No. _____

In The
Supreme Court of the United States

DANIEL GOLDSTEIN, ET AL.,
Petitioners,

v.

GEORGE E. PATAKI, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Is the Court's statement that the Public Use Clause prohibits the taking of "property under the mere pretext of a public purpose, when [the] actual purpose [is] to bestow a private benefit," *Kelo v. City of New London*, 545 U.S. 469, 478 (2005), a rule of general application, or is it limited to takings justified *solely* on economic development grounds?

Does the substantial deference afforded to legislative public use determinations under *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984), apply to non-legislative condemnation decisions?

What are the elements of a Public Use Clause claim, and how should such a claim be evaluated on a motion to dismiss, given the tension between *Kelo*'s assurance that "purpose" and "pretext" matter and *Midkiff*'s statement that courts should defer to a legislative taking that appears "rationally related to a conceivable public purpose"?

PARTIES TO THE PROCEEDINGS

Petitioners are Daniel Goldstein, Maria Gonzalez, Jerry Campbell, Yesenia Gonzalez, David Sheets, Jackie Gonzalez, Aaron Piller, Peter Williams Enterprises, Inc., 535 Carlton Ave. Realty Corp., Pacific Carlton Development Corp., Chadderton's Bar and Grill, Inc., Gelin Group, LLC, and Rockwell Property Management, LLC.

Respondents are George E. Pataki, New York State Urban 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.

RULE 29.6 STATEMENT

Petitioners Peter Williams Enterprises, Inc., 535 Carlton Ave. Realty Corp., Pacific Carlton Development Corp., Chadderton's Bar and Grill, Inc., Gelin Group, LLC, and Rockwell Property Management, LLC have no parent companies, and no public company owns ten percent or more of their stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The decision of the court of appeals (App. A, 1a-30a) is reported at 516 F.3d 50. The decision of the district court (App. B, 31a-115a) is reported at 488 F. Supp. 2d 254. The report and recommendation of the magistrate judge (App. C, 116a-168a) is unofficially reported at 2007 WL 1695573.

JURISDICTION

The court of appeals entered its judgment affirming the dismissal of petitioners' complaint for failure to state a claim on February 1, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The public use requirement of the Takings Clause of the Fifth Amendment to the United States Constitution provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

Fed. R. Civ. P. 12(b)(6) provides for pre-answer, pre-discovery dismissal for "failure to state a claim upon which relief may be granted."

STATEMENT OF THE CASE

A. Introduction

The court of appeals in this case made two novel rulings. Both collide with this Court's precedents interpreting the Public Use Clause, the decisions of other federal circuit courts of appeals, and various state court decisions, most notably the court of last resort for the District of Columbia. Both illustrate the confusion engendered by *Kelo v. City of New London,* 545 U.S. 469 (2005), in which the Court focused on the condemnors' "purpose," "motive," "intent" and "pretext," while at the same time hewing to the language of near absolute deference—*e.g.*, "palpably without reasonable foundation" and "rationally related to a conceivable public purpose"—set forth in *Berman v. Parker*, 348 U.S. 26 (1954), and *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

First, the court of appeals held that a decision to seize scores of private homes and businesses openly coveted—indeed long targeted for acquisition—by a single powerful real estate developer is wholly immune from judicial scrutiny provided that the official who acceded to the developer's demand proffers a minimally plausible (albeit indisputably *post hoc*) pretext, such as the elimination of blight. 1a-30a.

This holding is directly at odds with this Court's reassurance in *Kelo* that the Public Use Clause "no doubt" prohibits the taking of "property under the mere pretext of a public purpose, when [the] actual purpose [is] to bestow a private benefit." 545 U.S. at 477-78. Nothing in *Kelo* supports the court of appeals'

holding that private takings justified by "classic" public purposes—*i.e.,* any purpose other than economic development—must be dismissed on the pleadings.

Moreover, this holding is flatly contrary to a recent decision from the highest court for the District of Columbia, which, faced with the identical question concerning the scope of *Kelo*'s "pretext" reference, reinstated the property owner's pleading and remanded so discovery could be conducted into whether the government's blight justification was pretextual. *See Franco v. Nat'l Capital Revitalization Corp.*, 930 A.2d 160 (D.C. 2007).

Second, the court of appeals held that *all* eminent domain decisions, whether legislative or not, must be upheld unless they are "palpably without reasonable foundation" or are not "rationally related to a conceivable public purpose." 20a. This highly deferential standard is, of course, derived from *Midkiff*, 467 U.S. at 232-34 (reviewing enactment of the Hawaii legislature), and *Berman*, 348 U.S. at 29-31 (reviewing law passed by Congress and determination of the District of Columbia Commissioners). The court of appeals, however, saw no basis for easing the standard of review on a motion to dismiss in this case even though the public benefit decision was officially made by a group of unelected directors of a quasi-governmental corporation[1] and bears none of the indicia of a presumptively legitimate taking. 20a

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[1] Respondent New York State Urban Development Corporation (doing business as Empire State Development Corporation).

