No. 10-402

In The Supreme Court of the United States

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

Petitioners,

v.

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

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of New York

BRIEF OF *AMICI CURIAE* THE INSTITUTE FOR JUSTICE, THE BECKET FUND FOR RELIGIOUS LIBERTY, AND THE CATO INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Does the Public Use Clause of the Fifth Amendment permit condemnations where the official stated purpose of alleviating "blight" is a pretext for the true purpose of benefiting a private party?

2. Does the Public Use Clause of the Fifth Amendment permit the use of eminent domain to take property for transfer to a known private entity that will get the vast majority of the benefit from the taking?

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INTEREST OF THE *AMICI CURIAE*[1]

The Institute for Justice ("IJ") is a nonprofit, public-interest law center committed to defending the essential foundations of a free society and securing the constitutional protections necessary to ensure individual liberty. A central pillar of IJ's mission is to protect property rights, both because an individual's control over his own property is a tenet of personal liberty and because property rights are inextricably linked to all other civil rights.

IJ is the nation's leading legal advocate against eminent-domain abuse. IJ represented the property owners in *Kelo v. City of New London*, 545 U.S. 469 (2005), and in many other federal and state eminent-domain cases throughout the country. This case presents constitutional issues at the core of property-rights protection in the wake of *Kelo*.

The Cato Institute was established in 1977 as a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward

[1] In accordance with Supreme Court Rule 37, counsel for all parties received notice at least 10 days before the due date of *amici's* intention to file this brief and have consented to the filing. No party's counsel authored this brief in whole or in part and no persons other than *amici* or their counsel made a monetary contribution to its preparation or submission.

those ends, Cato publishes books and studies, conducts conferences, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs, including in various cases concerning property rights. This case is of central concern to Cato because it implicates the safeguards the Fifth and Fourteenth Amendments provide to prevent eminent-domain abuse.

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jains, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in litigation across the country and around the world. It frequently represents houses of worship whose religious freedom has been violated under the guise of land use regulation, including eminent domain.

The Becket Fund submits this brief because it is concerned that the New York Court of Appeals' decision would, if left uncorrected, add to the already potent threat that eminent domain poses to the religious liberty of Americans of all faith traditions.

STATEMENT OF THE CASE

Amici incorporate by reference the description of the facts in the petition for writ of certiorari. Pet. at 5-16.

REASONS FOR GRANTING THE PETITION

This case presents an opportunity for this Court to clarify the definition of a "pretextual taking" under the Public Use Clause of the Fifth Amendment. In *Kelo v. City of New London*, 545 U.S. 469, 479-85 (2005), this Court ruled that "economic development" is a public purpose justifying the use of eminent domain. But the Court also emphasized that government may not "take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." *Id.* at 478. In his concurrence, Justice Kennedy noted that a taking characterized by "impermissible favoritism" would be unconstitutional if the government cannot prove that it served a non-pretextual public purpose. *Id.* at 491 (Kennedy, J., concurring). More generally, although public purpose is defined broadly, this "Court's cases have repeatedly stated that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (internal citation omitted).

Unfortunately, *Kelo* provided only limited guidance on what counts as a pretextual taking. *See, e.g.*, *Goldstein v. Pataki*, 488 F. Supp. 2d 254, 288 (EDNY 2007), *aff'd*, 516 F.3d 50 (2d Cir. 2008) (noting that "[a]lthough *Kelo* held that merely pretextual purposes do not satisfy the public use requirement, the *Kelo* majority did not define the term 'mere pretext'").

As a result, lower courts have applied different standards.[2] Several state supreme courts look to the motives of the condemnor. Others focus on whether the new private owner captures most of the benefits of the condemnation. A third group focuses on the extent of the planning process preceding the taking. Finally, the New York Court of Appeals and the United States Court of Appeals for the Second Circuit essentially ignore all these considerations. They define pretext so narrowly that even the most blatant favoritism will escape judicial scrutiny. This confusion calls out for resolution by this Court.

