction of "modern, state-of-the-art educational and research facilities" in the context of "a new urban campus environment" that will be "integrated with the urban grid, with all streets

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[7] A-158 (FEIS, Chapter 24, *Alternatives*).

remaining open to the public ... and a new open space network open to University-affiliated personnel and the general public alike."[8] CPC further found that Columbia "is a major educational institution and center of state-of-the-art research in the sciences and humanities, and makes a valuable contribution to the intellectual, scientific and cultural life of the City."[9]

Based on a careful review, CPC concluded that "the open space network, Central Below-Grade Service Area, and other beneficial features of the Columbia proposal" may require the use of eminent domain,[10] and that the exercise of eminent domain "would serve a public purpose insofar as it would allow for realization of the public benefits of the Columbia proposal."[11]

After the City Council approved the Rezoning on December 19, 2007, ESDC adopted a proposed General Project Plan ("GPP") for the Project as both a Land Use Improvement Project and a Civic Project on July 17, 2008. The GPP, together with the Rezoning, would allow the development of a Columbia campus that would include academic and research facilities, university-related housing, more than two acres of publicly accessible open space and street-level uses

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[8] A-2081.

[9] A-2079.

[10] A-2090.

[11] A-2093.

that will transform the Project Site into a vibrant, attractive urban streetscape.[12]

ESDC solicited public comment on the GPP and its proposed use of eminent domain in connection with the Project. ESDC held a duly-noticed public hearing on September 2 and 4, 2008. In connection with the hearing notice, ESDC made available copies of the GPP, the FEIS and the two neighborhood conditions reports separately prepared by ESDC's consultants, AKRF and Earth Tech. (ESDC hired Earth Tech to conduct an independent neighborhood conditions study after being criticized for engaging AKRF, which had performed work for Columbia on matters relating to the Project Site.) Each of those two consultants photographed and conducted detailed inspections and assessments of each of the lots in the Project Site, documenting physical and structural conditions, health and safety concerns, vacancy rates, site utilization, property ownership, building code violations, environmental hazards and crime data.[13] The public hearing was well attended and 98 attendees, including Petitioners and their counsel, spoke about the Project.[14]

During the public comment period, Petitioners submitted two legal memoranda and more than 10,000 pages of materials.[15] They

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[12] A-3063; A-2585, A-2587 and A-2591 (GPP, Exs. C, D & F).

[13] A-1142-43; A-996-97.

[14] A-990-1132, A-1133-1414, A-1415-1706, A-1135, A-1192-96, A-1417, A-1418, A-1420, A-1483-99, A-1569-79.

[15] A-1732-56, A-1757-70, A-1771.

focused much of their comments on critiquing the FEIS and neighborhood condition reports that served as the factual underpinning for ESDC's proposed finding, set forth in the draft GPP, that the Project Site is a substandard and insanitary area. Petitioners even submitted their own "No Blight" study utilizing the extensive documentation provided by ESDC and their own investigation of site conditions. ESDC subsequently prepared a 75-page document entitled "Response to Comments" that addressed the comments received from Petitioners and others and prepared a GPP that was modified in certain respects in response to public comment.[16]

Petitioners and their counsel made additional and extensive comments at the December 18, 2008 meeting at which ESDC's Directors affirmed the revised GPP.[17] The revised GPP, like the draft GPP, made the findings to approve the Project as a Land Use Improvement Project and as a Civic Project under the UDC Act.[18] At the same meeting, ESDC's Directors approved ESDC's 83-page New York State Environmental Quality Review ("SEQRA") Statement of Findings and made its Determination and Findings pursuant to EDPL § 204.[19]

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[16] A-2868-2942.

[17] A-3145-3255.

[18] A-2574-A-2579

[19] A-3231 and A-3231. In accordance with Rule 15.2 of this Court, ESDC objects to Petitioners' repeated statements that the there is no comprehensive or integrated plan for the Project. *See, e.g.*, Pet. 2, 3, 25.