The decision by the court of appeals to afford the same deference to respondents' takings determination as it would a legislative body is inconsistent with this Court's Public Use Clause precedents, which speak almost exclusively about the judicial deference owed to *legislative* determinations. Nor can it be squared with the decisions of other circuits. *See Daniels v. Area Plan Comm'n of Allen County*, 306 F.3d 445 (7th Cir. 2002) (holding that the *Midkiff* and *Berman* standard does not apply to unrestrained administrative decisions); *Armendariz v. Penman*, 75 F.3d 1311, 1321 (9th Cir. 1996) (*en banc*) (refusing to apply "the usual extreme deference that courts owe to legislative determinations of public use" under *Berman* and *Midkiff*).

Finally, this Court's focus on the "purpose," "motive," and "intent" behind the takings in *Kelo* and its recognition that true purposes may be concealed by pretextual justifications is difficult to reconcile with the teaching of *Midkiff* and *Berman*, which require restraint unless a proffered justification is "palpably without reasonable foundation" or is not "rationally related to a conceivable public purpose."

In the years since *Kelo* was decided, no court has managed to resolve this tension. Instead, lacking guidance from this Court, they arbitrarily choose one approach or the other.

Some, like the court of appeals and the district court in this case, choose to ignore *Kelo*, believing that to do otherwise would amount to "overrul[ing] *Berman, Midkiff*, and over a century of precedent and . . . require federal courts in all cases to give close scrutiny

to the mechanics of a taking rationally related to a classic public use as a means to gauge the purity of the motives of the various officials who approved it." 25a.

Others, like *Franco*, choose to effectively ignore *Midkiff*, reinstate the pleading, and remand for discovery concerning the legislature's motive in making a finding of public purpose because "*Kelo* makes clear that there is room for a landowner to claim that the legislature's declaration of public purpose is a pretext designed to mask a taking for private purposes." 930 A.2d at 171.

In an area as important and fraught with difficulty as the circumstances under which the government is allowed to forcibly appropriate private property, this continuing confusion is both unacceptable and unnecessary. This Court can readily resolve the tension, harmonize its Public Use Clause jurisprudence, and articulate uniform standards for courts to employ when reviewing pretext-based Public Use Clause claims.

B. Petitioners' Allegations

Petitioners challenge the taking of their homes and businesses as unconstitutional. The pertinent allegations are summarized below. *See generally* Amended Complaint ("Complaint") (App. D, 169a-216a).

On or before 2002, respondent Bruce Ratner conceived a plan to develop a large, 22 acre swath of central Brooklyn, New York. 184a-185a.

Ratner's plan, which later became known as the Atlantic Yards Arena and Redevelopment Project ("Project"), included 16 high-rise office and apartment towers ranging from 18 to 60 stories and totaling about 8.8 million square feet of office, residential and commercial space, a 180-room hotel, and an arena for a professional basketball team. 171a, n.1, 183a.

Ratner's vision faced significant hurdles: (1) approximately half of the site—68 separate parcels and 123 tax lots—was privately owned in a prosperous community where property values were increasing rapidly (the "Takings Area"),[2] 186a-188a; (2) the other half of the site was primarily a below-grade open rail yard owned by the state Metropolitan Transportation Authority ("MTA"), *id.*, a public authority controlled by respondents George Pataki and Michael Bloomberg, 178a; (3) the massive scope of the Project violated scores of local zoning laws, including density, height, and use restrictions, 189a; and (4) the selection of private developers for projects that receive billions of dollars in tax breaks and direct subsidies are typically subject to competitive selection. *Id*.

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[2] The Takings Area consists primarily of two large, non-contiguous, rectangularly shaped parcels situated directly south of the rail yards. These two parcels, containing petitioners' homes and businesses, are separated by an equally large rectangular parcel owned in substantial part by a developer who, early on, cut a deal with Ratner to spare his property from condemnation. Petitioners were less fortunate. *See* Matthew Schuerman, *Ratner Rules: Brooklyn Nets Plan Spares Developer Shaya Boymelgreen's Project*, VILL. VOICE, Apr. 5, 2004, *available at* http://www.villagevoice.com/news/0414, schuerman,52432,5.html.

Ratner's plan to overcome these daunting hurdles was simple: secure the support and assistance of respondents Pataki and Bloomberg. Only Pataki and Bloomberg could: (1) wield the power of eminent domain to seize the 68 parcels of private property and transfer them to Ratner; (2) direct the MTA to sell the rail yard to Ratner without competitive bidding; (3) award the entire Project to Ratner, including billions in tax breaks and direct subsidies, without a competitive selection process of any kind; (4) bypass all local zoning laws; and (5) bypass local law mandating approval by the 51-member legislative body, the New York City Council. *Id*.

No later than 2003, Ratner, a top political supporter of Pataki (who was known to have presidential aspirations at the time), secured the unqualified support of his old law school friend.[3] From that point onward, the Project, and the billions in profit it would generate for Ratner and his companies, was a *fait accompli*. 185a.

The vehicle employed to clear the obstacles to the Project was respondent New York State Urban Development Corporation (doing business as the Empire State Development Corporation ("ESDC")). The ESDC was created in 1968. It is a quasi-governmental corporation that was wholly controlled by Pataki at all relevant times. It has the power to

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[3] *See* "*For Brooklyn, a Celebration or a Curse*?", WASHINGTON POST, Jan. 26, 2004, at A1 ("Ratner is [a] top political contributor and law school friend of Pataki.").

condemn private property and to bypass local zoning laws and legislative review procedures. 189a.

