UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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DANIEL GOLDSTEIN, JERRY CAMPBELL, as the putative administrator of the estate of OLIVER ST. CLAIR STEWART and in his individual capacity, THE GELIN GROUP, LLC, CHADDERTON'S BAR AND GRILL INC., d/b/a FREDDY'S BAR AND BACKROOM, MARIA GONZALEZ, JACKIE GONZALEZ, YESENIA GONZALEZ, HUDA MUFLEH-ODEH, JAN AKHTAR, DAVID SHEETS, JOSEPH PASTORE, PETER WILLIAMS, PETER WILLIAMS ENTERPRISES, INC., HENRY WEINSTEIN, 535 CARLETON AVE. REALTY CORP., 535 CARLTON AVE. REALTY CORP., and PACIFIC CARLTON DEVELOPMENT CORP.,

Plaintiffs,

06-CV-5827 (NGG)

- against -

GEORGE E. PATAKI, CHARLES A. GARGANO, NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION, BRUCE C. RATNER, JAMES P. STUCKEY, FOREST CITY ENTERPRISES, INC., FOREST CITY RATNER COMPANY, RATNER GROUP, INC., BR FCRC, LLC, BR LAND, LLC FCR LAND, LLC, BROOKLYN ARENA, LLC, ATLANTIC YARDS DEVELOPMENT COMPANY, LLC, MICHAEL BLOOMBERG, DANIEL DOCTOROFF, ANDREW M. ALPER, JOSHUA SIREFMAN, CITY OF NEW YORK and NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION ,

Defendants.

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PLAINTIFFS' MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

Defendants fundamentally misapprehend the circumstances under which the government is entitled to deference under established Public Use Clause case law. To be sure, cases like *Berman v. Parker*, 384 U.S. 26 (1954), *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), and *Kelo v. City of New London*, 545 U.S. 469 (2005), establish that courts owe substantial deference to legislative judgments regarding the geographic location and reach of areas slated for condemnation.

Those same cases, however, establish that such deference is warranted *only* where the legislature *first* concludes that developing a given area will benefit the public, *then* identifies the specific properties to be seized to advance that predetermined purpose, and *then* engages in a fair and open bidding process with prospective developers to select the beneficiaries of the seizures. The temporal sequence is critical, and rightly so.

By contrast, no such deference is called for where, as here, (1) it is the *private developer* who *first* identifies private property that he wants to acquire to advance his own purposes, and (2) it is the *private developer* who *then* persuades the government to accede to his wishes, and (3) *then* the process concludes with the government magically declaring (after a supposedly thorough analysis) that it has determined that the public good will be served by seizing *the very same* private properties that were pre-selected by the developer and giving them to *the very same* developer without so much as considering an alternative beneficiary for this government largesse. That is exactly what happened in this case. That is why plaintiffs' Complaint states a compelling claim under the Public Use Clause.

A second striking aspect of defendants' motion to dismiss is the lengths to which

they go in attempting to build artificial procedural roadblocks to the adjudication of plaintiffs' well-pled constitutional claims.

Defendants contend that plaintiffs' claims somehow are not ripe, despite the fact that the Empire State Development Corporation ("ESDC") has already issued a formal and *final* "Determination and Findings" concluding unambiguously that plaintiffs' properties will be condemned, and despite case law squarely refuting their remarkably strained theory that there is no federal jurisdiction until *after* title to plaintiffs' property actually passes to the ESDC. Defendants also urge this Court to abstain from hearing plaintiffs' constitutional claims under *Younger v. Harris*, despite the fact that there is not a single ongoing state judicial proceeding involving any of the plaintiffs, and despite the fact that even if there were, such a hypothetical proceeding indisputably would not afford plaintiffs the opportunity to engage in discovery or even proffer an evidentiary record of any kind. Perhaps most telling of all, defendants sheepishly ask this Court to borrow the heightened pleading standard applicable to fraud claims under Rule 9(b), despite a slew of cases confirming not only that doing so would be error, but that plaintiffs' civil rights claims are, if anything, subject to particularly deferential review on this motion.

If the answer were not so obvious, defendants' barrage of patently meritless procedural arguments might leave one wondering what they are afraid of. Just as defendants strove to squelch public participation in the debate over the Project and to avoid a legitimate competitive bidding process, defendants will do whatever it takes to avoid answering further questions in this litigation for a simple reason: as the record ultimately will establish, defendants chose to condemn plaintiffs' property not because of any supposed "public benefits," but rather for the singleminded purpose of further enriching Bruce Ratner.

FACTS

Plaintiffs respectfully refer the Court to the Complaint for a full description of the factual bases for their claims, but offer the following condensed version for purposes of this brief.

Defendants Governor Pataki and Mayor Bloomberg, at defendant Ratner's behest, agreed to grant Ratner the exclusive right to build the single largest multi-use real estate development in the history of the City of New York in the heart of central Brooklyn (the "Project"). This deal was struck without first creating a comprehensive development plan or so much as considering a single alternative to Ratner's plan for development of the area, without a true competitive bidding process, and without a process to allow for meaningful community input. Compl. ¶ 2.

Defendants' decision to take plaintiffs' properties serves only one purpose: to allow Ratner to build a Project of unprecedented size, and thus to reap a profit that defendants, tellingly, have thus far refused to disclose. This is not merely favoritism of a particular developer in the classic sense, although it is that. Here, the "favored" developer in fact is driving and dictating the process, with government officials at all levels obediently falling into line. *Id.* ¶ 3.

The area where plaintiffs properties are located (the "Takings Area") "rests smack in the middle of some of the most valuable real estate in Brooklyn." *Id.* ¶ 55. Following "the Project's announcement in 2003, defendant Forest City Ratner Companies ("FCRC"), using the threat of eminent domain, has aggressively purchased property in the Takings Area, cleared out buildings, and left them empty." *Id.* ¶ 56. Moreover, in its "fervor to purchase as much property as possible within the Takings Area, FCRC has repeatedly warned reluctant property owners that

they only have two choices; sell to FCRC or wait until FCRC takes their property by eminent domain." *Id.* ¶ 57. The threatened and actual seizure of plaintiffs' properties in the Takings Area is a transparent effort to co-opt the government's power of eminent domain in order to expand a private development and maximize the profits it generates. *Id.* ¶ 58.

MTA's Vanderbilt Yards could easily be developed without involving the Takings Area. A large mixed-use residential and commercial complex could be built without taking a single piece of private property by eminent domain. *Id.* ¶ 59.

Defendants' claim that the seizure of plaintiffs' properties is necessary to promote economic development is false. *Id.* ¶ 60.

Ordinarily, the New York City Council and the City's fifty-nine Community Boards provide a forum for the voices of the people to be heard whenever major land use questions arise like those presented by the Project. Pursuant to the 2002-2003 agreement between Ratner, Pataki and Bloomberg, however, any meaningful opportunity to be heard through normal processes was extinguished by executive fiat, at both the state and local levels. *Id.* ¶¶ 61-65.

The agreement to develop the Project and take plaintiffs' properties included express provisions bestowing atypical benefits upon FCRC. Under one written agreement, FCRC will receive a raft of special discretionary goodies not available as-of-right to real estate developers, including $200 million in capital contributions from the City and State, low-cost financing for the arena, extra property tax savings, a low-cost lease, and the guaranteed transfer of private property through eminent domain. Under a second agreement, FCRC is granted the

unfettered right to develop other properties near the Project footprint including areas *outside the Project,* without interference by the City. *Id.* ¶¶ 66-68.

Like much of the evidence to this very day, one of the agreements detailing these special benefits was hidden from public scrutiny. Indeed, it was only produced by threat of legal compulsion under the Freedom of Information Law. *Id.* ¶ 67

Pursuant to the 2002-2003 agreement between Pataki, Bloomberg and Ratner, FCRC was gifted the rights to build over the MTA's Vanderbilt Rail Yard. This was expressly confirmed, on more than one occasion, by MTA spokespersons in discussions with news reporters. *Id.* ¶ 69. Apparently embarrassed by the disclosure that a back-room deal had already been struck to convey the MTA's property to FCRC, the MTA retracted its previous statements. *Id.* ¶ 70.

Bent on papering over its candid disclosure of the existing deal, the MTA later executed a "letter agreement" with FCRC designed to make it appear as if a final agreement on the sale of the MTA's property to FCRC had not yet been reached – although, in fact, such an arrangement had long been secured. *Id.*

Thereafter, intent on creating the appearance of an open bidding process (even though the outcome was predetermined), the MTA released a request for proposals ("RFP") for purchase of the development rights to the rail yards. The sham RFP was profoundly biased in favor of FCRC. Whereas FCRC had been working on its (pre-approved) proposal for purchase of the railyards *with the MTA and other State officials* for more than two years, the RFP gave everyone else forty-two days to generate proposals. Among other things, the RFP required proposers to submit a twenty-year profit and loss statement *(pro forma)*. *Id.* ¶¶ 70-72.

FCRC submitted a formal bid to develop over the railyards, offering to pay the MTA $50 million – $164.5 million less than the appraised value of $214.5 million. Notably, FCRC failed to submit a profit and loss projection as the RFP required. *Id.* ¶ 73.

Extell Development Company, a large and highly reputable real estate developer, submitted a bid for $150 million. Extell's proposal was much smaller in scale than FCRC's, *and did not require the taking of any private property by eminent domain*. Extell even submitted the required twenty-year profit and loss statement and in its bid proposed to go through ULURP and a vote by the City Council. *Id.* ¶ 74.

Consistent with its prior understanding with FCRC, and notwithstanding the overall superiority of the Extell bid, the MTA Board, which at the time was controlled by defendant Pataki, granted FCRC the exclusive right to negotiate the terms of sale agreement with the MTA over the course of forty-five days. *Id.* ¶ 74.

A bit more than a month later, the MTA and FCRC formally announced that FCRC would pay $100 million for the rights to the site, still well below the appraised value and below the Extell bid. When the lone dissenting MTA Board member, Mitch Pally, asked for an explanation, MTA Board Chair Peter Kalikow replied, "I'm not going to be beholden by that appraisal, it's just some guy's idea of what those yards are worth." *Id.* ¶ 76.

Prior to the vote, defendant Doctoroff submitted a letter to the MTA Board declaring that the City would only commit its financial resources to the FCRC Project, and *not* the Extell bid. *Id.* ¶ 77.

In violation of the terms of the RFP, FCRC never provided the MTA with its projected profits from the Project. When pressed by a reporter to reveal FCRC's anticipated

profits, defendant Stuckey claimed that profit numbers would emerge only *after* the Project was completed. Stuckey defended FCRC's right to make money remarking: "It is, after all, America." *Id.* ¶ 78.

Rather than openly admitting that the true purpose for the taking of plaintiffs' properties is to enrich Ratner, defendants proffer a number of supposed public benefit justifications. All "are either wildly exaggerated or simply false. At best, the public benefits that the Project offers are incidental; at worst, they are non-existent." *Id.* ¶ 85.

Defendants claim that the taking of plaintiffs' properties is necessary to eliminate blight is a classic *post-hoc* justification – a pretext with no basis in fact. When the Project was publicly unveiled in the fall of 2003, the elimination of blight was never raised as a justification for the taking of private property, or for the development of the Project in general. This was not an oversight born of early enthusiasm over the Project. Neither of the two 2005 agreements between the City, the State and FCRC so much as reference "blight" as a basis for government action or otherwise. *Id.* ¶¶ 94-95.

After the Supreme Court's opinion in *Kelo,* however, defendants commissioned a "Blight Study" of the area to be performed by a company called AKRF. FCRC paid for the study. AKRF is the antithesis of an independent consultant. Each and every time AKRF has been retained to study a project in conjunction with an environmental review in New York City, it has drawn conclusions that favored the proposed project. *Id.* ¶¶ 96-97.