D. The Freedom Of Information Law Litigation

Both before and during the EDPL process, Petitioners served numerous Freedom of Information Law ("FOIL") requests on ESDC and other agencies seeking Project-related documents.[20] In response, ESDC turned over about 8,000 pages of material. ESDC did not withhold any of the documents that formed part of the administrative record, including the GPP (as initially adopted for public comment by ESDC), the FEIS and the AKRF and Earth Tech neighborhood conditions studies. All of those documents were in the public domain during the EDPL public comment period.[21]

In connection with some of their FOIL requests, Petitioners filed N.Y. Civil Procedure Law and Rules Article 78 proceedings requesting orders directing ESDC to disclose documents withheld under FOIL exemptions. The Supreme Court for New York County ordered ESDC to make a further production, and the Appellate Division affirmed in part. *See Tuck-It-Away Assocs., L.P. v. ESDC*, 54 A.D.3d 154 (1st Dep't 2008). With respect to seven documents, ESDC successfully sought leave to appeal the disclosure order to the New York Court of Appeals. The Court of Appeals ultimately affirmed. The Court of Appeals did not hold that ESDC improperly categorized any of the documents

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[20] A-1734.

[21] A-996-97; A-1142-43, A-1426-27.

as exempt from disclosure under FOIL.[22] Rather, the Court upheld the disclosure order on the basis that ESDC had not sufficiently articulated a particularized reason for denying disclosure of these documents prior to the commencement of the FOIL litigation.

Here, as explained below, the Court of Appeals expressly held that Petitioners failed to demonstrate that any of the documents withheld under FOIL were material to this matter.[23]

E. Petitioners' Claims And The Decisions Below

Petitioners own four self-storage facilities and two gas stations within the Project Site. They challenged the Project on multiple grounds in the Appellate Division. Petitioners claimed that the proposed condemnations will not serve a public purpose, that ESDC's finding that the Project Site is blighted was made in bad faith and on the basis of an unconstitutionally vague statute, and that the Project serves only the private interests of Columbia. Petitioners also asserted that their due process rights were violated by ESDC's closing of the administrative record before some of their FOIL lawsuits were resolved.

On December 3, 2009, the Appellate Division granted the Petitions and annulled ESDC's Determination and Findings. A two-judge plurality

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[22] *See West Harlem Bus. Group v. ESDC*, 13 N.Y.3d 882, 884-85 (2009); Pet. 9a-10a.

[23] Pet. 30a-31a.

conducted a *de novo* review of ESDC's blight findings and concluded that the Project lacked a public purpose. These two judges also held that the UDC Act's authorization of eminent domain for Civic Projects serving "educational" purposes did not extend to projects involving private, non-profit educational institutions such as Columbia. A third judge, who concurred in the result, concluded that Petitioners' due process rights were violated when ESDC closed the administrative record before all appeals in the FOIL litigations had been heard and decided.

Two judges dissented, concluding that (1) Petitioners' objections to ESDC's Determination and Findings merely presented a "difference of opinion" as to the conclusions to be drawn from the evidence, in which event the courts should defer to the agency; (2) ESDC did not exceed its statutory authority under the UDC Act in designating the Project a "land use improvement project" and a "civic project"; (3) ESDC's finding that the Project will serve a public purpose was neither irrational nor baseless; and (4) there was no basis for Petitioners' contention that ESDC closed the record prematurely.

On June 24, 2010, the Court of Appeals unanimously reversed the Appellate Division's decision. The Court held that the Project would serve two separate public purposes – remediation of blight and advancement of education.[24]

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[24] One judge concurred in the result, agreeing that the Project should be sustained as a Land Use Improvement Project to remediate blight, and that Petitioners' due process rights were

The Court of Appeals first upheld ESDC's determination that the Project will rehabilitate a blighted area by replacing dilapidated buildings with modern buildings and creating much-needed publicly-accessible open space. Based on its review of the extensive administrative record, the Court concluded that "there is record support – 'extensively documented photographically and otherwise on a lot-by-lot basis' – for ESDC's determination that the Project Site was blighted."[25] The Court also found that ESDC utilized "objective data ... in its findings of blight."[26] More specifically, "ESDC considered a wide range of factors including the physical, economic, engineering and environmental conditions at the Project site. Its decision was not based on any one of these factors, but on the Project site conditions as a whole."[27]

The Court of Appeals rejected Petitioners' allegations that ESDC acted "in 'bad faith' and with pretext when it concluded that the Project Site was blighted."[28] The Court stressed that ESDC's findings were based on "objective data,"[29] citing three independent studies in the record which documented the blighted physical conditions in the

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not violated by the closure of the administrative record before completion of the FOIL litigation. Pet. 32a-34a.

[25] Pet. 19a (citation omitted).

[26] Pet. 19a.

[27] *Id.*

[28] Pet. 20a.

[29] Pet. 19a.

area, the first of which was prepared at a time when Columbia was only beginning to purchase property there.