The Court should also address the question of pretextual takings because it is substantively important. Since World War II, hundreds of thousands of Americans have been forcibly displaced from their homes or businesses as a result of economic-development and blight condemnations. Most of those displaced are poor or ethnic minorities with little political influence.[3] Judicial enforcement of constitutional property rights is often their only hope for protection against pretextual takings.

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[2] For detailed discussions of the widely divergent post-*Kelo* case law on pretext, see Kelly, *Pretextual Takings,* and Ilya Somin, *The Judicial Reaction to Kelo*, ___ ALB. GOVT. L. REV. ___ (forthcoming 2011), at 22-30.

[3] *See* Dick M. Carpenter II & John K. Ross, *Victimizing the Vulnerable* (Institute for Justice 2007), *available at* http://www.ij.org/images/pdf_folder/other_pubs/Victimizing_the_Vulnerable.pdf.

The present case is a particularly flagrant example of the abuse of eminent domain. It includes all four factors that this Court and lower courts have identified as indications of pretext: evidence of pretextual intent, benefits that flow predominantly to a private party, haphazard planning, and a readily identifiable private beneficiary. It therefore gives the Court an excellent opportunity to clarify the importance of each factor in adjudicating pretextual takings.

I. STATE SUPREME COURTS AND LOWER FEDERAL COURTS DISAGREE OVER THE DEFINITION OF A PRETEXTUAL TAKING.

In deciding whether to grant *certiorari*, this Court gives preference to cases where "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." Sup. Ct. R. 10(b). There are few more confused splits than the division over pretextual takings after *Kelo*.

Two state supreme courts interpret *Kelo* as requiring a focus on the actual intentions of the condemning authority. The District of Columbia Court of Appeals focuses instead on the magnitude of the expected public benefits from the taking. Two other high courts emphasize the extent of the planning process behind a condemnation. Finally, the

Second Circuit, and the New York Court of Appeals in the present case, define pretextual takings so narrowly that it becomes virtually impossible to invalidate even the most abusive condemnations.

A. State Supreme Courts and Federal Courts Emphasizing the Actual Intentions of Condemning Authorities.

Two state supreme courts interpret *Kelo*'s pretextual-taking inquiry as focusing primarily on the actual intentions of condemning authorities and the plausibility of the condemning authority's asserted purpose. In *Middletown Township v. Lands of Stone*, the Pennsylvania Supreme Court interpreted *Kelo* as requiring it to examine "the real or fundamental purpose behind a taking ... the true purpose must primarily benefit the public." 939 A.2d 331, 337 (Pa. 2007); *see also In re O'Reilly,* No. 10 WAP 2009, 2010 WL 3810005 at *2 (Pa. Sept. 30, 2010) (quoting *Lands of Stone*, 939 A.2d at 337). *O'Reilly* also noted the crucial factor: "the public must be the primary and paramount beneficiary of the taking." *Id.* at *10.

The Hawaii Supreme Court also focuses on motive. It held in *County of Hawaii v. C&J Coupe Family Ltd. Partnership* that *Kelo* requires courts to look for "the actual purpose" of a taking to determine whether the official rationale was "a mere pretext." *See* 198 P.3d 615, 647-49 (Haw. 2008). However, Hawaii and Pennsylvania differ in that the latter

relies far more on the distribution of benefits to determine purpose.

Several pre-*Kelo* federal decisions take a similar approach. *See Armendariz v. Penman,* 75 F.3d 1311, 1321 (9th Cir. 1996) (en banc) (invalidating a taking because the official rationale of blight alleviation was a pretext for "a scheme ... to deprive the plaintiffs of their property ... so a shopping-center developer could buy [it] at a lower price"); *Aaron v. Target Corp.*, 269 F. Supp. 2d 1162, 1174-76 (E.D. Mo. 2003), *rev'd on other grounds*, 357 F.3d 768 (8th Cir. 2004) (holding that a property owner was likely to prevail on a claim that a taking ostensibly to alleviate blight was actually intended to serve the interests of the Target Corporation); *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203, 1229 (C.D. Cal. 2002) ("Courts must look beyond the government's purported public use to determine whether that is the genuine reason or if it is merely pretext."); *99 Cents Only Store v. Lancaster Redev. Agency*, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001) ("No judicial deference is required ... where the ostensible public use is demonstrably pretextual").[4]

A lower court in the present case also focused on evidence showing that the condemnation's actual motive was to benefit Columbia. *See Kaur v. New York State Urban Dev. Corp.,* 892 N.Y.S.2d 8,

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[4] *See also Kelo*, 545 U.S. at 487 n.17 (favorably citing *99 Cents Only*).