The conditions that the AKRF Blight Study found to be "blighted" in fact *are a direct result of the Project itself* and the attendant non-enforcement and neglect by the City of

New York, the New York City Department of Transportation, the MTA and FCRC, as well as property warehousing by FCRC. *Id.* ¶ 98.

FCRC will profit enormously from the Project. The magnitude of that profit cannot be discerned at this time, however, because FCRC has refused to disclose this data publicly. FCRC's profit is conservatively estimated at one billion dollars ($1,000,000,000). FCRC's profit will certainly be greater than the public return, if any. The financial risks associated with the Project will be borne by the public, not FCRC. *Id.* ¶¶ 117-121.

In addition to the hostile seizure of plaintiffs' properties, defendants will also execute a number of so-called "friendly" takings. The friendly takings consist of defendants acquiring, without objection, title to FCRC's own properties, presumably after paying "just compensation" as required by the Fifth Amendment. This will then allow for the eviction of tenants, like the plaintiff residing at 479 Dean Street, who are otherwise protected from eviction without cause by State rent laws. Thus, in one fell swoop, the friendly taking will allow FCRC (I) to avoid the rent laws and their "onerous" relocation requirements, (ii) to evict all tenants without any cause or justification, and (iii) to line its pockets with additional funds from the public fisc. *Id.* ¶¶ 122-126.

By taking plaintiffs' property and giving it to FCRC, defendants intend to benefit FCRC. FCRC is the primary beneficiary of the taking of plaintiffs' properties. The public does not benefit from the taking of plaintiffs' properties. Alternatively, insofar as the public derives any benefit from the taking of plaintiffs' properties, it is secondary and incidental to the benefit that inures to FCRC. Defendants' desire to confer a private benefit to FCRC was a substantial, motivating factor in defendants' decision to seize plaintiffs' property and transfer it to FCRC.

As set forth above, among other indicia that the taking of plaintiffs' properties is being done to benefit FCRC, without limitation, are: (A) the Project was wholly conceived by FCRC; (B) absent FCRC's persistence in pursuing the Project, there would be no development at the site that would require the condemnation of plaintiff's property; ©) not a single alternative plan (much less multiple plans) was considered before the determination to proceed with the Project; (D) not a single alternative private developer (much less multiple developers) was considered before the determination to proceed with FCRC; (E) the beneficiary of the land transfer by eminent domain was known long before the determination to proceed; (F) there was no meaningful community or local input before (or even after) the decision to proceed; (G) the Project is not the product of a carefully considered development plan; (H) the environmental impact of the Project was not studied before the determination to proceed; (I) the social ramifications of the Project were not considered before the determination to proceed; (J) there was no independent consultant or team of consultants who evaluated the Project before the determination to proceed; (K) there was no finding that the Project was consistent with the overall development goals of the City and State before the determination to proceed; (L) there was no finding that the area to be condemned was blighted before the determination to proceed; (M) New York City is not struggling to rebound from an economic depression; (N) Brooklyn is not struggling to rebound from an economic depression; (O) the substantial public financing and incentives provided for the program were not put in place *before* the developer was known; (P) the public economic benefits, if any, to be realized from the Project are *de minimus*; and (Q) many of the procedural protections in place to prevent development without local and community input and approval were bypassed. *Id.* ¶¶ 129-134.

Defendants' claims of public benefit are a pretext to justify a private taking. Indicia that defendants' claims of public benefit are a pretext include, without limitation: (1) the Project will not actually create more jobs; (2) the Project will not generate a net economic benefit for the community or the City or any gain will be *de minimus;* (3) the Project will not materially increase available affordable housing; and (4) the area slated for condemnation is not blighted. *Id.* ¶¶ 135-136.

These facts, along with all the other allegations in the Complaint, must be accepted as true for purposes of this motion.

STANDARD OF REVIEW

While the extremely permissive standard governing a motion to dismiss is well known, it is of critical importance in civil rights cases like this one where: (1) defendants have exclusive possession and control of virtually all of the evidence concerning the decision-making process that led to the alleged constitutional deprivation; and (2) the immense power of government has been enlisted in service of seizing plaintiffs' properties and giving them to a group of extremely wealthy and powerful individuals and corporations to further enhance that same power and wealth. Absent strict adherence to liberal pleading standards in such circumstances, constitutional violations will go largely unchecked, and 42 U.S.C. § 1983 will become a dead letter.

While it would be asking a lot to expect defendants to emphasize the importance of the standard, or to note that the Second Circuit has held that it should be applied with particular strictness in cases like this one, it is surprising that the ESDC defendants and Governor Pataki *ignore the standard altogether.* Not a word is offered. Worse still, although the Ratner

defendants make reference to the appropriate standard, they then urge the Court to ignore it completely by asserting the frivolous argument that Rule 9 heightened pleading standards apply to plaintiffs' section 1983 claims.

Given all of this, it cannot be overemphasized at the outset that a motion to dismiss for failure to state a claim should not be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Cleveland v. Caplaw Enterprises*, 446 F.3d 518, 521 (2d Cir. 2006) (quoting *Sheppard v. Beerman*, 18 F.3d 147, 150 (2d Cir. 1994)).

Perhaps more important, this standard must be "applied with particular strictness when the plaintiff complains of a civil rights violation." *Id.*; *see also Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 644 (2d Cir. 1998); *Branum v. Clark*, 927 F.2d 698, 705 (2d Cir. 1991); *Hodge v. City of Long Beach*, 306 F. Supp. 2d 288, 291 (E.D.N.Y. 2003).

The Ratner defendants argue that the heightened pleading requirement applicable to fraud claims under Fed. R. Civ. P. 9(b) applies to plaintiffs' civil rights claims in this case. This argument is frivolous. The Supreme Court has expressly disavowed any such rule on at least two occasions.

In *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), Chief Justice Rehnquist, writing for a unanimous Court, expressly held that Rule 9(b)'s heightened pleading standard does not apply to civil rights actions brought under section 1983. Rather, the Court held that civil rights complaints are governed only by "the liberal system of 'notice pleading' set up by" Rule 8(a)(2), which requires no more than "a short plain statement of the claim." 507 U.S. at 168; *see also id.* ("The Federal Rules of Civil Procedure do

not require a claimant to set out in detail the facts upon which he bases his claim.") (quoting *Conley v. Gibson*, 255 U.S. 41, 47 (1957)). Chief Justice Rehnquist observed that Congress was free to impose a heightened pleading standard on section 1983 claims, but that courts are not free to impose such a standard as a matter of common law: "Perhaps if Rules 8 and 9 were rewritten today, claims against municipalities under § 1983 might be subjected to the added specificity requirement of Rule 9(b). But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." 507 U.S. at 168.

More recently, the Supreme Court held in *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002), that Title VII does not impose heightened pleading requirements on employment discrimination plaintiffs. Writing for a unanimous Court, Justice Thomas explained that under Rule 8(a), a civil rights plaintiff need only give the defendant "fair notice of the basis" for his or her claims. *Id.* at 514. The Court observed that "[i]f a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before responding," and that "claims lacking merit may be dealt with through summary judgment under Rule 56." *Id.* The Court cautioned, however, that claims must not be dismissed under Rule 12(b)(6) simply because "it may appear on the face of the pleadings that a recovery is very remote and unlikely" because "that is not the test." *Id.* at 515 (quotation omitted). Relying on *Leatherman*, Justice Thomas reiterated that courts are prohibited from applying Rule 9(b)'s heightened pleading standard to claims other than for fraud. *See id.*

Indeed, the Second Circuit has expressly held that any pre-2002 case law purporting to suggest that there can be a heightened pleading standard in section 1983 cases was overruled by, and is no longer good law in light of, *Swierkiewicz*. *See Phelps v. Kapnolas*, 308

F.3d 180, 187 n.6 (2d Cir. 2002); *see also Educadores Puertorriquenos En Accion v. Hernandez*, 367 F.3d 61, 63-67 (1st Cir. 2004); *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1121, 1123-26 (9th Cir. 2002); *Goad v. Mitchell*, 297 F.3d 497, 502-03 (6th Cir. 2002); *Higgs v. Carver*, 286 F.3d 437, 439 (7th Cir. 2002); *Currier v. Doran*, 242 F.3d 905, 911-17 (10th Cir. 2001); *Tsotesi v. Bd. of Educ. of the City of New York*, 258 F. Supp. 2d 336, 338 & n.10 (S.D.N.Y. 2003).

Given the Second Circuit's repudiation in *Phelps* of pre-*Swierkiewicz* case law purporting to impose a heightened pleading requirement in civil rights cases, the Ratner defendants' singular reliance on *Rosenthal & Rosenthal v. New York State Urban Development Corp.*, 605 F. Supp. 612 (S.D.N.Y. 1985) – a pre-*Swierkiewicz* district court case – is unavailing, to put it mildly. Indeed, like the ESDC's and Governor Pataki's refusal to so much as mention the applicable standard, the Ratner defendants' reliance on demonstrably bad law and failure to cite controlling Supreme Court precedent is telling. Defendants are desperately seeking to avoid the light that will be shown upon their decision-making process during discovery.

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE RIPE

Defendants gamely argue that "plaintiffs have filed a *patently premature* action." ESDC Br. at 1 (emphasis supplied).[1] They contend that plaintiffs' claims under the Public Use Clause (and perhaps the Equal Protection and Due Process Clauses)[2] will not be ripe for

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[1] *All* defendants join and adopt the ESDC defendants' motion to dismiss with respect to ripeness, abstention and failure to state a claim grounds.

[2] It is unclear whether defendants are moving to dismiss plaintiffs Equal Protection and (continued...)

adjudication until the ESDC commences state court special proceedings against plaintiffs under Article 4 of the New York Eminent Domain Procedure Law ("EDPL").

For this argument to succeed, this Court must (I) defy controlling precedent from the Supreme Court and the Court of Appeals for the Second Circuit; (ii) ignore the fact that, on December 8, 2006, the ESDC issued its "*Final Determination and Findings*" of public use, benefit or purpose pursuant to EDPL § 204(B)(1), ESDC Br. at 8 (emphasis supplied); (iii) pretend that the EDPL scheme that deems plaintiffs' federal constitutional public use challenges to be ripe for adjudication as of December 8, 2006 doesn't exist; and (iv) conflate *Williamson*'s first ripeness prong requiring a final state *agency* decision (which at least arguably applies) with the second prong requiring a final state *court* decision (which defendants rightly concede does not apply). Needless to say, there is little to recommend this approach.

A court evaluating a ripeness challenge must consider: (1) whether a controversy is fit for judicial determination (here, whether there has been a final determination by a decision-maker); and (2) the hardship to the parties of withholding court consideration. *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99, 105 (1977).

"The 'fitness of the issues for judicial decision' prong recognizes the restraints Article III places on federal courts. It requires a weighing of the sensitivity of the issues presented and *whether there exists a need for further factual development*." *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 347 (2d Cir. 2005) (emphasis supplied) (citing *Thomas*

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[2](...continued)
Due Process claims on ripeness grounds. Their brief addresses only plaintiffs' Public Use Clause claim on this point.

v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 581 (1985)). The ripeness doctrine is designed to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Labs.*, 387 U.S. at 148.

Undeterred by reality, defendants claim that the "process is in its embryonic stages." ESDC Br. at 15. "Any number of eventualities, foreseeable[3] and not, might arise, in the meantime to derail the planned project." *Id.* at 16.