The Court of Appeals further held that the statutory term "substandard or insanitary area" should not be deemed void for vagueness. The Court held that "it is not necessary that the degree of deterioration or precise percentage of obsolescence or mathematical measurement of other factors be arrived at with precision (*Yonkers Cmty. Dev. Agency,* 37 N.Y.2d [478] at 484)."[30] The Court also pointed out that the U.S. Supreme Court, in *Berman v. Parker,* 348 U.S. 26, 33-34 (1954), "held that blight is an elastic concept that does not call for an inflexible, one-size-fits-all definition."[31]

The Court of Appeals also held that the Project independently qualifies as a Civic Project under the UDC Act because its purpose "is unquestionably to promote education and academic research while providing public benefits to the local community."[32] In so ruling, it rejected Petitioners' contention that the UDC Act limits a proposed educational project to public educational institutions. The Court also held that New York has long recognized "that schools, both public and

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[30] Pet. 21a (internal quotation omitted).

[31] Pet. 22a (*citing Berman v. Parker,* 348 U.S. 26, 33-34 (1954)).

[32] Pet. 26a.

private, 'serve the public's welfare and morals,'"[33] and it stressed that education is an "indisputably public purpose" and that "education and the expansion of knowledge are pivotal government interests."[34] Moreover, the Court noted that, because Columbia is a non-profit educational institution, "the concern that a private enterprise will be profiting through eminent domain is not present."[35] And it explained that the Project will "bestow numerous other significant civic benefits to the public," including the creation of "two acres of publicly accessible open space," upgrades in transit infrastructure, and the creation of 14,000 construction jobs and 6,000 permanent jobs.[36]

Finally, the Court of Appeals rejected Petitioners' claim that their due process rights were violated. The Court held that Petitioners had a meaningful opportunity to be heard because they had had "unfettered access" to the documents that formed the basis for ESDC's decision and had fully participated in the public process. The Court also ruled that Petitioners failed to establish that any of the documents at issue in the FOIL litigation (which are not in the record in this case, but which the Court of Appeals had examined) was material to ESDC's eminent domain determination.

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[33] Pet. 26a (*quoting Cornell Univ. v. Bagnardi*, 68 N.Y.2d 583, 593 (1986)).

[34] Pet. 26a.

[35] Pet. 26a.

[36] Pet. 3a-4a, 26a-27a.

REASONS FOR DENYING THE PETITION

POINT I

THE "PUBLIC USE" ISSUE PRESENTED IN THE PETITION DOES NOT WARRANT THIS COURT'S REVIEW

A. The Court Of Appeals' Decision Raises No Important Issue Warranting Review

Petitioners argue that this case raises the question "whether *Kelo* controls whenever courts are confronted with evidence of impermissible governmental favoritism and pretext in an eminent domain proceeding."[37] In fact, this case does not raise that question. The Court of Appeals never suggested that the issue of pretext was irrelevant to this case, and it examined Petitioners' claims of bad faith and pretext and rejected them on the merits, holding that Petitioners' pretext claim was "unsubstantiated by the record." The Court concluded that Petitioners had failed to make out a plausible claim of pretext, given (1) the overwhelming evidence in the administrative record supporting ESDC's determination that the Project Site was blighted, (2) ESDC's undisputed determination that the Project advances educational purposes, and (3) Petitioners' failure to substantiate their allegations of bad faith and pretext.

Petitioners contend, however, that "the instant case presents such a clear example of the

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[37] Pet. 18.

sort of bad faith, pretext, and favoritism toward a pre-determined beneficiary that one could only conclude ... that 'a private purpose was afoot.'"[38] In so arguing, Petitioners merely challenge the Court of Appeals' conclusion in this particular case that the record supports ESDC's conclusion that the Project Site suffers from longstanding deteriorated conditions and that Petitioners had failed to substantiate their conclusory allegations of bad faith and pretext. That factbound determination raises no issue warranting review by this Court.[39]

Moreover, the Court of Appeals properly rejected Petitioners' claims of bad faith and pretext. In particular, the Court of Appeals rejected Petitioners' contention that ESDC's finding that the Project Site was blighted was tainted by ESDC's use of AKRF, a consultant that had previously worked for Columbia.[40] The Court of Appeals noted that, as a measure of caution and in response to criticism of its use of that consultant, ESDC engaged a second consulting firm, Earth Tech, which had no prior relationship to Columbia and which conducted an independent review and also arrived at the conclusion that the Project Site was blighted.[41] The Court further determined that,

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[38] Pet. 18. (quoting *Kelo v. City of New London,* 545 U.S. 469, 487 (2005) ("*Kelo*")).