18-20 (N.Y. App. Div. 2009), *rev'd* 15 N.Y.3d 235 (N.Y. 2010).

B. Courts Emphasizing the Magnitude and Distribution of Expected Benefits.

In contrast to the Hawaii and Pennsylvania supreme courts, the Court of Appeals of the District of Columbia emphasizes the magnitude of the public benefits of the taking relative to the private ones: "If the property is being transferred to another private party, and the benefits to the public are only 'incidental' or 'pretextual,' a 'pretext' defense may well succeed." *Franco v. Nat'l Capital Revitalization Corp.*, 930 A.2d 160, 173-74 (D.C. 2007). The court remanded *Franco* with instructions to "focus primarily on the benefits the public hopes to realize from the proposed taking." *Id.* at 173. This approach builds on Justice Kennedy's concurring opinion in *Kelo*, which suggested that a taking might be invalidated if it has "only incidental or pretextual public benefits." *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring).

In *MHC Financing Ltd. Partnership v. City of San Rafael,* the Northern District of California also interpreted *Kelo* as requiring "'careful and extensive inquiry into whether, in fact, the development plan is of primary benefit to the developer ... [and] only incidental benefit to the City.'" No. C 00-3785VRW, 2006 WL 3507937, at *14 (N.D. Cal. Dec. 5, 2006) (quoting *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring)).

A pre-*Kelo* Seventh Circuit case also emphasizes the distribution of the benefits of a taking. *See Daniels v. Area Plan Comm'n,* 306 F.3d 445, 456-66 (7th Cir. 2002) (holding that the takings' true purpose was "to confer a private benefit" because "any speculative public benefit would be incidental at best.")[5]

C. Courts Focusing on the Extent of the Pre-Condemnation Planning Process.

The Maryland, Pennsylvania, and Rhode Island supreme courts have relied on the absence of extensive planning to indicate a pretextual taking. *See Middletown*, 939 A.2d at 338 (concluding that "evidence of a well-developed plan of proper scope is significant proof that an authorized purpose truly motivates a taking"); *Mayor & City Council of Balt. v. Valsamaki*, 916 A.2d 324, 352-53 (Md. 2007) (noting absence of clear plan for the use of condemned property, and contrasting with *Kelo*); *R. I. Econ. Dev. Corp. v. The Parking Company,* 892 A.2d 87 (R.I. 2006) (emphasizing difference between condemnor's approach and the "exhaustive preparatory efforts that preceded the takings in *Kelo*"). These decisions

[5] While *Daniels* differs slightly from the present case because the alleged public purpose claimed by the government was not pursuant to a specific "legislative determination," the court's analysis also focused on the importance of the distribution of benefits from a taking as an independent factor weighing against the government. *Id.* at 465-66.

build on *Kelo*'s emphasis on the presence of an "integrated development plan" behind the takings upheld in that case. *Kelo,* 545 U.S. at 488.

D. The Presence of a Known Private Beneficiary.

Both the majority and concurrence in *Kelo* note that there is a greater risk of a pretextual taking when the taking's private beneficiary is known in advance. *See Kelo,* 545 U.S. at 478 n. 6; *id*. at 491-92 (Kennedy, J., concurring). Most lower courts either ignore this aspect of *Kelo's* analysis or, in the case of the Second Circuit, give it little weight. *See Goldstein v. Pataki*, 516 F.3d 50, 55-56 (2d Cir. 2008) (dismissing the significance of the "acknowledged fact that [a private developer] was the impetus behind the project ... and that it was his plan for the Project that [was] ... eventually adopted without significant modification"). The absence of this factor from lower-court analyses further indicates confusion about *Kelo*'s meaning.