There is nothing abstract or conjectural about this controversy. There certainly is no need to await factual developments because nothing foreseeable will alter the nature of this case. The contours of the dispute are fixed and immutable. They will not change. Either the taking of plaintiffs' properties violates the Public Use, Equal Protection and Due Process Clauses, or it does not. Every fact needed to answer that factual and legal question already exits and will (after discovery) be available for the Court's determination on the merits.[4]

As alleged in the Complaint, defendants Ratner, Pataki and Bloomberg (among others) made the final decision to take plaintiffs' properties years ago, but certainly no later than July 24, 2006, when ESDC formally notified plaintiffs, pursuant to EDPL § 202, that their

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[3] The only foreseeable eventuality defendants identified that might derail the Project was the meeting of the Public Authorities Control Board ("PACB"). ESDC Br. at 16 n.14. In keeping with long-standing agreements to wield the power of eminent domain against plaintiffs, the three voting members of the PACB, including defendant Pataki's agent, met and unanimously approved the Project on December 20, 2006. After the vote, Ratner issued a statement that he was "very thankful to Governor Pataki, Speaker Silver and Senate Majority Leader Bruno for their support and today's approval, and we are very grateful to Mayor Bloomberg's continued effort over the past three years to make this day possible." So much for "the road to a final taking" being "positively frought with contingencies." ESDC Br. at 14.

[4] Of course, at this stage, only a scant few facts are known to plaintiffs and the public. The overwhelming majority of the facts material to this dispute remain unknown to all save defendants themselves.

properties would be taken for "public purposes." By commencing the process of taking plaintiffs' properties for public purposes, as dictated by the EDPL, defendants formalized their final decision.

That said, this Court need not decide whether defendants' decision was final and ripe for review when they commenced the EDPL administrative process in July 2006. Any sliver of doubt on the ripeness score was put to rest on December 8, 2006 when defendants issued their "*final determination and findings* pursuant to EDPL § 204," ESDC Br. at 8 (emphasis supplied). That accurately self-described *final* finding resoundingly slams the door on defendants' ripeness argument. But there is more.

The Supreme Court in *Williamson County Regional Planning v. Hamilton Bank*, 473 U.S. 172 (1985), established a two-prong test for determining ripeness when considering a claim asserting an unconstitutional *regulatory* taking under the Just Compensation Clause of the Fifth Amendment. The first prong, "paralleling the initial prong of *Abbott Laboratories*," requires that the agency's determination concerning the property must be final or definitive. *Murphy*, 402 F.3d at 348 (citing *Williamson*, 473 U.S. at 186). The second prong requires a property owner to seek just compensation for an alleged taking in the state courts before filing a federal court action. *Williamson*, 573 U.S. at 194. As defendants recognize, *Williamson*'s second prong obviously does not apply here. ESDC Br. at 13 n.12. That leaves the first prong.

Given the sharp differences between (1) a regulatory takings claim that seeks a court determination of whether a government regulation (most often a zoning regulation) will operate in a manner that amounts to a taking of property and (2) a physical takings claim that seeks a determination that the threatened taking has not satisfied the Public Use Clause, it is

questionable whether the first prong of *Williamson* has any logical applicability here. *See Murphy*, 402 F.3d at 349-350 (discussing applicability of *Williamson* prong one finality rule to substantive due process and First Amendment claims concerning land use disputes). The question is academic, however, because plaintiffs handily satisfy, as they must, the essentially identical standard for ripeness set forth in *Abbott Labs.* and *Thomas*. *See Murphy*, 402 F.3d at 347-48.

The obvious ripeness of plaintiffs' claims is most readily established by the fact that the Supreme Court and the Second Circuit have decided Public Use Clause cases that were in identical postures without so much as explaining why they believed they had jurisdiction over the controversy. *See, e.g., Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 234 (1984); *Rosenthal & Rosenthal, Inc. v. New York State Urban Dev. Corp.*, 771 F.2d 44 (1985), *aff'g* 605 F. Supp. 612, 615 (S.D.N.Y. 1985) (reaching merits of plaintiffs claim as condemnation was imminent after ESDC had made its final determination and findings pursuant to EDPL § 204).[5]

In *Midkiff*, the defendant Hawaii Housing Authority (HHA) held a public hearing to consider acquiring land by eminent domain. Thereafter, HHA "made the statutorily required finding" of public purpose. 467 U.S. at 234. In February 1979, plaintiff Midkiff and others filed suit in federal district court challenging the proposed taking of their properties under the Public Use Clause. *Id.* In June 1979, the district court granted Midkiff's motion for a preliminary injunction. *Id.* In September 1979, the HHA commenced an eminent domain lawsuit in state

[5] Defendants try to dull the impact of the *Rosenthal* case (but not *Midkiff*) by surmising that the Second Circuit must have determined, *sub silentio,* that it did not have jurisdiction on ripeness grounds, but would reach the merits nonetheless based on the doctrine of "hypothetical jurisdiction." ESDC. Br. at 16 n.14. To state this argument is to refute it.

court. *Id.* In December 1979, the district court granted summary judgment. *Id.* Not surprisingly, no party and no court that considered Midkiff's claims ever raised ripeness as a bar to adjudication. *See id.*; *see also Midkiff v. Haw. Hous. Auth.*, 483 F. Supp. 62 (D. Haw. 1979), *rev'd*, 702 F.2d 788 (9th Cir. 1983).

The procedural history and statutory scheme for exercising the state's eminent domain power at issue in *Midkiff* is indistinguishable from this case. Here, as in *Midkiff*, plaintiffs seek injunctive relief in federal court under the Public Use Clause *after* an agency determination of public purpose and *before* the agency commences court proceedings to seize title. *See also Berman v. Parker*, 384 U.S. 26, 28-30 (1954) (reviewing Public Use Clause challenge to proposed taking filed in federal district court *after* public hearings and findings but before condemning agency commenced any court proceedings to transfer title); *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1215-16 (C.D. Cal. 2002) (refusing to abstain or dismiss and enjoining eminent domain proceedings where federal action was commenced before City Council adopted resolution of necessity and before state court condemnation action was filed); *99 Cents Only Stores v. Lancaster Dev. Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001) (granting plaintiff summary judgment on Public Use Clause claim brought *after* public hearings but *before* any state court condemnation action was filed), *appeal dismissed*, 60 Fed. Appx. 123 (9th Cir. 2003).

It is difficult to imagine that the jurisdictional ripeness of the action in *Midkiff* somehow escaped the minds of the District Judge, the three Circuit Judges and the nine Justices of the Supreme Court. Jurisdiction is an issue that must be addressed in every federal action and on every federal appeal:

> [E]very federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review," even though the parties are prepared to concede it. *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934). *See Juidice v. Vail*, 430 U.S. 327, 331-332 (1977) (standing). "And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it."

United States v. Corrick, 298 U.S. 435, 440 (1936) (footnotes omitted); *see also Arizonans for Official English v. Arizona*, 520 U.S. 43, 73 (1997) (quoting *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986)).

And then there is *Aaron v. Target Corp.*, 265 F. Supp. 2d 1162, 1175-76 (E.D. Mo. 2003), *rev'd on other grounds*, 357 F.3d 768, 776 (8th Cir. 2004). In *Aaron*, the district court enjoined a taking for violating the Public Use Clause and rejected the "defendant's contention that this case is not ripe for decision" because "there must be a taking of private property before plaintiffs can assert a claim under the Fifth Amendment's Takings Clause." *Id.* "In this case, the threat to plaintiffs' constitutional rights is real and immediate, as the City . . . made a final decision to take the properties and initiated suit to do so." *Id.*

Lined up against the weight of authority outlined above is *Port Chester Yacht Club, Inc. v. Iasillo*, 614 F. Supp. 318, 321-22 (S.D.N.Y. 1985), which defendants say is "one of the few cases from this Circuit *addressing the ripeness issue raised here*." ESDC Br. at 16 (emphasis supplied). According to defendants, "*Port Chester Yacht Club* holds that the condemnor's mere adoption of a redevelopment plan . . . is insufficient to support a justiciable takings claim." ESDC Br. at 17. Defendants are wrong.

As plaintiffs pointed out in their letter to the Court dated December 6, 2006, in *Port Chester Yacht Club*, "Judge Leisure dismissed the plaintiff's *procedural due process* claims

as premature because the plaintiff had not yet availed itself of available state court procedures." (emphasis in original). That statement is true.[6] Save once in the background section of the opinion where the Public Use Clause is mentioned, Judge Leisure repeatedly characterizes the Yacht Club to be "claiming that it is being deprived of its property without due process of law and without just compensation." 614 F. Supp. at 321. No fair reading of Judge Leisure's opinion can escape the conclusion that *Port Chester Yacht Club* is a procedural due process case, not a takings case. The following passage illustrates the point:

> The complaint fails to state anywhere that the Village has taken the Club's property without due process of law. No factual determination has been made as to who owns the property nor has any of the Club's property actually been taken by the Village. The simple approval of a redevelopment plan can not be considered a deprivation of the Yacht Club's constitutional rights. In addition, the complaint does not contend that the procedures used by New York State to resolve such a dispute are unconstitutional. In fact, the Yacht Club, in order to insure that it receives the proper due process should avail itself of these procedures. Judge Weinfeld has stated "that the bypassing of an adequate state remedy renders the complaint subject to dismissal for failure to state a constitutional violation.

614 F. Supp. at 321-22 (footnote and citations omitted). The court was thus unquestionably adverting to the Yacht Club's procedural due process claims, not its takings claim, when it ruled that the case was premature.

In addition to *Port Chester Yacht Club*, defendants also manage to scrape together a handful of district court opinions from other jurisdictions that note, in *dicta* or with little

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[6] Defendants charge that plaintiffs falsely asserted that *Port Chester Yacht Club* "involved only" procedural due process claims. ESDC Br. at 16 n.15. The letter reveals otherwise. Plaintiffs simply said – correctly – that the court dismissed the Yacht Club's procedural due process claims as premature because it had not pursued its state remedies. Plaintiffs also said that the case was irrelevant. It is.

analysis, that a takings claims under the Public Use Clause is not ripe until a plaintiff's property is physically seized. None of these cases is persuasive. None of them affects the ripeness analysis in this case. *See, e.g., Schiessle v. Stephens*, 525 F. Supp. 763, 768 n.5 (N.D. Ill. 1981) (granting motion to abstain and noting, in *dicta*, that although there may have been ripeness problem when case was commenced based on defendants' threat to condemn, ripeness issue was resolved when defendants initiated state condemnation proceeding that resulted in court's decision to abstain); *HMK Corp. v. County of Chesterfield*, 616 F. Supp. 667, 670-71 (E.D. Va. 1985) (although "the '*Williamson County* finality doctrine' is an area of the law with which I am unfamiliar . . . and as I have admitted from the bench, *Williamson* is or may be a puzzle to me . . . [i]t appears that until the [state court] grants a fee simple title [to the condemnor], the question presented to me is not ripe"); *Eddystone Equip. & Rental Corp. v. Redevelopment Auth. of Del.*, 87 Civ. 8246, 1988 WL 52082 (E.D. Pa. May 17, 1988) (conflating final determination by state *agency* under *Williamson*'s first ripeness prong with final determination by state *court* under second prong that applies only to claims under Just Compensation Clause); *Hemperly v. Crumpton*, 708 F. Supp. 1247, 1250 (M.D. Ala. 1988) (citing *Williamson* and holding that plaintiffs cannot assert that taking of their property is not for public purpose until "defendants actually attempt to take their property"); *Residents of the New Ritz Hotel v. City of Chicago*, 99 Civ. 6826, 2001 WL58958 (N.D. Ill. 2001) (dismissing on abstention grounds and observing there "also may be a question of ripeness").