1. The Rail Yards. The Project was so wired that the chief spokesperson for the MTA told reporters, on two separate occasions in 2004, that the rail yards, which accounted for about 40% of Ratner's site, had already been conveyed to Ratner in a private deal. 190a.

Later, in May 2005, the MTA retracted those statements, and announced a "competitive" selection process. The MTA's request for proposals ("RFP") to purchase and develop the rail yards was a sham. The time allotted for responses was a mere 42 days. This was a significant advantage for Ratner, who, unlike others, had devised his mammoth Project years earlier. 191a.

Even though the deadline was short, a well-respected developer, Extell, submitted a proposal to purchase the rail yards for $150 million. The Extell proposal was limited to the rail yards themselves. It did not require, nor contemplate, condemning nearby homes and businesses. It was a lower density project that did not require wholesale zoning overrides, was subject to City Council approval, and was expected to create jobs, affordable housing, and tax revenues. Extell's proposal fully complied with the RFP, including the requirement that all submissions include a twenty-year profit and loss projection. 191a-192a.

Ratner offered $50 million for the rail yards. The appraised value of the rail yards was $214.5 million. Ratner's offer was contingent upon condemning

petitioners' properties and bypassing local zoning and city council review laws. Ratner refused to provide the requisite profit projection. *Id*.

Ratner's non-compliant, non-responsive proposal for $50 million was accepted by the MTA. Extell's compliant proposal for $150 million was rejected.[4] *Id*.

2. Blight. The Project was officially announced in December 2003. The public benefit touted at that time was economic development, including the alleged creation of jobs and the specter of a professional basketball team moving from New Jersey to Brooklyn. Neither the alleged existence of blight nor its remediation was ever mentioned. 197a.

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[4] The MTA's July 2007 request for proposals to develop the Hudson rail yards in Manhattan ("Hudson RFP") stands in sharp contrast to the MTA's May 2005 RFP for Ratner ("Ratner RFP"). Unlike the Ratner RFP, the MTA and the City, including the City Council and local community boards, engaged in an extensive planning process culminating in a comprehensive development plan for the area before soliciting bids from developers. The Ratner RFP was only forty-two pages long. It provided little guidance to developers interested in the property. It did not present a comprehensive or detailed vision for the future of the site. Responses were due no later than forty-two days after its release. 190a-193a. The Hudson RFP was 1,369 pages long. It was comprehensive, detailed, and contained hundreds of pages of design guidelines, thus ensuring that the pre-determined needs of the public would be met. There was a ninety-two day window from RFP publication to the deadline for submitting responses. *See* Hudson RFP, *available at* http://www.mtawsy.com/en-US/.

Ratner signed a series of Memoranda of Understanding ("MOUs") with the ESDC concerning the Project in 2004 and 2005. The MOUs describe the Project and its anticipated benefits. They do not mention the existence or remediation of blight. 189a-190a.

Following the Project's announcement in December 2003, Ratner, using the threat of eminent domain, aggressively purchased property in the Takings Area, cleared out buildings, and left them empty. Petitioners, whose homes and businesses occupy more than 20% of the Takings Area, resisted. 187a-188a.

The first mention of blight by respondents occurred two years after the Project was first announced and after Ratner had acquired numerous properties in the Takings Area and let them lie fallow. In late 2005, the ESDC retained a consultant, AKRF, to conduct a "blight study." 197a-198a.

The sole objective of the study was to justify Ratner's property selection. *Id.* Rather than a review of Ratner's site *and its environs*, the study examined exclusively the properties Ratner had selected for acquisition years before. Not a speck of land bordering the irregularly shaped Project site was evaluated for blight. *Id.*

AKRF was paid by Ratner. Without exception, every study ever conducted by AKRF has been pro-development. AKRF did not disappoint. In a report issued almost three years after the Project was publicly unveiled, AKRF concluded that about 50% of the Takings Area was characterized by blight. For

many of the properties included in the "blighted" 50% of the Takings Area, the sole blighting condition was "underutilization," meaning the owners of those properties had elected not to build to more than 60% of the maximum square footage allowed by law. Others had "graffiti."[5] *Id.*

Petitioners' homes and businesses are not blighted. The Takings Area is not blighted. 187a, 197a, 207a.

3. Other Pretexts. Rather than acknowledging the true purpose served by the seizure of petitioners' homes and businesses, respondents have proffered a number of alleged public benefit justifications. All are false. 171a, 207a.

The arena for Ratner's professional basketball team is no more a public benefit than the planned hotel. Both, like countless other consumer oriented businesses, will be accessible to the public – for a price. When first announced, the City of New York agreed to contribute $100 million. Based on that figure, the Independent Budget Office of New York City (IBO) initially concluded that the professional basketball arena would generate – at best – less than $1 million per year in new tax revenue for the City over thirty years. 196a. Later, the City committed an additional

[5] No doubt the entire City of New York, indeed most any urban city, would be declared blighted under these standards.