[39] Sup. Ct. Rule 10; *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n.8 (1981) (improvident grant of cross-petition that presented "primarily a question of fact," "which does not merit Court review").

[40] Pet. 20a.

[41] Pet. 20a.

"[c]ontrary to petitioners' assertions, Earth Tech did not merely review and rubber stamp AKRF's study, but conducted its own independent research and gathered separate data and photographs of the area before arriving at its own conclusions."[42] Earth Tech's analysis strongly supported ESDC's blight finding; as the Court explained, Earth Tech "determined that since 1961 there was a dearth of new construction in the area ... [and] enumerated the extensive building code violations in the area and the chronic problems that the buildings had with water infiltration."[43] Earth Tech also "found that many of the buildings in the Project site had deteriorated facades and that several of the buildings had been sealed by the New York City Fire Department because of unsafe conditions."[44] In sum, Earth Tech concluded that the neighborhood conditions created "'a blighted and discouraging impact on the surrounding community.'"[45]

The Court of Appeals also rejected, as unsupported by the record, Petitioners' contention that Columbia was responsible for the blight in the

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[42] Pet. 20a.

[43] Pet. 11a.

[44] The amicus brief filed by Senator Perkins incorrectly states on page 2 that ESDC "determined" that Petitioners' properties were "well-maintained." In fact, Petitioner Tuck-It-Away owned one building that had to be evacuated to avoid imminent collapse, and, its four parcels, taken together, had more than three times the average number of building violations as the parcels acquired by Columbia over the previous several years. Pet. 11a.

[45] Pet. 11a (quoting the Earth Tech report).

area by purchasing buildings and allowing them to fall into disrepair. The Court of Appeals noted that in 2003, when Columbia was just beginning to acquire property in the neighborhood, another study conducted by a different consultant, Urbitran, retained by a different agency "unequivocally concluded that there was 'ample evidence of deterioration of the building stock in the study area' and that 'substandard and unsanitary conditions were detected in the area.'"[46]

In sum, the Court of Appeals correctly concluded that the record amply supports ESDC's blight finding and contains no support for Petitioners' allegations of bad faith.

Petitioners assert that their allegations of pretext are supported by an ambiguous e-mail written by an ESDC staff attorney who had no role in the Project or its approval.[47] Although the e-mail was not part of the record below, it was before the Court of Appeals in connection with Petitioners' FOIL proceeding. The Court considered the e-mail, as evidenced by an exchange that took place during oral argument. When Petitioners' counsel read from the e-mail, one judge commented, "you're not really saying that this transforms the case? It's the same case with or without that document, isn't it?"[48]

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[46] Pet. 23a.

[47] Pet. 96a.

[48] http://www.nycourts.gov/ctapps/arguments/2010/Jun10/Jun10_OA.htm at 31:48-32:45 (video of Court of Appeals argument).

The Court of Appeals recognized that ambiguous, subjective musings of a staff attorney not working on a project are immaterial. Where, as here, the objective record demonstrates that the proposed condemnation will further numerous, substantial public purposes, an email authored by an agency employee not involved in the condemnation could not negate the objective public purposes served by the project. A contrary rule of law would encourage harmful fishing expeditions into the multi-faceted subjective motivations of staff and public officials. *Cf. Edwards v. Aguillard*, 482 U.S. 578, 636-37 (1987) (Scalia, J., dissenting) ("[W]hile it is possible to discern the objective 'purpose' of a statute (i.e., the public good at which its provisions appear to be directed), ... discerning the subjective motivation of [a legislative body] is ... almost always an impossible task.").

B. The Court Of Appeals' Decision Is Consistent With Kelo

Petitioners, joined by its amici, raise a broadside challenge to the Court of Appeals' employment of a deferential standard of review to determine whether the proposed condemnation in this case advances a public use. The Court of Appeals did not err in doing so. As this Court reaffirmed in *Kelo*, "public use jurisprudence has wisely ...afforded legislatures broad latitude in determining what public needs justify the use of the takings power." 545 U.S. at 483. Because "[t]he role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one," *Berman*, 348 U.S. at 32, a court should not "substitute its judgment for a

legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'" *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (quoting *United States v. Gettysburg Elec. Ry.*, 160 U.S. 668, 680 (1896)).