Finally, while New York State Law cannot dictate or limit this Court's jurisdiction, *see* U.S. Const. art. VI, § 2 (Supremacy Clause), it is strange that defendants appear to believe that plaintiffs' claims under the United States Constitution, including the Public Use

Clause of the Fifth Amendment, are unquestionably ripe for adjudication in state court, yet at the same time are *patently premature* when filed in the courthouse across the street.[7] Now that plaintiffs have filed their state law claims pursuant to EDPL § 207 as supplemental claims in this action under 28 U.S.C. § 1367(a), defendants' position has morphed from strange to nonsensical.

Plaintiffs' claims are ripe. Defendants' motion to dismiss this case for want of jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) should be denied.

II. ABSTENTION IS NOT WARRANTED

Federal courts "have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996); *see also, e.g., England v. La. Bd. of Med. Examiners*, 375 U.S. 411, 415 (1964) ("'When a federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction.'") (quoting *Willcox v. Consol. Gas Co.*, 212 U.S. 19, 40 (1909)); *Cohens v. Virginia*, 6 Wheat. 264, 404, 5 L.Ed. 257 (1821) (federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not"). The Supreme Court has long emphasized that "abstention rarely should be invoked because the federal courts have a virtually unflagging . . . obligation to exercise the jurisdiction given them." *Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992) (citing *Co. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). The strong policy disfavoring abstention applies with special force in civil rights

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[7] Notwithstanding the obvious fact that the subject matter jurisdiction of New York State courts is not constrained by Article III of the United States Constitution, it appears that the New York Courts routinely analyzed whether a case is ripe for adjudication pursuant to standards established in the federal courts. *See, e.g., De St. Aubin v. Flacke*, 68 N.Y.2d 66, 75, 505 N.Y.S.2d 859, 864 (1986) (applying Supreme Court's *Williamson* ripeness test).

cases because "[s]ection 1983 provides a unique federal remedy based on the Constitution." *C & A Carbone, Inc. v. Town of Clarkstown*, 770 F. Supp. 848, 853 (S.D.N.Y. 1991).

Defendants have not come close to overcoming the strong presumption that this Court must exercise its jurisdiction to adjudicate plaintiffs' constitutional claims.

A. *Younger v. Harris* Does Not Require Abstention.

ESDC makes two arguments in support of its contention that this Court should abstain on the basis of ongoing state court proceedings that have not yet commenced.[8] First, they argue, in the face of precedent to the contrary, that state court proceedings have been ongoing since ESDC gave notice of its intention to hold public hearings to consider the Atlantic Yards project pursuant to EDPL § 207. Alternately, they argue that a challenge under EDPL § 207 filed by *other* residents of the Atlantic Yards Project footprint would be grounds for abstention under *Younger v. Harris*, 401 U.S. 27 (1971). They are wrong on both counts.

1. Ongoing State Proceedings

Courts should not abstain under *Younger v. Harris* in the absence of pending state court proceedings that are judicial in nature. *Cecos Int'l, Inc. v. Jorling*, 895 F.2d 66, 72 (2d Cir. 1990). This is so because "*Younger* abstention does, in fact, depend on the 'technicality' of ongoing judicial proceedings." *Agriesti v. MGM Grand Hotels*, 53 F.3d 1000, 1002 (9th Cir.

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[8] Abstention is appropriate under *Younger v. Harris* only if three conditions are met: (1) there are ongoing state court proceedings, (2) that implicate important state interests, and (3) provide an adequate opportunity to raise the federal claims. *Middlesex County Ethics Comm.v. Garden State Bar Ass'n*, 457 U.S. 423 (1983). As there are no ongoing state court proceedings that provide an adequate opportunity to litigate plaintiffs' federal claims, *Younger* abstention is not warranted.

1995). And, "[a]bsent some unusual use of language, a lawsuit begins when it is filed," not when a determination is made that could be subject to a judicial challenge. *M&A Gabaee v. Cmty. Redevelopment Agency of Los Angeles*, 419 F.3d 1036, 1040 (9th Cir. 2005) (quotation omitted).

In the context of eminent domain proceedings, courts have invariably held that it is the commencement of judicial condemnation proceedings, not their quasi-legislative precursors, that triggers *Younger*. *See Hous. Auth. v. Midkiff*, 467 U.S. 229, 238-39 (1984); *Aaron v. Target Corp.*, 357 F.3d 768, 776 (8th Cir. 2004) (state condemnation proceedings "commenced" when state court proceedings filed, not upon selection of property for eminent domain or publication of blight findings); *Cottonwood Christian Center v. Cypress Redevelopment Agcy.*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002) (same); *Bryant v. New Jersey Dept. of Transportation*, 1 F. Supp. 2d 426 (D.N.J. 1998) (same).

In *Midkiff*, for example, the state law challenged in federal court first required public hearings on the propriety of state acquisitions, then compulsory negotiation concerning compensation. Separate and apart from these proceedings, the State was empowered to bring condemnation proceedings in state court. When the plaintiffs in *Midkiff* filed their federal suit, public hearings had been held, and the plaintiffs had participated in compulsory negotiations. Condemnation proceedings were not commenced until the parties had filed motions for summary judgment in the federal case and a preliminary injunction had issued. The Court held that the ongoing administrative proceedings did not warrant abstention under *Younger v. Harris* because "state judicial proceedings had not been initiated at the time proceedings of substance took place in federal court." *Id.* at 238.

ESDC attempts to distinguish *Midkiff* on the ground that the state statute at issue in *Midkiff* stated that the administrative proceedings were not a part of, and were not themselves, judicial condemnation proceedings. This is a distinction without a difference. Like the law at issue in *Midkiff*, New York's Eminent Domain Procedure Law outlines a multi-faceted procedure for condemnations. First, the condemning authority must hold hearings to determine the public purpose of the project under EDPL § 202; condemnees and other interested parties then have the right to challenge the authority's findings in state court under EDPL § 207; and, once any legal challenges to the authority's findings are concluded, the authority may commence condemnation proceedings under EDPL § 401. Constitutional claims may be raised in an Article 2 challenge, but not in the condemnation proceeding brought pursuant to Article 4. However, it is the Article 4 proceeding that effects the taking of property, and it is that proceeding that triggers a *Younger* analysis.

ESDC relies on *Didden v. Vill. of Port Chester*, 304 F. Supp. 2d 548, 564 (S.D.N.Y. 2004), for the proposition that New York's eminent domain proceedings are unitary, implying that ongoing Article 2 proceedings trigger *Younger*. Its reliance is misplaced. In *Didden*, the court described New York's eminent domain procedures as unitary for the purposes of determining whether the plaintiffs in that case had a full and fair opportunity to litigate their constitutional claims in state court, the third prong of the *Younger* test. However, in that case, the filing of the condemnation proceeding pursuant to EDPL Article 4 was the relevant "ongoing state judicial proceeding" that triggered a *Younger* analysis.

Defendants' argument is identical to the one rejected by the Supreme Court in *New Orleans Pub. Serv., Inc. v. City Council of New Orleans*, 491 U.S. 350 (1989) ("*NOPSI*").

There, the party claiming abstention was attempting to characterize a non-judicial process – rate-making by a city council – as judicial, in order to claim that abstention was appropriate on the basis of ongoing state proceedings. The crux of their argument was that the availability of judicial review transformed a non-judicial process into the type of administrative proceeding warranting *Younger* abstention. The Court rejected their argument: "While we have expanded *Younger* beyond criminal proceedings, and even beyond proceedings in courts, we have never extended it to proceedings that are not 'judicial in nature.'" *Id.* at 369-370.

Abstention is not appropriate if the state proceedings are not "judicial in nature" or lack "trial-like trappings." *See Telco Communications, Inc. v. Carbaugh*, 885 F.2d 1125, 1228 (4th Cir. 1989). Unlike the administrative proceedings that were deemed to warrant abstention in *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 433-434 (1982), *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 627 (1986), and *Christ the King Reg'l High Sch. v. Culvert*, 815 F.2d 219 (2d Cir. 1987), the EDPL Article 2 proceedings do not possess the characteristics of an adjudicatory process. The EDPL hearings permit no discovery, no ability to subpoena records, no ability to examine witnesses under oath and, of course, no cross-examination. Further, any appeals from the findings presented following those hearings is limited to the record produced as a result of the non-judicial hearings. *Younger*'s reach cannot be extended to a proceeding of this type without ignoring the Supreme Court's holding in *NOPSI*.

In any event, the final fatal blow to defendants' strained "ongoing state proceeding" argument is that plaintiffs have amended their Complaint to include their Article 2 challenge *in this Court* pursuant to this Court's supplement jurisdiction under 28 U.S.C. § 1367.

See City of Chicago v. International College of Surgeons, 522 U.S. 156 (1997) (holding that federal courts have supplemental jurisdiction over all factually related claims, including state law claims for on-the-record review of state administrative agency findings). It would be absurd to suggest that this Court should "abstain" in favor of state claims that are now pending before *itself.*

2. State Court Proceedings That May (Or May Not) Be Brought By Others

Recognizing that *Younger* analysis does not apply to the recently completed non-judicial proceedings under the EDPL, defendants next argue that by the time this Court "rules on this motion, an action under EDPL § 207 attacking ESDC's public use determination almost certainly will have been filed" – which, they argue, will require this Court to abstain. ESDC. Br. at 2. Plaintiffs certainly will not be commencing any Article 2 proceedings in state court, for they have now amended their Complaint to assert such claims here under 28 U.S.C. § 1367. Time will tell whether any aggrieved parties other than the plaintiffs in this case commence a state court Article 2 proceeding. But even if defendants' prediction that such a filing will occur proves prescient, their assertion that such an eventuality would force this Court to abstain is surely wrong.

a. No Interference

"[T]here is no doctrine that the availability or even the pendency of state judicial proceedings excludes the federal courts." *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 373 (1989) ("*NOPSI*"). Thus, the mere existence of parallel proceedings is not sufficient for a federal court to abstain under *Younger*.

Instead, the Supreme Court has confirmed that "interference" with ongoing state judicial proceedings is the guiding principle when considering whether to abstain under *Younger*. *See, e.g.*, *Samuels v. Mackell*, 401 U.S. 66, 72 (1971). The Ninth Circuit, sitting *en banc*, has explained that *Younger* abstention is proper only where the federal court's interference "would have the same practical effect on the state proceeding *as a formal injunction*." *Gilbertson v. Albright*, 381 F.3d 965, 977-78 (9th Cir. 2004) (*en banc*) (emphasis supplied).

Even if state court proceedings are filed by others under the EDPL as defendants surmise, none of the relief plaintiffs seek in this case would have the "same practical effect on the state proceeding as a formal injunction." *Gilbertson*, 381 F.3d at 977-78. This is so because the most fundamental aspect of the relief that plaintiffs seek here is an injunction prohibiting the ESDC from taking *their* properties, *not* the properties of any state court litigants who are not parties to this federal proceeding. To be sure, a hypothetical state court judge may well be persuaded to follow this Court's lead, whatever this Court ultimately decides, but the plaintiffs here certainly will never ask this Court to enjoin any state court judge from acting in any state court proceeding that may eventually be commenced by others.