$105 million to Ratner.[6] Thus, under the best case, the arena will be a $70 million loss to the City.[7]

The Project will not create affordable housing. Ratner recently conceded that, while he was confident about starting construction on the arena for his basketball team, the residential construction "could be put off for years." *See* "*Slow Economy Likely to Stall Atlantic Yards*," N.Y. TIMES, Mar. 21, 2008, at A1. Affordable housing funds are no longer available, and there is no established timeline for the affordable housing phase of the Project. *Id.* The promise of affordable housing will never be realized. It is a stalking horse for luxury condominiums and an arena for Ratner's basketball team.

ESDC's own study concluded that the Project could indirectly eliminate 2,929 at-risk households (defined as "privately held units that are unprotected by rent regulations, whose incomes or poverty status indicates that they could not pay substantial rent increases").

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[6] Eliot Brown, *Bloomberg Budget Doubles Subsidy for Atlantic Yards*, N.Y. SUN, Jan. 30, 2007, *available at* http://www.nysun.com/article/47664.

[7] It is well established that sports arenas do not benefit the economy. *See* MARK S. ROSENTRAUB, MAJOR LEAGUE LOSERS: THE REAL COST OF SPORTS AND WHO'S PAYING FOR IT (1999). Claims to social benefits have also been debunked. *See* KEVIN J. DELANEY AND RICK ECKSTEIN, PUBLIC DOLLARS, PRIVATE STADIUMS: THE BATTLE OVER BUILDING SPORTS STADIUMS (2003).

200a.[8] Thus, nearly 3000 low-income households will be displaced in exchange for the ever-dwindling possibility that it might create 2,250 affordable units—a net affordable housing loss. 200a.

4. Benefit To Ratner. Ratner will receive special discretionary perks, including without limitation a minimum of $305 million in capital contributions from the City and State, zoning overrides, a government blank check eliminating the risk of "extraordinary infrastructure costs," low-cost financing for the arena, housing, property, and mortgage tax exemptions, City land conveyed for one dollar, and the guaranteed transfer of petitioners' properties. 190a; *see also supra* note 6.

Ratner will profit enormously from the Project. The magnitude of that profit is not known, however, because Ratner has refused to disclose this data publicly.[9] Ratner's profit from the Project has been conservatively estimated at one billion dollars. 202a.

C. The Second Circuit's Decision

The court of appeals affirmed the dismissal of the Complaint for failure to state a claim. The court of

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[8] *See also* Final Environmental Impact Statement, ch.4, at3, *available at* http://www.empire.state.ny.us/pdf/AtlanticYards/FEIS/Volume1/04_Socio/04_Socio.pdf.

[9] Ratner refused to disclose his profit projections even to the ESDC. Eliot Brown, *State Never Saw Business Plan For Atlantic Yards Project*, N.Y. SUN, Mar. 28, 2007, *available at* http://www.nysun.com/article/51354.

appeals began its analysis by noting that "one person's property may not be taken for the benefit of another private person without a justifying public purpose." 13a (citing *Thompson v. Consol. Gas Utils. Corp.*, 300 U.S. 55, 80 (1937)). The court observed that its role "in reviewing a *legislature's* judgment of what constitutes public use, . . . [is] 'extremely narrow.'" 14a (citing *Midkiff*, 467 U.S. at 240, and *Berman*, 348 U.S. at 32) (emphasis supplied). "Judicial deference is required because . . . *legislatures* are better able to assess what public purposes should be advanced by an exercise of the taking power." *Id.* (quoting *Midkiff*, 467 U.S. at 244) (emphasis supplied). Thus, the court explained, its "'review of a *legislature's* public use determination is limited" to whether "the exercise of the eminent domain power is rationally related to a conceivable public purpose.'" 15a (quoting *Midkiff*, 467 U.S. at 241) (emphasis supplied).

Recognizing that the primary thrust of petitioners' claim was that respondents' *post hoc* references to public purpose were a "mere pretext" designed to conceal their "actual purpose . . . to bestow a private benefit," 21a (quoting *Kelo*, 545 U.S. at 478), the court of appeals held that this Court's reference to the "long accepted" proposition that the Public Use Clause prohibits pretextual takings actually intended to confer a private benefit was limited *solely* to circumstances where the pretext offered is economic development. Thus, the court held that as long as a public benefit justification with a more established pedigree than economic development is offered—*e.g.*, the elimination of blight (*Berman*) or concentrated land ownership (*Midkiff*)—the takings decision is

insulated from judicial scrutiny and dismissal at the pleading stage is warranted. 21a-25a, 27a-28a.[10]

This is so, explained the court, because the reference to pretext in *Kelo* "must be understood in light of both the holding of the case," which permitted a taking "solely on the basis of an economic development rationale," and *Kelo*'s "self-identification with a tradition of public use jurisprudence that . . . 'has wisely eschewed . . . intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify use of the takings power.'" 21a-22a (quoting *Kelo*, 545 U.S. at 483).

Dramatically mischaracterizing petitioners' arguments, the court of appeals "reject[ed] the notion that, in a single sentence, the *Kelo* majority sought *sub silentio* to overrule *Berman, Midkiff,* and over a century of precedent and to require federal courts in all cases to give close scrutiny to the mechanics of a taking rationally related to a classic public use as a means to gauge the purity of the motives of various government officials who approved it." 25a.