Petitioners criticize the Court of Appeals for not citing *Kelo* and for expressly deciding this case under the New York Constitution rather than the federal Constitution. The Court of Appeals may have assumed, however, that the "public use" requirement of Art. I, § 7(a) of the New York Constitution was at least as protective of property rights as the analogous provision of the Fifth Amendment of the U.S. Constitution, and thus may have found it unnecessary expressly to address the federal question. *See In re Goldstein v. New York State Urban Dev. Corp.*, 13 N.Y.3d 511, 550-51 (2010) (Smith, J., dissenting) (noting that Court of Appeals avoided holding that the private property protections of New York Constitution's public use provision are limited to those of the federal constitutional clause).

Petitioners argue that the Court of Appeals should have applied "the lengthy list of procedural safeguards" upon which Justice Kennedy purportedly "conditioned his tie-breaking concurrence" in *Kelo*.[49] Petitioners misread Justice Kennedy's opinion. Justice Kennedy "join[ed] the opinion for the Court and add[ed] ...further observations," commenting on the factual details in

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[49] Pet. 18.

New London's economic development plan.[50] He also reaffirmed the deferential standard of review set forth in this Court's prior jurisprudence.[51]

Moreover, nothing in *any* of the opinions in *Kelo* suggests – as Petitioners contend – that the government is required by the Constitution to send out a "request for proposals" when it is considering an exercise of eminent domain that would, in and of itself, advance a public purpose.[52] As even the dissent in *Kelo* agreed, where the proposed taking will eradicate longstanding blight, as is the case here, a public purpose would be achieved directly when the "harmful use" is eliminated.[53]

Here, the condemnation of Petitioners' properties will not only eliminate a "harmful use," it will also promote higher education.[54] The Court

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[50] 545 U.S. at 491-93.

[51] *Id.* at 490-91.

[52] Petitioners suggest that the Project escaped meaningful public scrutiny because ESDC did not initiate a competitive bidding process and because Columbia agreed to pay for the costs of the Plan. Pet. 23-24. There can be no serious contention that public scrutiny and accountability were lacking in this case. Many public entities in the City and State of New York had input into the proposed condemnation decision, as did the general public. The CPC and ESDC obtained information from the public using the alternative means of holding hearings and public comment periods under SEQRA, ULURP and the EDPL. ESDC approved the Project only after years of planning and after public notice, comment discussion and the City's Rezoning.

[53] *Kelo,* 545 U.S. at 500.

[54] Pet. 26a.

of Appeals recognized that higher education, academic research and expansion of knowledge are "pivotal government interests" which "serve the public's welfare and morals" and that "[t]he indisputably public purpose of education is particularly vital for New York City and the State to maintain their respective statuses as global centers of higher education and research."[55] Thus, as an independent ground for its decision, the Court of Appeals concluded that the Project is a valid exercise of eminent domain because "the purpose of the Project is unquestionably to promote education and academic research while providing public benefits to the local community."[56] Petitioners do not explain how their claim of pretext — which challenges the propriety of ESDC's blight determination — could undermine that conclusion, given that no finding of blight is necessary for approval of a Civic Project to advance education.[57] Indeed, Petitioners do not deny that the Project facilities will be used for educational purposes by Columbia, a non-profit university.[58]

Moreover, it could hardly be impermissible – or considered to be pretextual – for the government

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[55] *Id.*

[56] *Id.*

[57] *See* p. 6-7, *supra,* p. 33-34, *infra.*

[58] Petitioners did not challenge the constitutionality of the UDC Act pertaining to Civic Projects. Pet. 27a n.9. Yet, as noted by the Court of Appeals, the Project's status as an educational project provides an alternate basis for ESDC's public use determination independent of ESDC's blight finding.

to exercise eminent domain for the purpose of advancing education merely because the government knows – and, indeed, publicizes – in advance which educational institution will construct educational facilities on the acquired property. To so hold would effectively invalidate many well-settled uses of eminent domain to advance a public purpose through the instrumentality of a private party, including the grants of rights-of-way to railroads and utility companies so that the public may receive vital services. Nothing in *Kelo* suggests that the Court's concern about the use of eminent domain for a purely "private purpose" (545 U.S. at 487) reaches so far as to require the government to be unaware of the identity of any private beneficiary when the government authorizes the exercise of eminent domain for a public benefit. *See Kelo*, 545 U.S. at 482 (reaffirming ruling in *Midkiff*, 467 U.S. at 244, that a taking does not violate public use requirement merely because private parties ultimately receive the property, as "'it is only the taking's purpose, and not its mechanics,' ... that matters in determining public use").