E. Courts That Virtually Define Pretextual Takings Out of Existence.

The Second Circuit and the New York Court of Appeals have defined pretextual takings so narrowly that it is virtually impossible to challenge a condemnation on that basis. As discussed above, that conclusion places them at odds with the Seventh and Ninth Circuits and the highest courts of the District of

Columbia, Hawaii, Maryland, Pennsylvania, and Rhode Island.

1. The Atlantic Yards Cases.

In *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008), the Second Circuit held that so long as a taking is "rationally related to a classic public use," it is impermissible to "give close scrutiny to the mechanics of a taking ... to gauge the purity of the motives of various government officials who approved it." *Id.* at 62.

The Second Circuit also rejected claims that the takings should be invalidated because most benefits would flow to developer Bruce Ratner or because any benefits to the community would be "dwarf[ed]" by the project's costs. *Id.* at 58. Similarly, the court rejected the idea that any significant scrutiny was required because Ratner was the originator of the project and his status as the main private beneficiary of the takings was known from the start. *Id.* at 55-56.

Finally, both the Second Circuit and a later decision by the New York Court of Appeals upholding the same takings failed to seriously consider evidence that the planning process was deliberately skewed to benefit Ratner. As Judge Robert Smith pointed out in his dissenting opinion in the state case, the original rationale for the condemnation was "economic development—job creation and the bringing of a professional basketball team to Brooklyn." *In re Goldstein v. N. Y. State Urban Dev. Corp.,* 921 N.E.2d 164,

189 (N.Y. 2009) (Smith, J., dissenting). Apparently, "nothing was said about 'blight' by the sponsors of the project until 2005," when the ESDC realized that a blight determination might be legally necessary. *Id*.

2. The New York Court of Appeals Ignored Virtually Every Possible Indicator of Pretext in the Present Case.

The Court of Appeals' decision in the present case gives free rein to pretextual takings just as much as the opinions in the *Goldstein* cases. It ignores evidence of pretextual motive, evidence that Columbia would reap most of the condemnation's benefits, evidence of inadequate planning, and the fact that Columbia's identity as the main beneficiary of the taking was known from the beginning. Amazingly, the court's decision fails to cite *Kelo* at all, despite a lower court's extensive reliance on *Kelo's* pretext analysis to invalidate these takings. *See Kaur v. N. Y. State Urban Dev. Corp.*, 892 N.Y.S.2d 8, 18-20 (N.Y. App. Div. 2009), *rev'd*, 15 N.Y.3d 235 (N.Y. 2010).

a. Evidence of Pretextual Motive.

The *Kaur* takings arose from Columbia University's effort to acquire property for expansion in Manhattanville. *Kaur*, 15 N.Y.3d at 244-47. The official reason for the condemnation was the need to alleviate "blight." But the Court of Appeals failed to consider extensive evidence showing that the "blight"

determination was deliberately rigged for the purpose of transferring the condemned property to Columbia.

These takings had previously been invalidated by New York's Appellate Division, which found "no evidence whatsoever that Manhattanville was blighted prior to Columbia gaining control over the vast majority of property therein." *Kaur,* 892 N.Y.S.2d at 20. The ESDC, the condemning agency, only ordered a blight study after Columbia had already acquired most of the property in the area and "gained control over the very properties that would form the basis for a subsequent blight study." *Id.* at 21. When Columbia presented the agency with a plan to use eminent domain to acquire the remaining property and use it for Columbia's "sole benefit," a blight study was commissioned from AKRF, a firm simultaneously employed by Columbia on another project. *Id.* at 20-21.

AKRF was instructed by the ESDC to use a methodology "biased in Columbia's favor," which established blight through the presence of minor defects like "unpainted block walls or loose awning supports."[6] *Kaur,* 892 N.Y.S.2d at 17. Later, another firm was hired to conduct an independent blight study, but it was required to use the same flawed methodology. *Id.* at 17-18. As the Appellate Division concluded, "[v]irtually every neighborhood in the five

[6] For more details on the biases and flaws in the blight study, see Pet. at 9-11.

boroughs will yield similar instances of disrepair that can be captured in close-up technicolor." *Id.* at 17. Moreover, most of the "blight" AKRF found was located on property owned by Columbia, and was possibly allowed to develop in order to justify a blight finding. *See* Root, *College Cheats* (noting that Columbia already owned 76% of the land in the area at the time of the study and that "the university refused to perform basic and necessary repairs—thereby ... manufacturing the ugly conditions that later advanced the school's real-estate interests").