The court of appeals did not address petitioners' argument that the only way to harmonize this Court's precedents was to allow pretext claims to proceed past

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[10] Quoting Justice O'Connor's dissent in *Kelo*, the court of appeals suggested that "a *railroad*, a public utility, or a *stadium*" are all accepted public uses. 22a n.8 (quoting *Kelo*, 545 U.S. at 498 (O'Connor, J., dissenting)) (emphasis in original). Justice O'Connor's dissent offered citations for the proposition that a railroad and a public utility are accepted public uses, but not a stadium. *See Kelo*, 545 U.S. at 498 (O'Connor, J., dissenting).

the pleading stage in those rare circumstances where, as here, the traditional indicia of a legitimate taking decision are plainly absent—*e.g.*, *inter alia*, where (1) a legislative body plays no role in determining public purpose, (2) the properties slated for condemnation are selected by the private beneficiary in the first instance, rather than as part of a comprehensive government-initiated plan, (3) no alternative development sites are ever considered (*i.e.*, sites that would not require condemnation at all, or sites that would burden those who the developer spared when he drew an oddly shaped, non-contiguous takings map), (4) the sole beneficiary of the land transfer is known before the decision to condemn, (5) no competitive process for selecting the private beneficiary is employed, (6) only a single plan (the developer/beneficiary's plan) is ever considered, (7) the public benefit justification is identified *after* the decision to condemn, and (8) the normal process for approving massive zoning variances and assessing public benefit (here, review by the local legislature, the New York City Council) is bypassed entirely.

The two indicia of legitimacy the court of appeals did address were (1) the complete absence of legislative involvement in the takings decision and (2) what it characterized as the "sequence of events." 28a.

The court of appeals held that the fact that the decision to seize petitioners' homes and businesses was made officially by the ESDC—a quasi-governmental corporation comprised of unelected directors beholden only to the Governor—was not relevant to determining whether the extremely deferential *Midkiff* standard of review applied at the pleading stage. 20a ("[W]e must

reject the argument that the ESDC is undeserving of such deference.").

Even though the takings and/or public purpose determinations in *Berman*, *Midkiff,* and *Kelo* all involved *legislative* bodies, the court of appeals did not explain its belief that the executive-dominated nature of the condemnor was irrelevant. Nor did it explain why this Court's references to the deference owed to *legislative* judgments of public purpose—language borne of rational basis review of facial challenges to legislative enactments—automatically translates to non-legislative decisions.

The court of appeals distilled petitioners' argument that the takings decision here was so devoid of any of the traditional indicia of legitimacy, factors detailed at length in *Kelo*, to the single charge that the Project "was proposed in the first instance by Ratner himself." 28a. So distilled, it dismissed petitioners' "sequence" argument for three reasons.

First, the court of appeals explained that "New York long ago decided by statute not to restrict the ESDC's mandate to those 'projects in which it is the prime mover.'" *Id.* (citations omitted). The court of appeals did not explain why this mattered. Whatever New York may have decided, the court failed to confront the highly probative and undisputed fact that petitioners' homes and businesses were never identified by the government in the first instance as necessary to further a pre-determined public purpose—a purpose that incidentally would also benefit an unknown private developer—but instead

were selected by a developer who was known to be the primary, indeed only, beneficiary of the taking.

Second, the court noted that *Kelo* reaffirmed that the "mere fact that a private party stands to benefit from a proposed taking does not suggest its purpose is invalid." *Id.*

Third, the court reasoned that "substantial factors not present in *Kelo*" supported dismissal of petitioners' complaint. Here, the court reiterated its conclusion that *Kelo*'s teaching that a challenge to a taking based on an allegation of pretext is limited solely to cases where the citizens challenging the government's seizure of their homes have the good fortune of a "stupid staffer" forgetting to offer anything other than economic development as a justification. *Kelo*, 545 U.S. at 502 (O'Connor, J., dissenting); 29a.

Finally, the court of appeals dismissed what it described as Justice Kennedy's "caveat" that a "court confronted with a plausible accusation of impermissible favoritism to private parties 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." 29a n.10 (quoting *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring)). Consistent with its holding concerning the limited applicability of the reference to "pretext" in this Court's majority opinion, the court of appeals further speculated that "Justice Kennedy [too] may well have intended this caveat to apply exclusively to cases where the *sole* ground asserted for the taking

was economic development." *Id.* (emphasis in original).

REASONS FOR GRANTING THE WRIT

I. The Second Circuit's Decision to Preclude Public Use Clause Claims as a Matter of Law Whenever the Proffered Public Purpose Pretext Is "Well-Established" or "Classic" Conflicts with the Decisions of this Court and Other Courts, Including the Highest Court for the District of Columbia

A. This Case. The Second Circuit held that this Court's reference to the "long accepted" proposition that the Public Use Clause "no doubt" prohibits takings actually intended to confer a private benefit—even where a pretextual justification is offered—is limited *solely* to circumstances where the proffered pretext is economic development. 21a-25a.