C. There Is No Conflict Among The Lower Courts That Warrants This Court's Review

Petitioners argue that "no consensus yet exists among the lower courts regarding whether *Kelo*'s pretext analysis should apply to all eminent domain takings or only to those asserting economic development as a public purpose."[59] Whether or

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[59] Pet. 26.

not there is such uncertainty in some lower courts, it is of no moment here, because the Court of Appeals never suggested that pretext was irrelevant in this case, where the condemnation is for the purposes of remediating blight and advancing education, not economic development as understood in *Kelo*. The Court of Appeals squarely considered Petitioners' contention that "ESDC acted in 'bad faith' and with pretext when it arrived at its determination"[60] and rejected that argument as unsupported by the record.[61] That factbound conclusion does not warrant this Court's review.

Because the Court of Appeals reached the pretext issue on the merits and held Petitioners' pretext allegations to be devoid of record support, the legal issue supposedly in disarray in the lower courts – whether the "mere pretext" doctrine applies outside the context of using eminent domain to foster economic development – would not affect the outcome of this lawsuit. If this Court were to hold that the "mere pretext" doctrine should be limited to economic-development takings, then the judgment of the Court of Appeals would be *affirmed* because the public purposes in this case are blight eradication and the construction of educational facilities. Yet if the Court were to hold that the "mere pretext" doctrine should apply in all eminent domain cases, then the judgment of the Court of Appeals would similarly be *affirmed* because the Court of Appeals has already

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[60] Pet. 20a.

[61] *See* pp. 15, 21, *supra*.

determined, based on its review of the voluminous record of proceedings before the CPC and ESDC, that there is no factual basis for Petitioners' "pretext" allegations in this case. Thus, the legal issue supposedly in disarray in the lower courts is not presented here and could not warrant granting the certiorari petition.

In any event, the Petition cites only a handful of cases to establish a supposed conflict in the scope of "pretext" review after *Kelo*. The fact that the Petition cites so few cases suggests that whatever conflict may exist is limited in nature and would benefit from further "percolation" in the lower courts. Since so few cases are cited as even having addressed the issue of pretext after *Kelo*, it is evident that the issue of pretext has not been thoroughly explored by the lower courts, and review by this Court would be premature. Moreover, as explained below, the very cases cited by Petitioners demonstrate that there is no substantial conflict among the lower courts.

Petitioners rely on *Franco v. National Capital Revitalization Corp.*, 930 A.2d 160 (D.C. 2007), where the D.C. Court of Appeals reversed the trial court's striking of a public use defense to a condemnation. There, a draft bill authorizing the condemnation "did not explain why the properties were 'necessary' or to what 'public use' they would be devoted." *Franco*, 930 A.2d at 163. The District of Columbia Council later passed a bill approving the condemnation, but the final bill included findings that were neither in the draft bill nor were the subject of a public hearing. Those findings asserted in conclusory fashion that the properties

were part of a complex that was "a blighting factor" in the nearby communities. *Id.* There was no record that supported this legislative "finding," and no opportunity for the public to contest the finding.

Mr. Franco challenged the taking of his property by asserting that the stated public purpose was pretextual. Concluding that Mr. Franco had properly pled a pretext claim, the Court of Appeals stated that while the "legislation recites that NCRC [the condemning agency] had 'advised the Council that the Skyland Shopping Center is blighted,' . . according to Mr. Franco, NCRC admitted that it had made no such finding." *Id.* at 171.

The *Franco* decision does not conflict with the decision below. The court in *Franco* rejected the trial court's conclusion that, "once the legislature has declared that there is a public purpose for a condemnation, an owner is foreclosed as a matter of law from demonstrating that the stated reason is a pretext," and thus allowed the plaintiff to make his case on remand. 930 A.2d at 168. The Court of Appeals in this case suggested nothing to the contrary; indeed it reviewed the merits of Petitioners' allegations of pretext. Moreover, the *Franco* court, like the court below in this case, recognized that litigation of a pretext claim is properly limited to review of the objective record underlying a public use determination: "if the record discloses ... that the taking will serve 'an overriding public purpose' and that the proposed development 'will provide substantial benefits to the public,' the courts must defer to the judgment of the legislature." *Id.* at 174. *Franco* also noted –

consistent with the Court of Appeals' decision in this case – that the *Kelo* court did not suggest a taking will *per se* fail the public use requirement whenever "the identities of the benefiting private parties were known before the taking was authorized by the legislature." *Id.* at 175.