The Appellate division concluded that the area could not be considered blighted, and also ruled that the blight findings were an unconstitutional "pretextual" taking under *Kelo*. *Kaur,* 892 N.Y.S.2d at 18-20.

In reversing the Appellate Division, the Court of Appeals refused to consider most of the evidence that the study deliberately used biased methodology, noting only that AKRF's objectivity was not compromised merely "because Columbia had previously engaged AKRF" to produce its development plan for the area. *Kaur*, 15 N.Y.3d at 255. The court also noted that AKRF's findings were confirmed by a study conducted by another firm. *Id*. But it did not consider the relevance of the fact that the other firm was also required to use the same biased methodology as AKRF.

The Court of Appeals also noted that a third firm, Urbitran, had conducted a study finding "blight" in

the area prior to AKRF's, thereby attempting to negate the Appellate Division's finding that there was no evidence of blight prior to the acquisition of most of the area by Columbia. *Id.* at 257. The Court of Appeals, however, did not dispute the Division's finding that the ESDC had only commissioned the AKRF study because ESDC staff doubted the legal adequacy of the Urbitran findings.[7] *Kaur*, 892 N.Y.S.2d at 12-13, 21.

The Appellate Division found further evidence of improper motive in the ESDC's behavior with regard to Freedom of Information Law requests. *Kaur*, 892 N.Y.S.2d at 17-18. The ESDC improperly withheld documents from the owners and then insisted on closing the record of the proceedings before it handed over the documents. The ESDC thus deprived the owners of vital information needed to challenge the project at the only time such evidence could be used. The failure to release the documents at the critical time not only amounted to a due process violation—it indicated the extent to which the ESDC was willing to take any action in order to approve the project. *Kaur*, 892 N.Y.S.2d at 17-18 (plurality), 19-23 (Richter, J., concurring and discussing due-process violations at length). The Court of Appeals simply ignored this significant constitutional issue, and the evidence of pretextual motive it represents.

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[7] The Court of Appeals incorrectly stated that the Appellate Division had "ignored" the Urbitran study. *Kaur*, 15 N.Y.3d at 257.

b. Evidence That Columbia Will Be the Primary Beneficiary of the Takings.

The Court of Appeals also failed to seriously consider evidence that Columbia University would be the primary beneficiary of the takings. These takings were conducted pursuant to Columbia's preexisting expansion plans. *See Kaur*, 892 N.Y.S.2d at 21-22; Pet. at 23-24. As the Appellate Division pointed out, Columbia will be able to use the condemned property for its "sole benefit." *Kaur*, 892 N.Y.S.2d at 21.

The conclusion that the takings will primarily benefit Columbia is reinforced by the fact that there is little or no evidence that the condemned area was actually blighted. As the Appellate Division pointed out, "[t]he 2002 West Harlem Master Plan stated that not only was Harlem experiencing a renaissance of economic development, but that the area had great development potential that could easily be realized through rezoning." *Kaur*, 892 N.Y.S.2d at 19. Since blight alleviation was the stated purpose behind the taking, the absence of any significant blight strongly suggests that there will be minimal public benefit. By contrast, the benefits to Columbia are likely to be extensive, since it has long sought to acquire the properties in question. Pet. at 5.

c. Lack of Careful, Objective Planning.

In *Kelo,* the Supreme Court emphasized that the New London condemnations were the result of a "carefully considered development plan." *Kelo*, 545 U.S. at 478. In this case, by contrast, the plan was concocted by Columbia University—the very private interest that stood to benefit from the condemnations. *See* §§ I.E.2.a-b, *supra*. The blight alleviation plan was concocted after the condemning authority had *already* decided to condemn the property and transfer it to Columbia. Pet. at 21-23. As the Appellate Division explained, "[t]he contrast between ESDC's scheme for the redevelopment of Manhattanville and New London's plan for Fort Trumbull could not be more dramatic." *Kaur*, 892 N.Y.S.2d at 19.

d. There is no Dispute that Columbia Was an Identifiable Private Beneficiary of these Takings.