Thus, the court reasoned, because some of respondents' asserted public purpose justifications were "classic"—*e.g.*, the removal of "blight"—dismissal as a matter of law on the pleadings was required. Under the Second Circuit's analysis, it did not matter that the Complaint alleges that the area slated for condemnation (the "Takings Area") was not blighted. 24a-25a. It did not matter that the Complaint alleges—indeed, it is undisputed—that blight was not offered as a justification for the Project until years after it was announced. It did not matter that the only evidence of blight is a self-serving, *post hoc* 2006 "blight study" bought and paid for by Ratner, which examined exclusively the irregular footprint drawn by

Ratner and concluded that about 50% of the Takings Area was blighted. Nor did it matter that the "blighting conditions" identified in 50% of the Takings Area were caused by Ratner himself and included such "devastating" public concerns as "graffiti," "weeds," and "underutilization"—meaning properties that were not built to the maximum square footage allowed under the zoning code. *Id.*

B. *Kelo*. The third section of the majority opinion in *Kelo* reviews the Court's Public Use Clause jurisprudence. 545 at 477-83. In it, the Court discusses the "long accepted" proposition that a "City is no doubt forbidden from taking [a person's] land for the purpose of conferring a private benefit on a particular private party." *Kelo*, 545 U.S. at 477-78 (citing *Midkiff*, 467 U.S. at 245; *Missouri Pacific R. Co. v. Nebraska*, 164 U.S. 403 (1896); and *Calder v. Bull*. 3 Dall. 386, 388 (1798)). The sentence that immediately follows is: "Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." *Id.*

The reference to pretext in the second sentence is just another way of expressing the central point of the first: the Public Use Clause prohibits a taking, even when just compensation is provided, if the purpose of the taking is to benefit a particular private party. There is nothing remarkable or new about that rule, as demonstrated by this Court's citation to *Midkiff* and other Supreme Court authority dating back to just after the enactment of the Bill of Rights. There certainly is no basis to conclude, as the Second Circuit did here, that the rule is somehow limited to the

economic development (or any other) context.[11] 21a-25a.

The Second Circuit's decision is especially perplexing because a special rule applicable only to economic development takings is precisely what this Court *rejected* in *Kelo*. *Kelo*'s core holding is that there is no analytical difference between an economic development justification and any other public purpose. *Id.* at 484 (rejecting proposed "new bright-line rule that economic development does not qualify

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[11] Intimating that this Court's reference to pretext was novel, the Second Circuit characterized it as a "passing reference to 'pretext' . . . in a single sentence." 21a. Well before *Kelo*, however, federal courts had invalidated takings because the government's claim of public purpose were pretextual. *See infra* at 36.

State courts likewise have long entertained pretext-based Public Use Clause claims. *See City of Springfield v. Dreison Ivestments, Inc.*, Nos. 19991318, 991230,and 000014, 2000 WL 782971, at *40-48 (Mass. Super. Feb. 5, 2000) (post-trial finding invalidating proposed taking to build professional sports stadium because the "dominant reason" for the taking was to benefit a private interest and the "primary beneficiary . . . was not the public"); *Borough of Essex Fells v. Kessler Inst. for Rehabilitation, Inc.*, 673 A.2d 856 (N.J. Super. 1995) (dismissing condemnation complaint because stated public use was a pretext to exclude non-profit rehabilitation institute from community); *Pheasant Ridge Assoc. v. Burlington Town*, 506 N.E.2d 1152 (Mass. 1987); *Carroll County v. City of Bremen*, 347 S.E.2d 598 (Ga. 1986); *Earth Management, Inc. v. Heard County*, 283 S.E.2d 455 (Ga 1981); *Redevelopment Auth. v. Owners or Parties in Int.*, 274 A.2d 244 (Pa. 1977); *In re Real Prop. in Village of Hewlett Bay Park*, 265 N.Y.S.2d 1006 (N.Y. Sup. Ct. 1966); *City of Miami v. Wolfe*, 150 So.2d 489 (Fla. 1963).

as public use"); *id.* at 487 (rejecting argument that "for takings of this kind we should require a 'reasonable certainty' that the expected benefits will actually accrue").

In *Kelo,* this Court held that the takings were not intended to confer a private benefit because they were: (1) "executed pursuant to a 'carefully considered' development plan," (2) the "trial judge and all the members of the Supreme Court of Connecticut agreed that there was no evidence of an illegitimate purpose," and (3) the record evidence "clearly demonstrate[d] that the development plan was not intended to serve the interests of Pfizer, Inc., or any other private entity" because "the identities of those private parties were not known when the plan was adopted." *Kelo*, 545 U.S. at 478 & n.6 (quotations and citations omitted). The Court noted that it was, "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." *Id.*

Unlike here, where no discovery was permitted and the court of appeals rejected inferences favorable to petitioners, the trial court in *Kelo* "conducted a careful and extensive inquiry into whether, in fact, the development plan [was] 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." *Id.* at 491-92 (Kennedy, J., concurring) (citations omitted).

The trial court "considered testimony from government officials and corporate officers" and "documentary evidence of communications between

these parties" indicating that the government (1) committed substantial funds to the project before the private beneficiaries were known, (2) "reviewed a variety of development plans" before the private beneficiaries were known, and (3) "chose a private developer from a group of applicants rather than picking out a particular transferee beforehand." *Id.* Based on these findings, the trial court in *Kelo* concluded that benefitting a private party "was not the primary motivation or effect of this development plan." *Id.*

In this case, faced with detailed factual allegations presenting a powerful circumstantial picture that is the antithesis of the facts in *Kelo*, the Second Circuit upheld the pre-discovery dismissal of petitioner's Complaint because, in its view, petitioners "effectively acknowledged the Project's rational relationship to numerous well-established public uses." 24a.