The Hawaii Supreme Court's decision in *County of Hawai'i v. C & J Coupe Family Ltd. Partnership*, 119 Haw. 352, 198 P.3d 615 (2008), is very similar. In that case, the lower court had initially rejected the condemnation after concluding that the County by resolution had illegally delegated its power of eminent domain through an agreement with a private developer. 198 P.3d at 644 n.34. Based on that agreement, the Court concluded that the project would not serve a public purpose. *Id.* After the County approved an amended resolution, which deleted any reference to the development agreement, the lower court found that the same project would serve a public purpose. *Id.* at 646. A divided Supreme Court of Hawaii reversed, finding that the lower court based its finding not on a review of the objective data in the record, but merely on the stated public purpose in the County's resolution. *Id.* This was error, the court ruled, because the trial court was obligated to consider the plaintiff's claim of pretext notwithstanding the resolution's assertion of a public purpose. *Id.* at 647. No such error is present here, where the Court of Appeals considered (and rejected) Petitioners' pretext claim on the merits.

The additional cases cited by Petitioners also do not conflict with the decision below. In *Rhode*

Island Economic Development Corp. v. The Parking Co., L.P., 892 A.2d 87 (R.I. 2006), the condemning authority already had a lease on and an option to purchase the property it sought to condemn. The record before the court indicated that the parties could not agree on a price for the purchase of the property and the condemnation was merely an effort to avoid further negotiations and to increase revenue for the government authority. The court stressed, however, that "it is not for this Court to question whether a taking ... will accomplish its intended goals because the [C]onstitution is satisfied if the Legislature '*rationally could have believed* that the [enactment] would promote its objective.'" *Id.* at 103 (quoting *Midkiff).* This deferential standard of review does not conflict with the Court of Appeals decision below.

In *Middletown Twp. v. Lands of Stone,* 595 Pa. 607, 939 A.2d 331 (2007), the Township sought to acquire property under a statute that authorized the use of eminent domain for recreational purposes; yet there was no evidence in the record that the Township planned any such recreational project, only that it had considered "various recreational options." Rather, the record showed that the Township decided to acquire the property to preserve open space and prevent development, purposes for which it had no authority to condemn property. Thus, the record objectively showed that the condemnation was not intended to accomplish its stated objective, which was a mere pretext. The opposite is true here; as the Court of Appeals explained, the record amply supports ESDC's conclusions that the condemnation was properly

authorized to remediate blight and to advance education.

POINT II

THE PROCEDURAL DUE PROCESS ISSUE PRESENTED IN THE PETITION DOES NOT WARRANT THIS COURT'S REVIEW

The Court of Appeals correctly held that Petitioners' due process rights were not violated when ESDC closed the administrative record pursuant to the EDPL before the FOIL requests made by the Tuck-It-Away Petitioners were resolved. That narrow conclusion does not warrant this Court's review.

A. Petitioners Do Not Present Any Important Legal Issue Warranting This Court's Review

Petitioners do not argue that New York's EDPL is unconstitutional on its face or inherently denies property owners a fair opportunity to be heard on the question whether a proposed condemnation is for "public use." The Second Circuit has upheld, after *Kelo*, the EDPL procedures against a due process challenge, observing that the EDPL gives property owners a fair opportunity to be heard on the issue of public use before property is taken. *See Brody v. Village of Port Chester*, 434 F.3d at 135-36; *Goldstein v. Pataki*, 488 F. Supp.2d 254, 272 (E.D.N.Y. 2007), *aff'd,* 516 F.3d 50, 55 (2d Cir.), *cert. denied,* 128 S. Ct. 2964 (2008). Petitioners do not challenge those decisions; they do not argue, for example, that the

Due Process Clause requires discovery or full trial-type proceedings in a challenge to a "public use" determination.

Rather, Petitioners argue that, in this particular case, they were denied due process because ESDC did not hold open the administrative record until final completion of their FOIL litigation. But even then, Petitioners do not contend that the Court of Appeals applied the wrong test for due process or failed to assign the correct weight to their interest in the due process balance. Indeed, the Court of Appeals' decision applied the same legal standard – that a condemnee be provided with an opportunity to be heard in a meaningful manner at a meaningful time – that the Petition urges upon this Court.[62] *See Mathews v. Eldridge,* 424 U.S. 319, 332 (1976). This legal standard is not in dispute by any party, nor is there any question that it was applied by the Court of Appeals. In short, Petitioners are really challenging the Court of Appeals' decision that they received due process in this particular case. That is not a basis for this Court's review.[63]

Furthermore, this case would not be an appropriate vehicle for consideration of any due process issue. Petitioners' challenge to ESDC's determination that the Project was an appropriate "Civic Project" for educational purposes rested

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[62] Pet. 33.