In *Kelo*, this Court emphasized that there is a greater risk of a pretextual taking when the identity of the private beneficiary is known at the time of the decision to condemn. *See Kelo,* 545 U.S. at 478 n.6; *id.* at 491-92 (Kennedy, J., concurring). In the present case, there is no doubt that Columbia's identity as the beneficiary of the condemnations was known in advance. Indeed, Columbia lobbied for the condemnations and designed the development project of which they were a part. Pet. at 21-23.

In short, the New York Court of Appeals has made it virtually impossible to challenge a taking as pretextual. As Justice Catterson of the Appellate Division recently explained, "[T]here is no longer any judicial oversight of eminent domain proceedings [in New York.]" *Uptown Holdings, LLC v. City of New York*, 2010 WL 3958687, at *3 (N.Y. App. Div. Oct. 12, 2010) (Catterson, J., concurring).

To sum up, there is disagreement between lower courts over the definition of what counts as a pretextual taking. The judicial abdication favored by the New York Court of Appeals and the Second Circuit stands in sharp contrast to the many federal courts and state supreme courts that have taken *Kelo*'s strictures against pretextual condemnations seriously.[8] The latter, however, disagree among themselves about the proper criteria by which to judge pretextual takings.

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[8] These cases all explicitly rely on *Kelo's* pretext analysis. Even where some of them do so in part to interpret their own state constitutions, this Court could serve an important purpose in clarifying the relevant doctrine, which depends in large part on its interpretation of the federal Constitution. *See, e.g.*, *Three Affiliated Tribes v. World Engineering, P.C.*, 467 U.S. 150, 152 (1984) ("[the] Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law").

II. THE COURT MUST ESTABLISH CLEAR STANDARDS FOR PRETEXTUAL TAKINGS IN ORDER TO PROTECT THE RIGHTS OF NUMEROUS PROPERTY OWNERS AGAINST CONDEMNATIONS DRIVEN BY FAVORITISM.

The issues raised by this case affect the rights of property owners across the country who are threatened by economic-development or "blight" takings. If courts do not protect property rights against pretextual condemnations, many people—particularly the poor, racial minorities, and those lacking political influence—risk losing their homes and businesses to condemnations undertaken for the benefit of well-connected private parties.

This danger is exacerbated in states like New York, which define "blight" broadly, making it possible to declare virtually any area blighted and then condemn it for transfer to a private interest. New York also employs uniquely dubious and abuse-prone eminent-domain procedures.

A. Blight and Economic-Development Takings Threaten Numerous Property Owners.

Since World War II, as many as several million Americans have been forcibly displaced by blight and economic development takings. *See* Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings after* Kelo, 15 SUP. CT. ECON. REV.

183, 267-71 (2007) (citing relevant data). Property owned or rented by the poor, minorities, and politically weak individuals is especially likely to be targeted for condemnation for transfer to politically influential interest groups. *See id.* at 190-93, 267-71; Dick M. Carpenter II & John K. Ross, *Victimizing the Vulnerable* (Institute for Justice 2007); Brief for the NAACP et al. as Amici Curiae Supporting Petitioners, *Kelo v. City of New London*, 545 U.S. 469 (2004) (No. 04-108).

Nonprofit and religious organizations are also unusually vulnerable to these condemnations. Because nonprofits generally do not pay taxes on their property and often produce little in the way of economic development, they make tempting targets for local governments hoping to increase tax revenue. *See* Brief for Becket Fund for Religious Liberty as Amicus Curiae in support of Petitioners, *Kelo v. City of New London*, 545 U.S. 469 (2004) (No. 04-108), 2004 WL 2787141, at *8-11 & n.20 (explaining the special vulnerability of religious nonprofits and listing numerous examples where they have been targeted by economic-development takings). For example, numerous churches and other nonprofit institutions were condemned in the notorious 1981 *Poletown* case in Detroit, where an entire neighborhood was taken in order to clear the way for a new General Motors factory.[9] *See* Ilya Somin, *Overcoming Poletown:*

[9] This condemnation was upheld by the Michigan Supreme Court in *Poletown Neighborhood Council v. City of Detroit*, 304

(Continued on following page)

County of Wayne v. Hathcock, *Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005, 1017-18 (2004).