In this way, this case is starkly different from the criminal context out of which the *Younger* doctrine grew. The classic *Younger* case is one in which a federal court is asked to enjoin a state court criminal proceeding on the ground that the state criminal proceeding allegedly violates the criminal defendant's federal rights. That scenario is problematic, if at all, because the federal court is being asked to intrude on state sovereignty by expressly forbidding a state court judge from continuing with an ongoing state court proceeding. Here, in contrast, there are no state proceedings that have anything to do with the plaintiffs, and this court therefore will

not ever be called upon to enjoin any state court from acting in any way it sees fit. For this basic reason, no ruling from this Court will ever have the "same practical effect on the state proceeding as a formal injunction," *Gilbertson*, 381 F.3d at 977-78, and *Younger* abstention is therefore inappropriate.

b. Third Parties Do Not Count

Moreover, *Younger* abstention does not generally act as a bar to relief in federal court where the federal litigants are not the same parties in "on-going state proceedings." *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975). In *Doran*, the owners of three bars sought to enjoin the enforcement of a town ordinance prohibiting topless dancing. One of the three bar owners had a criminal proceeding pending against it in state Court. The Court failed to apply *Younger* to the bar owners against whom no state cases were pending, noting:

> [although] there plainly may be some circumstances in which legally distinct parties are so closely related that they should all be subject to the *Younger* considerations which govern any one of them, this is not such a case; while respondents are represented by common counsel, and have similar business activities and problems, they are apparently unrelated in terms of ownership, control, and management. We thus think that each of the respondents should be placed in the position required by our cases as if that respondent stood alone.

Id. at 928-929.

Defendants rely on *Spargo v. New York State Comm'n on Judicial Conduct*, 351 F.3d 65 (2d Cir. 2003), for the proposition that *Younger* should bar federal court claims made by parties against whom no state proceedings are pending. In *Spargo*, the litigants were challenging rules on judicial conduct that they alleged violated the First Amendment. One plaintiff was a judge against whom charges were pending, and the other two were parties claiming to be harmed

by their inability to benefit from the judge's speech. The Court abstained under *Younger* on the grounds that the claims of the two plaintiffs who were not involved in state court proceedings were "entirely derivative" of the claims of the one who was. *Id.* at 83.

This case is not like *Spargo*. If there are any proceedings filed in state court, they will be by parties who are entirely unrelated to the plaintiffs in this case. (Again, it bears emphasis that the plaintiffs in this case have amended their Complaint to include their state Article 2 claims *here*, before *this* Court.) To the extent there are any state court litigants at all, they certainly will not be plaintiffs' subsidiaries, employees, or related entities, and they certainly will not be parties whose rights are "entirely derived" from those of the plaintiffs. As the Court did in *Doran*, the claims of each litigant should be considered separately, and this Court should not abstain based on claims brought by unrelated third parties.

B. *Burford v. Sun Oil* Does Not Require Abstention

Defendants argue that abstention under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), is appropriate here because "the exercise of federal review of the question in [this] case would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *NOPSI*, 491 U.S. at 361. The Second Circuit has established a three-prong test to determine whether *Burford* abstention is appropriate: "(1) the degree of specificity of the state regulatory scheme; (2) the need to give one or another debatable constructions to a state statute; and (3) whether the subject matter of the litigation is traditionally one of state concern." *Hachamovitch v. DeBuono*, 159 F.3d 687 (2d Cir. 1998).

In *Minnich v. Gargano*, 2001 WL 46989 (S.D.N.Y.), *rev'd on other grounds*, 261 F.3d 288 (2d Cir. 2001), the plaintiffs challenged the constitutionality of certain provisions of the

EDPL on due process grounds. The ESDC argued that the court should abstain under *Burford*. The court declined to abstain, finding that two of the three factors necessary to invoke *Burford* were absent. While the EDPL is procedurally precise, it is not a statute with complexity on issues of state concern, nor was it a complex regulatory scheme that would be upset by the court's ruling. And, further, while the constitutionality of the statute was challenged, the court was not called upon to give a debatable construction to a state statute. Similarly, this Court is not called upon to interpret the state's EDPL; it is being asked to judge the constitutionality of the proposed project under the Public Use Clause of the Fifth Amendment. The State's scheme would not be upset by a decision in favor of the plaintiffs.

Unlike those cases where courts have abstained under *Burford*, this case does not involve federal claims "entangled in a skein of state law that must be untangled before the federal case can proceed." *NOPSI*, 491 U.S. at 361. Abstention under *Burford v. Sun Oil* is therefore inappropriate.

III. PLAINTIFFS HAVE ADEQUATELY PLED COGNIZABLE CLAIMS UNDER THE PUBLIC USE, EQUAL PROTECTION AND DUE PROCESS CLAUSES

A. The Public Use Clause

Plaintiffs state a claim for violation of the Public Use Clause for three separate and independent reasons.

First, defendants' *motives* in making the decision to take plaintiffs' properties and businesses is the central material issue of disputed fact for adjudication on this claim. It is a quintessential question of fact. It cannot be resolved on a motion to dismiss.

Second, in *Berman* and *Kelo* (among other cases), the takings maps were drawn

by legislative bodies (or their functional equivalents) after there had been a threshold determination that a development project was needed to accomplish a public purpose but *before* the private beneficiaries of the takings map were known. For obvious reasons, the findings that emanate from such a process are entitled to considerable deference. Here, however, the boundaries of the takings map that aggrieves the plaintiffs was drawn *in the first instance* by Ratner and his corporate affiliates in furtherance of their wholly private goal and desire to maximize profit, and later accepted by defendants Pataki and Bloomberg at Ratner's behest. *Only then* did ESDC, with Ratner's map in hand, conduct an "independent" analysis that, lo and behold, generated the identical map first drawn by Ratner. This process is presumptively illegitimate. It should receive no deference whatever.

Third, any deference that otherwise might be afforded to ESDC's exercise of eminent domain in this action is further eroded by the fact that it is not a legislative body and is operating pursuant to a delegation of power that is entirely uncabined. Condemnation decisions made by non-legislative bodies wielding the power of eminent domain with unfettered discretion deserve little deference from the courts.

1. Motives Matter

Defendants have nominally abandoned their prior expressly stated argument that motives are irrelevant to this case, in favor of its functional cousin. Their argument now goes like this: Defendants say that *Berman* and *Rosenthal* hold that a legislature's takings determinations in furtherance of remedying blight are effectively non-reviewable. Then they claim that *Kelo* did not overrule *Berman* and *Rosenthal*. Thus, because ESDC has determined

that the Project serves public purposes, including the elimination of blight, that decision cannot be reviewed. In other words, motives are irrelevant. This, of course, flies in the face of *Kelo*.

The Supreme Court's opinion in *Kelo* is not ambiguous. The Court refers repeatedly to the government's *purpose*, *motive* or *intent* in reaching the decision to wield the power of eminent domain. *See, e.g.*, 125 S. Ct. at 2661 (the government is "no doubt . . . forbidden from taking [plaintiffs'] land for the *purpose* of conferring a private benefit on a particular private party") (citation omitted) (emphasis supplied); *id.* (the government is not "allowed to take property under the mere pretext of a public *purpose*, when its actual *purpose* was to bestow a private benefit") (emphasis supplied).

The Court then explained why the taking in *Kelo* was not *intended* to confer a private benefit:

> The takings before us, however, would be executed pursuant to a "carefully considered" development plan. The trial judge and all the members of the Supreme Court of Connecticut agreed that there was no evidence of an illegitimate *purpose* in this case. . . . The record clearly demonstrates that the development plan was not *intended* to serve the interests of Pfizer, Inc., or any other private entity . . . And while the City *intends* to transfer certain of the parcels to a private developer in a long-term lease – which developer, in turn, is expected to lease the office space and so forth to other private tenants – the identities of those private parties were not known when the plan was adopted. It is, of course, difficult to accuse the government of having taken A's property to benefit the private interests of B when the identity of B was unknown.

Kelo, 125 S. Ct. at 2661 & n.6 (quotations and citations omitted) (emphasis supplied). Lest there be any confusion, everything set forth above is from Justice Steven's *majority* opinion.

That said, Justice Kennedy, in his concurring opinion, confirms the same point. *See, e.g., id.* at 2669 ("transfers *intended* to confer benefits on particular, favored private entities,

and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause") (emphasis supplied); *id.* at 2670 ("There may be private transfers in which the risk of undetected impermissible *favoritism* of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause") (citation omitted) (emphasis supplied).

In cases like this one, when a court is "confronted with a plausible accusation of impermissible favoritism to private parties" it should "treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose." *Id.* at 2669 (Kennedy J. concurring). The trial court in *Kelo* did just that:

> Here, the trial court conducted a careful and extensive inquiry into "whether, in fact, the development plan is of primary benefit to ... the developer, and private businesses which may eventually locate in the plan area, and in that regard, only of incidental benefit to the city." The trial court considered *testimony from government officials and corporate officers; documentary evidence of communications between these parties*; respondents' awareness of New London's depressed economic condition and evidence corroborating the validity of this concern; the substantial commitment of public funds by the State to the development project before most of the private beneficiaries were known; evidence that respondents reviewed a variety of development plans and chose a private developer from a group of applicants rather than picking out a particular transferee beforehand; and the fact that the other private beneficiaries of the project are still unknown because the office space proposed to be built has not yet been rented.
>
> The trial court concluded, based on these findings, that benefiting Pfizer was not "the primary *motivation* or effect of this development plan"; instead, "the primary *motivation* for [respondents] was to take advantage of Pfizer's presence." Likewise, the trial court concluded that "[t]here is nothing in the record to indicate that ... [respondents] were *motivated* by a desire

> to aid [other] particular private entities." Even the dissenting justices on the Connecticut Supreme Court agreed that respondents' development plan was *intended* to revitalize the local economy, not to serve the interests of Pfizer, Corcoran Jennison, or any other private party. This case, then, survives the meaningful rational basis review that in my view is required under the Public Use Clause.

Kelo, 125 S. Ct. at 2669-70 (Kennedy J. concurring) (citations omitted) (emphasis supplied).

Given *Kelo*'s clear command, defendants' unstated argument that their purpose, motive or intent is *irrelevant* is hard to take seriously. Defendants' motive or intent is not just an issue; it is *the* issue. It is also a quintessential fact question. It cannot be resolved summarily even at the summary judgment stage. *Johnson v. Ganim*, 342 F.3d 105, 117 (2d Cir. 2003) (when "a factual issue exists on the issue of motive or intent, a defendant's motion for summary judgment . . . must fail") (citations omitted). It most certainly cannot be resolved on a motion to dismiss.

2. The Circumstances Surrounding the Drawing of Defendants' Takings Map Give Rise To "A Plausible Accusation Of Favoritism"

We would not be here if the circumstances underling the taking of plaintiffs' properties in this case were the same as those in *Berman*, *Kelo* or even *Rosenthal*, as defendants appear to contend. In *Berman* and *Kelo*, the identity of the private developer who would benefit from the transfer of plaintiff's property was *unknown*. In *Kelo*, the legislature considered and adopted a comprehensive plan for economic development (and in *Berman* the elimination of blight).

The beneficiaries of the takings in *Berman*, *Kelo* and *Rosenthal* certainly did not conceive of the Project and drive it to completion. But that is precisely what happened here. The legislature in *Berman* and *Kelo* did not cut a back-room deal to convey a massive swath of

government-owned property to a private developer and then try to cover up the favoritism by concocting a sham public bidding process. But that is what happened here.

In a passage that defendants claim "has particular resonance here," ESDC Br. at 31, the Court in *Berman* explained that it "is not for the courts to oversee the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch." *Id.* (citing *Berman* 348 U.S. at 35-36). Agreed. Plaintiffs likewise believe that the facts in *Berman* resonate for purposes of evaluating defendants' motion to dismiss. The application of *Berman*, however, does not, as defendants claim, mandate dismissal. Quite the contrary.

In *Berman* and *Kelo*, all available evidence indicated that the legislature, as part of a deliberative process, decided to green light an economic development project in order to better the community and address various public needs. *After* that initial decision was made, the precise details of the plan and the geographic parameters of the takings area were determined in furtherance of the public goals. Much *later*, the private beneficiaries of the properties selected for condemnation were identified.