[63] *See* Sup. Ct. R. 10 (certiorari is "rarely granted" when the petition asserts "the misapplication of a properly stated rule of law").

entirely on a *legal* argument – namely, that under the UDC Act, eminent domain was authorized only for *public* educational institutions.[64] The Court of Appeals rejected that contention as a matter of law, concluding that eminent domain could be used to construct facilities for non-profit educational institutions such as Columbia.[65] Petitioners do not explain how the additional documents they sought under FOIL could have had any bearing on that issue of state law.

B. The Public Processes Provided By The Eminent Domain Procedure Law Comply With Due Process

As the Court of Appeals recognized, due process in the context of an agency determination requires that the agency provide an opportunity to be heard in a meaningful manner at a meaningful time. *Mathews*, 424 U.S. at 332. The opportunity must be appropriate to the nature of the case. *Mullane v. Cent. Hanover Trust Co.*, 339 U.S. 306, 313 (1950). Thus, due process is not a rigid rule unrelated to time, place and circumstances, but rather a flexible concept that calls for the procedural protection the particular situation demands. *Mathews*, 424 U.S. at 334.

The Court of Appeals also concluded, in applying the *Mathews* standard that, "[i]n this case, petitioners had an opportunity to comment on the proposed Project in a meaningful manner – both orally and through written submissions – and

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[64] Pet. 65a.

[65] Pet. 23a-27a.

at a meaningful time – well before ESDC issued its findings and determination to acquire petitioners' property by eminent domain."[66] The Petition does not identify any specific error in that decision. Petitioners do not dispute, for example, that ESDC held an extensive public hearing, that they were offered and took the opportunity to participate in that hearing, and that they submitted extensive comments for the record that ESDC then considered.

The Court of Appeals clearly reached the right result here. The Court explained that "petitioners' substantial opportunity to be heard is reflected in their extensive written submissions after the completion of the two-day public hearing." In addition, "prior to the ESDC determination, [Petitioners] had unfettered access to over 8,000 pages of documents including, most significantly, the GPP (as initially adopted by ESDC), the FEIS, and the AKRF and Earth Tech neighborhood conditions studies. All of these documents were available to the public during the comment period...."[67]

As a result of Petitioners' and others' vigorous participation in the public process, "ESDC prepared 75 pages of detailed responses to the comments received and duly considered their submissions before rendering its findings and determination."[68] Petitioners and their counsel

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[66] Pet. 28a-29a.

[67] Pet. 29a.

[68] *Id.*

once again objected to the Project at ESDC's December 18, 2008 meeting where the Directors voted to adopt SEQRA Findings, affirm the GPP, and issue the Determination and Findings to proceed with the Project.

Finally, review is unwarranted in light of the Court of Appeals' determination that the internal ESDC documents at issue in Petitioners' FOIL proceeding were not material and that Petitioners were not prejudiced by not obtaining them.[69] Petitioners provide no basis for this Court to review, much less overturn, that determination. Even if Petitioners were entitled to the documents under FOIL at the time of the hearing, a FOIL violation would not in and of itself establish a due process violation. Due process is violated only if Petitioners were deprived of an "opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews*, 424 U.S. at 333. To establish that a FOIL violation rose to the level of a due process violation, petitioners "must show that the withholding of the [documents] caused [them] prejudice." *Adams v. United States*, 673 F. Supp. 1249, 1260 (S.D.N.Y. 1987). Since the Court of Appeals concluded that Petitioners failed to demonstrate the materiality of the documents at issue, it properly determined that Petitioners were

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[69] Pet. 30a-31a. Moreover, Petitioners failed to seek vacatur of the automatic stay of disclosure when ESDC appealed the Appellate Division's decision. *Id.* Had they done so, the courts could have considered at an earlier juncture whether Petitioners would suffer harm by closure of the administrative record without those documents.

not prejudiced and correctly rejected their assertion that they were denied due process.[70]

CONCLUSION

The petition for a writ of certiorari should be denied.

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November 11, 2010

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[70] Pet. 30a-31a.

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