The approach adopted by the New York Court of Appeals exacerbates this problem by giving condemning authorities virtually unlimited power to use eminent domain to benefit politically influential interests.

B. The Risk of Pretextual Condemnations Is Greater in States That Have a Virtually Unlimited Definition of Blight.

The dangers of pretextual takings are heightened in states like New York that have adopted a nearly limitless definition of blight that makes it possible for almost any area to be declared "blighted" and condemned. Under such laws, almost any private interest group with political clout can lobby to have an area declared "blighted" and transferred to it. Abuses of this kind often occur in states with broad definitions of blight. *See generally* Ilya Somin, *Blight Sweet Blight*, LEGAL TIMES, Aug. 14, 2006, at 42. Judicial scrutiny of potentially pretextual takings is necessary to ensure that broad definitions of blight do not become a license for takings that serve private interests at the expense of the public.

N.W.2d 455 (Mich. 1981), *overruled by County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

Since *Kelo,* forty-three states have passed laws that constrain or forbid "economic development" condemnations. *See* Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100 (2009). Many of these laws are strong enough to significantly curtail eminent domain abuse. *Id.* at 2138-49. In many states, however, restrictions on economic development condemnations are undercut by the retention of nearly unlimited definitions of "blight," which leave virtually any property vulnerable to condemnation. *See id*. at 2120-30 (describing these statutes in detail). Even in the aftermath of the political response to *Kelo*, there is a serious danger of pretextual blight condemnations in many jurisdictions.

C. New York Law Leaves Its Citizens Especially Vulnerable to Eminent-Domain Abuse.

New York law vastly increases the danger of pretextual takings in two ways. First, it has adopted an incredibly broad definition of "blight." Second, its eminent-domain procedures make it almost impossible for a citizen to question—let alone refute—a condemnor's assertion that the use of eminent domain is legally proper.

1. New York's Definition of "Blight" Is Extraordinarily Broad.

The definition of "blight" endorsed by the Court of Appeals in the present case and *Goldstein v. New York Urban Development Corporation*, 921 N.E.2d 164 (2009), is one of the broadest in the country, and therefore especially vulnerable to abuse.

In *Goldstein,* the court concluded that the property in question could be condemned as "blighted" and blight alleviation is a "public use" recognized by the New York Constitution, thanks to a constitutional amendment allowing the condemnation of slum areas. 921 N.E.2d at 171-73.

The court, despite conceding that the area "d[id] not begin to approach in severity the dire circumstances of urban slum dwelling" that led to the enactment of New York's state constitutional amendment allowing blight condemnations, found that "economic underdevelopment and stagnation" sufficed to constitute "blight." *Goldstein,* 921 N.E.2d. at 171-72. Since there is nearly always "room for reasonable difference of opinion" as to whether any area is "underdeveloped," the *Goldstein* standard is essentially limitless. *See id.* at 172.

In the present case, the Court of Appeals applied the same definition of blight. *See Kaur,* 15 N.Y.3d at 255. Indeed, members of New York's lower courts have already recognized that, after *Goldstein* and *Kaur,* "there is no longer any judicial oversight of" blight condemnations in New York. *Uptown Holdings*,

2010 WL 3958687, at *3 (Catterson, J., concurring). The field is therefore left wide open for pretextual condemnations.

2. New York's Unique Eminent-Domain Procedures Leave the State's Property Owners Particularly Vulnerable to Pretextual Takings.