Here, the chronology that gave rise to a substantial deference to the decision-makers in *Berman* and *Kelo*, has been turned on its head. The difference is stark.

First, no later than 2002 (and likely much, much earlier), *Ratner* determined the geographic outlines of the property he wanted to condemn to realize *his* dream and maximize *his* profits. Then, in 2002, Pataki, Bloomberg and those under their control agreed to help Ratner realize his vision. Then, by no later than 2004, the MTA told reporters that it has decided to

convey the rail yards to Ratner without considering any other offers. Then, in 2005, defendants manufactured a sham RFP process to cover up the earlier leak that the decision to convey was a *fait a compli*. Then, in 2005, with the geographic boundaries set by *Ratner* to use as a tracing form, the governmental defendants, including ESDC, decided (or so they unconvincingly claim) that the area that needed to be taken in order to accomplish their goal of benefitting the public was *precisely the same* as had been initially identified by Ratner no later than 2002.[9] A remarkable coincidence, indeed.

A careful reading of the cases giving rise to highly deferential takings review reveals that they follow a pattern:

Step One: A legislative body deliberates and decides that a particular economic development project will promote or serve a public need or purpose. Or, alternatively, a legislative body delegates its eminent domain power with express instructions or guidelines confining the power to authorize the taking of private property to specific circumstances that the legislature deems to satisfy a public use or purpose; and then the recipient of the delegated power determines that a specific economic development project meets those guidelines. *See Kelo, Midkiff* and *Berman*.

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[9] Actually, there was one modification. After 2002, when Ratner first secured Pataki's and Bloomberg's support for his takings map, he decided to expand the footprint to encompass Site 5, which includes a commercial building at the corner of Atlantic and 4th Avenues that he had built and owned, thus enabling him to condemn his own property through the ESDC process and then build a massive replacement that would have otherwise violated New York City's zoning rules. *Ratner himself* therefore redrew his own takings map in order to even further increase his own wealth, and, not surprisingly, the ESDC fell into line with its tracing pen.

Step Two: The same legislative body, or the recipient of an appropriately circumscribed delegation, after analyzing all relevant facts and circumstances, targets the precise geographic takings area that will accomplish its predetermined goals. *See Kelo* and *Berman*.

Step Three: The private beneficiaries of the predetermined takings are identified through an open public process designed to maximize the predetermined public goal. *See Kelo* and *Berman*.

As was most recently reaffirmed by the opinion for the Court in *Kelo*, these circumstances unquestionably give rise to an extremely deferential level of review. So, it is not surprising that the Court in *Kelo* and *Berman* (and other factually similar cases) routinely deny injunctions or grant summary judgment in favor of defendants.

Conversely, a careful reading of the cases refusing to apply such a standard reveal the opposite pattern.

Step One: A private party covets another's property or pursues a goal that requires the acquisition of property from unwilling owners. That same party identifies the specific property for acquisition. *See Aaron v. Target Corp.*, 269 F. Supp. 2d 1162 (E.D. Mo. 2003) (Target identified plaintiff's property for acquisition and development of store and then persuaded municipality to condemn the site by declaring it blighted and then transfer title to Target), *rev'd*, 356 F.3d 768 (8th Cir. 2003); *99 Cents Only Store v. Lancaster Redevelopment Agcy.*, 237 F. Supp. 2d 1123 (C.D. Ca. 2001) (Costco identified plaintiff's property for acquisition and use as a parking

lot for its nearby store and then persuaded municipality to condemn the site and transfer title to Costco); *Cottonwood Christian Center v. Cypress Development Agcy.*, 218 F. Supp. 2d 1203 (C.D. Ca. 2002) (real estate developer identified church's property for acquisition and use as a major discount retail outlet and then persuaded municipality to condemn the site and transfer title).

Step Two: The same party then approaches a non-legislative governmental entity empowered to condemn property by eminent domain and persuades them to assist. (Frequently, the non-legislative governmental entity, like ESDC, operates without meaningful restrictions.) *See Aaron, 99 Cents,* and *Cottonwood.*

Step Three: The unrestrained governmental body makes a finding that the precise property first identified by the private party must be condemned to further one of a host of plausible public purposes. No other beneficiary of the taking is seriously considered, or none is considered at all. *See 99 Cents Only Store*, 237 F. Supp. 2d at 1129 ("undisputed that Costco could have easily expanded . . . onto adjacent property *without* displacing 99 Cents at all but refused to do so" (emphasis in original); *Aaron* (same); *Cottonwood* (same).

Needless to say, the facts in this case are in lock-step with the pattern set forth above. As set forth in *99 Cents, Cottonwood* and *Aaron*, and as implied by Justice Kennedy's concurring opinion in *Kelo*, these circumstances, at minimum, give rise to a presumption that

impermissible favoritism is driving the taking. So, it is not surprising that the courts in *99 Cents, Cottonwood* and *Aaron* all enjoined defendants from taking the plaintiffs' properties. The same should happen here.

After the Supreme Court's decision in *Kelo*, and *after* FCRC had purchased and abandoned much of the property in the Takings Area, defendants made a finding that plaintiffs' properties were blighted. Now they say that their self-serving blight determination distinguishes this case from *Kelo*. They say the searching review endorsed in *Kelo* applies *only* to cases where economic development is the *sole* public justification. This makes no sense.

The Complaint cogently explains the facts that support the conclusion that blight – and defendants' other proffered justifications – are a pretext. Surely defendants cannot avoid the kind of meaningful review endorsed by the majority in *Kelo*, by merely mouthing the words "blight" (or "jobs" or "housing") in the face of substantial evidence to the contrary.

3. No Deference Is Owed To ESDC On These Facts

Defendants make much of the fact that cases like *Berman* and *Midkiff* make clear that courts must afford substantial deference to legislative judgments regarding the nature and scope of a putative "public use." It is equally clear, however, that the deference to legislative wisdom evidenced in *Berman* and *Midkiff* – asking only whether the exercise of eminent domain is "related to a conceivable public purpose" – does *not* apply where, as here, the Legislature has not defined what constitutes a legitimate "public use," and where the task of deciding whether the "public use" requirement has been satisfied has been left entirely to the unbridled discretion of an unelected administrative agency.

This is precisely what the Seventh Circuit held in *Daniels v. Area Plan Commission of Allen County*, 306 F.3d 445 (7th Cir. 2002). *Daniels* involved the putative decision by an unelected administrative agency to nullify a restrictive covenant requiring lots in a specified subdivision to remain exclusively residential. The agency claimed it had concluded that vacating the restrictive covenant would serve a public use – encouraging commercial development – and argued that *Berman* and *Midkiff* required the court to defer to that judgment. The Seventh Circuit disagreed, holding squarely that such deference applies only where *the legislature itself* has specifically defined what it means to be a "public use" for purposes of eminent domain:

> In this case, however, the legislature has not made a specific determination of what constitutes a "public use" under [state law] and instead has delegated that duty to the local Plan Commission. This has not been the situation in prior case law prescribing deference to state "public use" determinations. For example, in *Midkiff*, the Court ruled that the decisions of the Hawaii Housing Authority in determining whether state acquisition of a certain track of land effectuated the public purposes of the Land Reform Act of 1967, as passed by the Hawaiian Legislature, would not be disturbed unless shown to be irrational. Similarly, in [*Berman*], the Court upheld the taking of private property that the government intended to reconvey to other private persons because the taking was part of a legislatively enacted plan to remove blight found by the legislature to be for public good. And finally, in *United States ex rel. TVA v. Welch*, 327 U.S. 546 (1946), the Court stated that "it is the function of Congress to decide what type of taking is for a public use and that the agency authorized to do the taking may do so to the full extent of its statutory authority." *Midkiff*, *Berman* and *Welch* differ from our situation in that the condemning state agencies *were not free to create a public purpose out of whole cloth* but instead were *limited to findings of public purpose established by the legislature.*

306 F.3d at 460-61 (citations omitted, emphasis supplied). Because state law provided only that the agency was required to determine that vacating the covenant would be in the "public interest"

– vesting discretion in the agency to define and determine what constituted a "public interest" – the Seventh Circuit held that it owed no deference to such "legislatively unrestrained decisions as to what constitutes a public use." *Id.* at 461; *see also id.* at 466 (reiterating that the deference afforded in cases such as *Midkiff* "applied to state legislatively or congressionally designated public purposes employed to justify the use of eminent domain and so *does not apply to independent findings by the Plan Commission that are unsupported by state code*") (emphasis supplied). On the merits, the Seventh Circuit rejected the agency's conclusion that vacating the covenant would serve any "public use" and enjoined the agency from doing so. *See id.* at 462-67.

Just like the state law at issue in *Daniels* – which delegated authority to an administrative agency to determine whether vacating a covenant would serve the "public interest" – New York law does not define what constitutes a "public use" for purposes of eminent domain, leaving it entirely to the ESDC (or other entity seeking to seize property through eminent domain) to decide what constitutes a "public use" and whether that notably amorphous standard has been met. The New York Legislature merely recognized generally that the government may acquire private property for "public use," *see* EDPL § 101; required generally that a condemnor must "review the public use to be served" by a proposed taking, *see* EDPL § 201; required generally that a condemnor must make specific findings regarding "the public use, benefit or purpose to be served" by a proposed taking, *see* EDPL § 204(B); and provided generally that adversely affected parties may challenge the existence of an adequate "public use, benefit or purpose," *see* EDPL § 207©)(4). *Nowhere*, however, does New York law specifically define what it means to be a "public use" sufficient to justify the involuntary seizure of a

citizen's private property. Indeed, the definitions section of the EDPL is completely tautological: "public project" is defined to mean "any program or project for which acquisition of property may be required for a public use," but "public use" is not defined *at all*. EDPL § 103. Instead, the crucial task of defining "public use" is left entirely to the unbridled discretion of unelected agencies such as the ESDC.[10]

In this way, New York law is markedly different from the state laws at issue in *Berman* and *Midkiff*. In *Berman*, after all, Congress had specifically provided that "the acquisition and the assembly of real property and the leasing or sale thereof pursuant to a project area redevelopment plan . . . *is hereby declared to be a public purpose.*" 348 U.S. at 29 (quoting Section 2 of the District of Columbia Redevelopment Act of 1945) (emphasis supplied). Likewise, in *Midkiff*, the Hawaii Legislature had made specific statutory findings that compelling large landowners to break up their estates served an important public purpose. *See* 1967 Haw. Sess. Laws, Act 307, § 1. Because New York law does not in any way cabin the discretion of administrative agencies – instead, leaving condemning state agencies "free to create a public purpose out of whole cloth" with no limiting "findings of public purpose established by the legislature" – the kind of deference evidenced in *Berman* and *Midkiff* does not apply to "public use" determinations made by the ESDC. *Daniels*, 306 F.3d at 461; *see also Armendariz v. Penman*, 75 F.3d 1311, 1321 (9th Cir. 1996) (en banc) (refusing to apply "the usual extreme

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[10] To be sure, the Legislature did make a statutory declaration with respect to *the general mission* of the ESDC. *See* N.Y. Unconsol. L. § 6252. Nowhere, however, did the Legislature make any findings, or in any way cabin the ESDC's discretion, with respect to identifying a "public use" that would justify the assertion of *eminent domain*, the agency's most significant power. Because state law permits the ESDC to conclude that literally anything constitutes a "public use" for eminent domain purposes, the fact that state law describes the agency's mission generally does nothing to set this case apart from the Seventh Circuit's holding in *Daniels*.

deference that courts owe to legislative determinations of public use" under *Berman* and *Midkiff* because "[i]f officials could take private property, even with adequate compensation, simply by deciding behind closed doors that some other use of the property would be a 'public use,' and if those officials could later justify their decisions in court merely by positing 'a conceivable public purpose' to which the taking is rationally related, the 'public use' provision of the Takings Clause would lose all power to restrain government takings").

B. Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Clause announces a "fundamental principle":

> [T]he State must govern impartially. General rules that apply evenhandedly to all persons within the jurisdiction unquestionably comply with this principle. Only when a governmental unit adopts a rule that has a special impact on less than all the persons subject to its jurisdiction does the question whether this principle is violated arise.

New York City Transit Auth. v. Beazer, 440 U.S. 568, 587-88 (1979).

"The Equal Protection Clause prohibits 'arbitrary and irrational' discrimination even if no suspect class or fundamental right is implicated." *Muller v. Costello*, 187 F.3d 298, 309 (2d Cir. 1999); *see also Burt v. City of New York*, 156 F.2d 791, 791-92 (2d Cir. 1946) (finding that complaint alleging that City denied architect's applications and "selected him for these oppressive measures" while "unconditionally approving the applications of other architects, similarly situated" based on defendants' "personal hostility" adequately alleged purposeful discrimination in violation of the Equal Protection Clause).

Informed by this basic principle, the Supreme Court in *Kelo* suggested that an

unusual exercise of the government takings power of the sort that occurred in *99 Cents Only Stores v. Lancaster Dev. Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), "may also implicate other constitutional guarantees." *Kelo*, 125 S. Ct. at 2667 n.17 (citing *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (*per curiam*)).

In *Olech*, the Court explained that "'the purpose of the Equal Protection Clause is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination,'" holding that an equal protection claim lies on behalf of a single person "where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for this difference in treatment." 528 U.S. at 564 (quoting *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445 (1923)); *see also id.* at 565 (Breyer, J., concurring) (equal protection violation alleged based on vindictive government action).

Olech, however, is not the exclusive means of proving a case of unconstitutional arbitrary discrimination in violation of the Equal Protection Clause. As the cases indicate, vindictive governmental action violates the Equal Protection Clause even if the government's malice is directed at a single unique entity. *See Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) ("If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."); *LeClair v. Saunders*, 627 F.2d 606, 611 (2d Cir. 1980) ("If Saunders went after Mr. LeClair to *get him*, for any reason, then he should be liable.") (emphasis in original); *see also Romer v. Evans*, 517 U.S. 620, 634 (1996) (invalidating law that "raise[d] the inevitable inference that the disadvantage imposed is born of

animosity towards the class affected"); *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (invalidating permit requirement for group for persons with mental disabilities under rational basis test because it "appears to us to rest on an irrational prejudice against the mentally retarded"); *Hilton v. City of Wheeling*, 209 F.3d 1005, 1007 (7th Cir. 2000) ("If the police decided to withdraw all police protection from Hilton out of sheer malice . . . he would state a claim under *Olech*."); *Esmail v. MacCrane*, 53 F.3d 176, 179 (7th Cir. 1995) ("If the power of the government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant animosity towards him, the individual ought to have a remedy in court.").

Under these standards, plaintiffs' Complaint amply pleads violations of the Equal Protection Clause. The Complaint alleges that by selecting plaintiffs' properties to be taken for the purpose of conferring a benefit (here, the plaintiffs' property) to FCRC, defendants have targeted plaintiffs for adverse treatment for no rational purpose. Compl. ¶ 147. At the same time that defendants singled out plaintiffs for unequal, adverse treatment, they selected FCRC as the recipient of irrational largess. Conferring a benefit upon FCRC under these circumstances is not rational. *Id.* ¶ 148. Elevating the status of one citizen or group of citizens, here FCRC, by mistreating plaintiffs is also prohibited by the Equal Protection Clause. *Id.* ¶ 149.

For these reasons, defendants' motion to dismiss plaintiffs' Equal Protection claims should be denied.

C. Due Process Clause

Defendants misconstrue the nature of plaintiffs' due process claim. It is simple. Plaintiffs allege that defendants deprived plaintiffs of property without due process of law by,

among other things, "at all times providing an empty, meaningless process with a pre-determined outcome." Compl. ¶ 160. That states a claim. *See Francis v. Coughllin*, 891 F.2d 43, 46 (2d Cir. 1989). "Since the touchstone of the right to due process is freedom from arbitrary governmental action, *Ponte v. Real*, 471 U.S. 491, 495 (1985), it is axiomatic that a . . . hearing in which the result it arbitrarily and adversely predetermined violates that right." *Id.*

IV. GOVERNOR PATAKI IS NOT ENTITLED TO DISMISSAL

Governor Pataki argues that plaintiffs have failed to state a claim against him in his personal capacity, inviting this Court to conclude – as a matter of law, prior to discovery – that he had no personal involvement in the deprivation of plaintiffs' constitutional rights. Alternatively, he contends that he is entitled to qualified immunity as a matter of law. He is wrong.

A. There Is No Official Capacity Claim Against Governor Pataki

At the outset, plaintiffs emphasize that they currently are asserting claims against Governor Pataki *only* in his personal capacity, and *only* for money damages and declaratory relief, *not* in his official capacity, and *not* for injunctive relief. It is true that when plaintiffs first commenced this action in October 2006, they did assert claims for injunctive relief against Governor Pataki in his official capacity, claims that were entirely proper under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908). Now, however, because Governor Pataki is no longer in office, plaintiffs agree that they cannot proceed on their official capacity claims against Governor Pataki for injunctive relief. Plaintiffs' Amended Complaint, filed simultaneously herewith, makes this clear.

For this reason, most of Governor Pataki's brief is completely irrelevant and should simply be ignored. *See* Pataki Br. at 1-10. The only issues that are properly before this Court concern *personal* capacity – whether Governor Pataki is somehow entitled to a pre-discovery ruling that he had no personal involvement in the taking of plaintiffs' property as a matter of law, *id.* at 10, and whether he is entitled to qualified immunity as a matter of law, *id.* at 11-13. The answer to both of those questions is no.

B. Plaintiffs Have Adequately Pled Personal Involvement

Governor Pataki's argument that he is entitled to have this Court rule – at the pleading stage, as a matter of law – that he was not personally involved in the deprivation of plaintiffs' constitutional rights is well wide of the mark. It certainly is no secret that the Atlantic Yards project would have had no chance of being approved – and that plaintiffs' properties would not be subject to eminent domain – without Governor Pataki's enthusiastic support. As the Complaint alleges, and as New York law makes plain, the Governor wholly controls the ESDC. *See* Compl. ¶¶ 4, 18, 19; N.Y. Unconsol. L. § 6254(1) (Governor appoints all nine members of the ESDC, seven directly and the other two by virtue of his power to appoint the superintendent of banks and the chair of the New York State Science and Technology Foundation, both of whom automatically serve as members of the ESDC). Indeed, regardless of how many ESDC appointees he controls, it is indisputable that the Governor has what amounts to absolute veto power over the ESDC by virtue of the fact that one of the three members of the Public Authorities Control Board – an entity that, by statute, must *unanimously* approve the financing and construction of any ESDC project – serves at his pleasure. *See* N.Y. Pub. Auth. L. §§ 50(2), 51(1)(e). Indeed, on December 20, 2006 (five days after defendants' motions were

filed and just days before leaving office), defendant Pataki granted final approval to the Project via the PACB.

The Governor also largely controls the MTA, especially when acting in concert with the Mayor of New York City. *See* N.Y. Pub. Auth. L. § 1263 (Governor and Mayor collectively control 10 out of 15 votes on the MTA board).

The Complaint alleges, and nobody could credibly deny, that Governor Pataki not only knew about and tacitly approved, but was (at the urging of his law school classmate Bruce Ratner) the chief proponent of both the Atlantic Yards project generally, and the decision to resort to the use of eminent domain specifically, and that he accomplished this goal by wielding his immense power over the ESDC, the PACB, and the MTA. It is axiomatic, of course, that acting as one of the main architects of a conspiracy to deprive federal rights gives rise to personal liability under section 1983. *See, e.g., Gronowski v. Spencer*, 424 F.3d 285 (2d Cir. 2005) (sustaining finding of sufficient personal involvement by mayor to give rise to section 1983 liability); *Hous. Works, Inc. v. Giuliani*, 179 F. Supp. 2d 177, 202-03 (S.D.N.Y. 2001) (denying motion to dismiss section 1983 claim against mayor in personal capacity); *Sims v. Kernan*, 29 F. Supp. 2d 952 (N.D. Ind. 1998) (sustaining claim against lieutenant governor).

It bears repeating, moreover, that this is a motion to dismiss, not a motion for summary judgment. At this procedural stage, the question is not whether plaintiffs have proven Governor Pataki's personal involvement in the deprivation of the rights, or even whether they have created a genuine issue of fact with respect to that issue. Rather, the question is simply whether plaintiffs have, consistent with Rule 8(a) of the Federal Rules of Civil Procedure, afforded Governor Pataki adequate notice of the nature of the claim that has been asserted against

him, which they undeniably have. *See Phillips v. Girdich*, 408 F.3d 124, 127-28 (2d Cir. 2005) (reiterating that "[u]nder the Federal Rules, a 'short and plain' complaint is sufficient as long as it puts the defendant on notice of the claims against it. Fed. R. Civ. P. 8(a)," and that courts must "rely on extensive discovery to flesh out the claims and issues in dispute") (citing *Swierkiewicz*, 534 U.S. 506); *see also James v. Aidala*, 389 F. Supp. 2d 451, 452-53 (W.D.N.Y. 2005) (denying motion to dismiss personal liability claim against New York State Commissioner of Corrections and observing that "the issue is not whether a plaintiff will ultimately prevail [on personal involvement] but whether the claimant is entitled to offer evidence to support the claim") (quotation omitted); *Shariff v. Goord*, 2005 WL 1863560, at *4-*5 (W.D.N.Y. Aug. 4, 2005) (same); *Evac LLC v. Pataki*, 89 F. Supp. 2d 250, 254-55 (N.D.N.Y. 2000) (denying Governor Pataki's motion to dismiss personal capacity claim under section 1983 because "[a]lthough the Complaint does not explain how . . . the facts could show that Defendants had sufficient personal involvement").[11]

None of the cases cited by Governor Pataki rescues his specious argument that he is entitled to 12(b)(6) dismissal with respect to personal involvement. *Al-Jundi v. Estate of Rockefeller*, 885 F.2d 1060 (2d Cir. 1989), was a summary judgment case, not a motion to dismiss, in which the summary judgment record made clear that the Governor "did not engage in

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[11] Nor is there any doubt that plaintiffs have adequately pled a conspiracy claim under section 1983 against Governor Pataki. To survive a motion to dismiss a conspiracy claim under section 1983, a plaintiff need only allege "(1) that two or more people entered into an agreement to violate the victim's civil rights, (2) that the alleged co-conspirators shared in the general conspiratorial objective, and (3) that an overt act was committed in furtherance of the conspiracy that caused injury to him." *Pizzuto v. County of Nassau*, 239 F. Supp. 2d 301, 308 (E.D.N.Y. 2003) (citations omitted).

or authorize any of the brutalities alleged." *Id.* at 1065-66. In *Wright v. Smith*, 21 F.3d 496 (2d Cir. 1994), the Circuit affirmed the dismissal of one Commissioner of Corrections who "was never put on actual or constructive notice" of the alleged deprivation of the plaintiff's rights, but reversed the dismissal of a second Commissioner of Corrections who learned of the alleged deprivation but "failed to remedy the wrong." *Id.* at 501-02. And in *Tricoles v. Bumpus*, 2006 WL 767897 (E.D.N.Y. Mar. 23, 2006), there was no allegation that the Commissioner of the Office of Children and Family Services has anything whatsoever to do with the plaintiff's injuries or was even aware that the plaintiff has been assaulted.[12]

Finally, Governor Pataki is plainly mistaken if he thinks that plaintiffs' personal capacity claims against him for money damages are moot simply because he has left office. Much to the contrary, unlike claims for injunctive relief, claims for monetary damages – even nominal damages – are not rendered moot simply because a public official who has engaged in a course of unconstitutional conduct leaves office shortly before the conspiracy he instigated is completed. *See, e.g., Beyah v. Coughlin*, 789 F.2d 968, 988-89 (2d Cir. 1986); *Sugarman v. Vill. of Chester*, 192 F. Supp. 2d 282, 290-91 (S.D.N.Y. 2002).