While the Complaint no doubt acknowledges that respondents have sought to justify the use of eminent domain by *claiming* that various public benefits will accrue from the taking of petitioners' properties—including "traditional" public benefits such as the removal of blight—acknowledging respondents' *contentions* is a far cry from "effectively acknowledging" their *truth.*[12] Indeed, the Complaint

[12] The court's willingness to read the Complaint as "effectively acknowledging" supposed public benefits when it expressly states otherwise (*e.g.*, "public does not benefit from the taking of [petitioners'] properties," 204a; takings "serve only one purpose:

expressly states that the *sole* purpose of the takings is to benefit Ratner, 172a, and that the public will not actually benefit from the seizures at all. 204a.

C. *Franco*. Faced with a case indistinguishable from petitioners' here, the Court of Appeals for the District of Columbia reinstated the property owner's pleading and remanded so discovery could be conducted concerning the true purpose of the taking. *Franco v. National Capital Revitalization Corp*., 930 A.2d 160 (D.C. 2007).

In *Franco*, a legislative body—the Council of the District of Columbia—passed a bill that included last-minute findings, including, among other "classic" public purposes, that the properties targeted for condemnation were "a blighting factor" in the immediate and surrounding communities. *Franco*, 930 A.2d at 163.

The findings that were added to the bill at the eleventh hour also determined that targeted properties were "underused, neglected, and poorly maintained," and that condemnation would "further many important public purposes, including removal of garbage and other unsanitary conditions, reduction of crime, reorganization of the site, provision of needed job opportunities and retail options for residents of the surrounding neighborhoods, revitalization of an economically distressed community, and expansion of

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[to benefit Ratner]," 172a) is especially troubling on a motion to dismiss.

the tax base of the District of Columbia." *Franco*, 930 A.2d at 163 (internal quotation marks omitted).

In his pleading challenging the condemnation of his property, Mr. Franco alleged that "the declared reason for the taking was pretextual and that the true purpose was to confer a private benefit on a particular private party" in violation of the "Fifth Amendment to the United States Constitution." *Id.* at 164. Specifically, Mr. Franco alleged that: (1) there was no "carefully considered development plan designed to serve a public purpose," (2) the determination to condemn and transfer his property to a pre-selected private developer was made two years before the legislation was passed, (3) all entreaties by the existing property owners to negotiate a deal to redevelop the site had been rejected, (4) the site was being sold to the pre-selected developer for $25 million less than its actual value, (5) the site was not "blighted or located in a blighted area," and (6) "the legislative findings inserted at the last minute were and remain pretextual, wrong, inaccurate, baseless and substantially irrelevant." *Id.* at 164, 170-71 (internal quotation marks omitted).

The trial court dismissed Mr. Franco's pleading, explaining, as the Second Circuit did here, that "once the legislature has declared a public purpose for a condemnation, an owner is foreclosed as a matter of law from demonstrating that the stated reason is a pretext." *Id.* at 168. Relying on *Kelo*, the highest court for the District of Columbia reversed. In its view, *Kelo* recognized that the "government will rarely acknowledge that it is acting for a forbidden reason, so a property owner must in some circumstances be

allowed to allege and to demonstrate that the stated public purpose for the condemnation is pretextual." *Franco*, 930 A.2d at 169. Thus, because "*Kelo* makes clear that there is room for a landowner to claim that the legislature's declaration of public purpose is a pretext designed to mask a taking for private purposes," Mr. Franco's pleading was reinstated.

D. Other Courts. *Franco* is not the only court to interpret the reference to "pretext" in *Kelo* in this manner.

The federal district court in *MHC Fin. Ltd. P'ship v. San Rafael*, No. C 00-3785, 2006 WL 3507937, at *13-14 (N.D. Cal. Dec. 5, 2006), denied summary judgment and ordered a trial to determine whether the actual purpose of a city ordinance was to provide affordable housing as the city claimed, or whether affordable housing was merely a pretext to justify a private taking.[13] *Id.*

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[13] The court in *MHC Financing* explained its denial of summary judgment as follows:

> Despite the deference to a legislature's determination compelled by *Kelo* and *Midkiff*, the Supreme Court maintains that "[a] City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party . . . . Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit . . . ." The trial court in *Kelo* satisfied Justice Kennedy's standard through "careful and extensive inquiry into whether, in fact, the development plan is of primary benefit to the developer . . . [and] only incidental benefit to the

In *49 WB, LLC v. Village of Haverstraw*, 839 N.Y.S.2d 127 (N.Y. App. Div. 2007), a state appellate court interpreted *Kelo* the same way. Adverting to *Kelo*, the court in *49 WB* explained that "[e]minent domain cannot be used as a mere pretext for conferring benefits upon purely private entities and persons." 839 N.Y.S.2d at 137. The court reviewed the government's claim that the impending condemnation was for a public purpose and invalidated the taking because "its ostensible purpose of providing affordable housing was a pretext to benefit private entities resulting in the creation of less affordable housing than if there had been no taking of property at all." *Id.* at 130.