The problems in New York's eminent-domain law are exacerbated by the fact that New York's eminent-domain procedures do not allow property owners access to any kind of adversarial process to build a record for judicial review. In general, would-be condemnors in New York are required to hold a public hearing on any proposed project involving eminent domain. N.Y. EDPL § 202. While holding a public meeting before a legislative determination is not unusual, New York is unique in that the public hearing is the *exclusive* means by which a factual record can be created for judicial review. N.Y. EDPL § 208. A property owner who wishes to contest taking of her property (as distinct from contesting the amount of compensation owed) is required to file an affirmative challenge, which is heard in the first instance by a mid-level appellate court. N.Y. EDPL § 207. At that hearing, the evidence eligible for review is strictly limited to the record of the public hearing. N.Y. EDPL § 208; *see also Brody v. Village of Port Chester*, 345 F.3d 103, 113-16 (2d Cir. 2003) (Sotomayor, J.) (discussing exclusivity of proceedings under Section 207).

In other words, a property owner in New York who claims a taking is pretextual is limited to the factual record created at a public hearing. This requirement ensures that he or she has no right to discovery and no right to question the condemnor's witnesses (or, at least, no right to demand answers). In fact, New York is literally the only state in which a person's property can be condemned as "blighted" without anyone ever having to testify under oath about why it is "blighted" or having to answer any hostile questions about whether the property is, in fact, blighted.[10] This uniquely circumscribed procedure makes New Yorkers particularly vulnerable to pretextual takings—which makes it all the more troubling that both the Second Circuit and the New York Court of Appeals have adopted such a radically permissive interpretation of *Kelo*.

[10] New York is alone is refusing to provide any adversarial process to property owners challenging the validity of a taking. Perhaps the closest analogue to New York's system is California, which also requires that property owners challenge a blight determination in court immediately after the determination is made. Cal. Health & Safety Code § 33368 (2010). Even there, however, property owners retain the right to raise defenses (including the sorts of pretext claims at issue in this case) at the time of condemnation, and may avail themselves of ordinary trial-court procedures like discovery when they do. *See* Cal. Code Civ. Proc. §§ 1250.350-1250.370 (2010).

III. THE PRESENT CASE IS AN EXCELLENT VEHICLE FOR THIS COURT TO DEFINE THE MEANING OF PRETEXTUAL TAKINGS.

The present case is an excellent vehicle for this Court to define "pretextual" takings and resolve the widespread confusion in the lower courts on this important issue. As discussed above, the case features all four elements that this Court and lower courts have identified as possible indicators of a pretextual taking.

The Court can therefore use this case to consider the weight to be accorded to each of the four criteria. By doing so, it can provide needed guidance to state courts and lower federal courts, thereby upholding "the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816) (Story, J.).

The question of how best to weigh the different factors is one best addressed when and if this court decides to grant the petition for *certiorari.* Here, we mention just a few considerations relevant to each of the four factors.

Both the presence of a pretextual motive and that of a project where all or most of the benefits go to a private party are strong indications of a pretextual taking. If the government's objective in condemning property is to benefit a private party, it becomes a pure "A to B" taking of the sort that this Court has

always considered to be unconstitutional. *See Kelo*, 545 U.S. at 477 (noting that "it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*"). Similarly, if a private party monopolizes all or nearly all of the benefits of a taking, that is a strong indication that there is no public use behind it. A taking that "serve[s] no legitimate purpose of government" cannot "withstand the scrutiny of the public use requirement" and must be declared "void." *Midkiff*, 467 U.S. at 245.

The lack of an unbiased pre-condemnation planning process is at minimum an indication that favoritism is likely, triggering the need for heightened judicial scrutiny. *See Kelo,* 545 U.S. at 487 (noting that "a one-to-one transfer of property, executed outside the confines of an integrated development plan" may require additional judicial scrutiny); *id.* at 493 (Kennedy, J., concurring) (indicating that the fact that "[t]his taking occurred in the context of a comprehensive development plan" reduces the need for "a demanding level of scrutiny").

Finally, the presence of a private beneficiary whose identity was known in advance should also trigger a higher level of judicial scrutiny to guard against "the risk of undetected impermissible favoritism." *Id.* This is especially necessary in a case like the present one, where the private beneficiary itself initiated the project justifying the taking. *See* § I.E.2, *supra*.

By taking this case, the Court can resolve an important division of authority that has plagued state supreme courts and lower federal courts. It can also ensure the protection of vital constitutional property rights against pretextual condemnations.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

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