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[12] *Al-Jundi*, *Wright*, and *Tricolores* are also inapposite for the independent reason that they are *supervisory* liability cases. Here, in contrast, the basis for Governor Pataki's liability is not merely his supervisory authority over those exercising the power of eminent domain, but rather his *direct* personal involvement in what plaintiffs allege was (and remains) a conspiracy to violate their constitutional rights. In any event, given plaintiffs' theory that Governor Pataki was one of the driving forces behind the unconstitutional assertion of eminent domain, and given his undeniable control of the ESDC, plaintiffs have stated a claim under at least three of the recognized supervisory liability theories: that Governor Pataki "participated directly in the alleged constitutional violation"; that he knew about but "failed to remedy the wrong"; and that he created a policy or custom under which the deprivation occurred. *See* Wright, 21 F.3d at 501.

For all of these reasons, plaintiffs plainly have stated valid claims against Governor Pataki in his personal capacity.

C. Governor Pataki Is Not Entitled to Qualified Immunity At This Stage

Governor Pataki's argument that he is entitled to qualified immunity as a matter of law – at the pleading stage, prior to discovery – is equally unavailing.

Curiously, Governor Pataki chose not to acknowledge the copious case law making clear that a defendant faces a decidedly "formidable hurdle" when asserting qualified immunity on a motion to dismiss. *See, e.g., Field Day, LLC v. County of Suffolk*, 463 F.3d 167, 191-92 (2d Cir. 2006). "Usually, the defense of qualified immunity cannot support the grant of a Rule 12(b)(6) motion for failure to state a claim on which relief can be granted." *McKenna v. Wright*, 386 F.3d 432, 435 (2d Cir. 2004) (quotation omitted). "Of course, a defendant presenting an immunity defense on a Rule 12(b)(6) motion instead of a motion for summary judgment must accept the more stringent standard applicable to this procedural route." *Id.* at 436. "Not only must the facts supporting the defense *appear on the face of the complaint*, but, as with all Rule 12(b)(6) motions, the motion may be granted only where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Id.* (emphasis supplied).

Not surprisingly, therefore, Governor Pataki has not cited a single case – not one – in which a complaint was dismissed on a Rule 12(b)(6) motion based on qualified immunity. To the contrary, *every single case* Governor Pataki cites is, without exception, a summary judgment case. *See* Pataki Br. at 11-13. As the Second Circuit put it in McKenna, "[h]owever the matter may stand at the summary judgment stage," Governor Pataki "cannot have the complaint

dismissed at the pleading stage on the basis of qualified immunity." 386 F.3d at 437.[13]

Indeed, granting a motion to dismiss based on qualified immunity would be particularly inappropriate where, as here, the alleged constitutional violation turns in part on the defendant's subjective motive. When a defendant's subjective intent is an element of a constitutional claim, a defendant is not entitled to qualified immunity simply because he can argue that he might have acted for legitimate reasons:

> Though the qualified immunity inquiry is generally an objective one, a defendant's subjective intent is indeed relevant in motive-based constitutional torts . . . . Otherwise, defendants in such cases would always be immunized from liability so long as they could point to objective evidence showing that a reasonable official could have acted on legitimate grounds. Where a factual issue exists on the issue of motive or intent, a defendant's motion for summary judgment on the basis of qualified immunity must fail.

Johnson v. Ganim, 342 F.3d 105, 117 (2d Cir. 2003) (citations omitted); *see also Mandell v. County of Suffolk*, 316 F.3d 368, 385 (2d Cir. 2003); *Locurto v. Safir*, 264 F.3d 154, 169 (2d Cir. 2001). Because Governor Pataki's personal liability hinges on his motives and intent – the extent to which he was motived by a desire to bestow a benefit on Ratner – qualified immunity plainly is not available at the pleading stage.

Governor Pataki makes only a halfhearted argument that the right he is accused of violating was not clearly established, *see* Pataki Br. at 12, and for good reason. It has long been settled law, after all, both that a state actor may not take a citizen's property for the purpose of conferring a private benefit on a particular private party, and that a state actor similarly may not

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[13] To the extent Governor Pataki is suggesting that he should be dismissed lest he be "distract[ed] from [his] official duties," Pataki Br. at 11, it suffices to observe that, as of four days ago, he no longer has any.

take property under the mere pretext of a public purpose with the actual purpose to bestow a private benefit. *See Kelo*, 125 S. Ct. at 2661 (citing *Midkiff*, 467 U.S. 229 at 245, and *Mo. Pac. R. Co. v. Nebraska*, 164 U.S. 403 (1896)).[14]

For these reasons, Governor Pataki's motion to dismiss based on qualified immunity should be denied.

V. THE CITY DEFENDANTS ARE NOT ENTITLED TO DISMISSAL

A. Official Capacities

Plaintiffs have stated valid official capacity claims for injunctive relief against both the City actors and the Economic Development Corporation ("EDC") actors. As discussed in the previous section, the only question on this motion to dismiss is whether plaintiffs' Complaint affords defendants adequate notice of the nature of the claims against them. That modest standard is easily met here. Whether the facts, as they will be developed, ultimately support plaintiffs' claim that the City and the EDC were the "moving force" behind the Atlantic Yards Project and the unconstitutional use of eminent domain is a question for summary judgment and/or trial – not for a motion to dismiss.

In any event, the record in this case *already* contains evidence confirming unmistakably that the City and the EDC are crucial players in the Atlantic Yards Project, and that plaintiffs' property would not be taken but for their active participation. Paragraph 8(I) of the Memorandum of Understanding dated February 18, 2005 (which the ESDC appended to the

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[14] Governor Pataki expressly declined to move to dismiss plaintiffs' due process and equal protection claims based on qualified immunity. *See* Pataki Br. at 12 n.2. His unsupported statement that plaintiffs are not pursuing those claims is little more than wishful thinking.

Kraus Declaration as Exhibit A) ("MOU") demonstrates that the City agreed to contribute *$100 million* in capital funding to the Project. Paragraph 7(iii) demonstrates that the City even went so far as to agree to convey *all* City-owned property within the Project area (including both buildings and streets) to the EDSC, much of it *for only $1 in consideration*. The City also agreed to allow ESDC to act as "lead agency" for the Project, such that the Project would not be subject to the City's normal zoning restrictions and land use approval process. *See id.* ¶5(iii); Compl. ¶¶ 64-66. And the EDC, for its part, expressly agreed to coordinate the activities of various essential city agencies to the full extent "necessary or useful in planning and implementing the Project." MOU ¶ 12.

The City's enormous financial endowment of the Project, coupled with its enthusiastic willingness to convey all City property in the Project area, is itself sufficient to establish that the City was a "moving force" behind the Project for municipal liability purposes. Indeed, it defies credulity to suggest that Ratner and the ESDC would have bothered to convince the City and the EDC to become parties to a formal, written MOU if they were anything less than indispensable players in the development of the Project. *See* N.Y. Unconsol. L. § 6266(1) (requiring the EDC to "work closely, consult and cooperate with local elected officials" and to "give primary consideration to local needs and desires"). And these facts are simply what we already know, based upon the notably skimpy public record. Surely plaintiffs are entitled to conduct discovery to determine what discussions, understandings, and agreements took place – beyond the four corners of MOUs themselves – with respect to the City's involvement in the Project generally and the use of eminent domain specifically. Following discovery, the City defendants will have the opportunity to move for summary judgment, but they plainly are not

entitled to a pre-discovery ruling that, as a matter of law, they are not a "moving force" behind the taking of plaintiffs' property.

B. Personal Capacities

Precisely the same analysis dooms the City defendants' claim that they are entitled to a pre-discovery finding that they had no personal involvement in the deprivation of plaintiffs' rights as a matter of law. Copious evidence suggests that each of them has been intimately involved with, and an indispensable part of, the Project. Whether plaintiffs ultimately will adduce sufficient evidence to create a genuine issue of fact for trial with respect to the "personal involvement" requirement is a question for summary judgment, not a motion to dismiss.

The City defendants attempt to evade this bedrock tenet of civil procedure with a sleight of hand. They contend that because they are not parties to *the condemnation proceeding itself*, they are not "personally involved" in the deprivation of plaintiffs' rights as a matter of law. *See* City Br. at 4. Tellingly, the City defendants cite no authority for the proposition that a government actor is categorically immune from liability in a Takings Clause case where he or she is not actually a party to the condemnation proceeding. To the contrary, the question here is simply whether the City defendants were part of a conspiracy to deprive plaintiffs of their federally protected rights – *i.e.*, whether they exerted their considerable influence to cause the ESDC to seize plaintiffs' property without any corresponding public benefit. At the summary judgment stage, the City defendants will be free to submit all of the evidence they want that the taking of plaintiffs' property is, as they claim, "being undertaken solely by ESDC." *Id.* For the

moment, the fact that plaintiffs have pled the contrary proposition is the beginning and end of the story with respect to this motion.[15]

None of the Rule 12(b)(6) cases cited by the City defendants requires a different result. In *Dove v. Ford.ham Univ.*, 56 F. Supp. 2d 330 (S.D.N.Y. 1999), the court dismissed the New York City Police Commissioner and a precinct commander because the complaint contained no allegation that they had anything even remotely do with the deprivation of the plaintiff's rights. In *Brown v. O'Shea-Schell*, 2006 WL 3179408 (E.D.N.Y. Oct. 11, 2006), a *pro se* plaintiff filed an abstruse complaint alleging that a court reporter improperly altered a transcript, and the court held that the state actor defendant could not be held personally responsible for the court reporter's unspecified "fraud." And in *Obilo v. City Univ. of the City of New York*, 2003 WL 1809471 (E.D.N.Y. Apr. 7, 2003), the court dismissed a high-ranking university official because the complaint contained "no allegations whatsoever of [her] personal involvement." *Id.* at *19.[16]

Finally, it is plain that the City defendants are no more entitled to qualified immunity on this motion than Governor Pataki is. As discussed in greater detail above, courts rarely dismiss a defendant on qualified immunity grounds at the pleading stage, and certainly not where the defendant's subjective motive is an element of the constitutional violation. For these

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[15] *Ciambriello v. County of Nassau*, 292 F.3d 307 (2d Cir. 2002), is not to the contrary. In *Ciambriello*, there were no specific conspiracy allegations at all, such that the defendants could not even "intelligently ... prepare their defense." *Id.* at 325.

[16] The City misunderstands plaintiffs' Due Process Clause claim. Contrary to the City's understanding, *see* City Br. at 5-6, plaintiffs' due process theory is that defendants afforded plaintiffs only a meaningless process for reviewing the decision to condemn their property, one that was predetermined from the outcome and therefore constitutionally inadequate. *See* Part III.C, *supra*.

reasons, and because the basic rights at issue in this litigation have long been clearly established, the City defendants' motion to dismiss should be denied.

CONCLUSION

For all the foregoing reasons, defendants' motions to dismiss the complaint should be denied.

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