II. The Court of Appeals' Decision Affording Substantial Deference to a Non-Legislative Takings Decision Conflicts with the Precedents of this Court and Other Circuit Courts of Appeal

Affording substantial deference to *legislative* judgments concerning the use of eminent domain to advance legitimate public purposes makes sense. Paying the same deference to a quasi-governmental corporation controlled by a governor and comprised of unelected "proxy" directors does not.

City." Such an inquiry will likewise be necessary in the present action.

Id. at *13-14 (citations omitted).

This Court's Public Use decisions have reviewed—and paid substantial deference to—*legislative* judgments concerning the propriety of condemnation for public use. *Berman* reviewed takings that were authorized in the first instance by Congress, followed by the consideration of multiple plans and final approval by a local legislative body (the District Commissioners). 348 U.S. at 28-29. *Midkiff* reviewed a law passed by a state legislature authorizing condemnation to advance the public purpose of eliminating a land oligopoly.[14] 467 U.S. at 233; *see also* 1967 Haw. Sess. Laws, Act 307, § 1. *Kelo* reviewed a city council's approval of the development plan, including the use of eminent domain. 545 U.S. at 475. Consistent with these authorities, the discussion of deference by the Second Circuit in this case uniformly references *legislative* judgments. 14a-15a.

This Court has never considered whether the deferential review required by *Berman*, *Midkiff*, and their predecessors should apply equally to non-legislative condemnation decisions, but the treatment of rational basis review under the Equal Protection Clause offers a guide to resolving the issue.

In conducting rational basis review of a legislative enactment, the legislature's intent "is not subject to courtroom fact-finding and may be based on rational

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[14] Indeed, the cases relied upon by the Court in *Midkiff* all involved legislative decisions. *See United States ex. rel. TVA v. Welch*, 327 U.S. 546 (1946); *Old Dominion, Inc. v. United States*, 269 U.S. 55 (1925); *United States v. Gettysburg Elec. R. Co.*, 160 U.S. 668, 680 (1896).

speculation unsupported by evidence of empirical data." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307 (1993). Conversely, when conducting rational basis review of a non-legislative determination in a "class of one" case—where the question is whether a citizen has been intentionally singled out for irrational and unequal treatment—the deference due to legislative judgments is replaced by a factual inquiry into the decision-maker's true purpose. *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000); *see also Olech v.Village of Willowbrook*, No. 97 C 4935, 2002 WL 31317415 (N.D. Ill. Oct. 10, 2002) (denying post-remand, post-discovery motion for summary judgment because of fact issue concerning whether plaintiffs were intentionally treated differently without rational basis).

The Seventh and Ninth Circuits have both recognized that the deference required by *Berman* and *Midkiff* is not absolute. In *Daniels v. Area Plan Commission of Allen County*, 306 F.3d 445 (7th Cir. 2002), the Seventh Circuit reviewed the public use decision of an unelected administrative agency. The condemning agency argued that *Berman* and *Midkiff* required the court to defer its judgment. The Seventh Circuit disagreed, holding that such deference applies only where *the legislature itself* is involved in determining the meaning of "public use" for purposes of eminent domain. *Id.* at 460-61.

In *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996), the Ninth Circuit, sitting *en banc*, refused to apply "the usual extreme 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." *Id.* at 1321.

Notwithstanding this Court's precedents—and, indeed, its own precedent[15]—the Second Circuit found that petitioners' claim that the decision to condemn was made by the executive (respondent Pataki) and then rubber stamped by the ESDC[16] was irrelevant and "reject[ed the argument that the ESDC is undeserving of such deference." 20a.

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[15] *See Nat'l R.R. Passenger Corp. v. Two Parcels of Land*, 822 F.2d 1261, 1264 (2d Cir. 1987) (reversing application of overly deferential standard of review to Amtrak condemnation because "Amtrak is not a 'governmental body'" and is instead "a creature of statute").

[16] New York law provides that the ESDC is an unelected, quasi-governmental corporation, wholly controlled by the Governor. N.Y. Unconsol. L. § 6254(1). The ESDC and its directors do not enjoy the privileges and immunities of a legislative body. Indeed, the ESDC is so removed from the traditional structure and function of government (whether legislative or executive) that the Eleventh Amendment does not protect it from suit. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) (Eleventh Amendment does not apply to political subdivision); *see also Mancuso v. New York State Thruway Auth.*, 86 F.3d 289 (2d Cir. 1996).

III. The Analytical Divide Between *Kelo* on the One Hand and *Midkiff* and *Berman* on the Other Can Be Bridged

Two principles flow inescapably from *Berman, Midkiff,* and *Kelo*. First, courts considering a Public Use Clause claim must treat *legislative* judgments concerning whether a taking is necessary to accomplish a public purpose with substantial deference. This principle is so engrained that its application by the Supreme Court has resulted in the dismissal of the Public Use Clause cases it has decided since 1954 (albeit, where necessary, *after* the parties challenging the seizure of their land had been afforded an opportunity to develop and present evidence). *See, e.g., Kelo*, 545 U.S. 475 (discovery followed by seven-day bench trial); *Berman*, 348 U.S. 26 (cross-motions for summary judgment based on uncontested facts).

Second, the Public Use Clause unquestionably prohibits the government from seizing a private citizen's property when the purpose of the taking is to benefit another, more favored private citizen. *Kelo*, 545 U.S. at 477 (government is "no doubt forbidden from taking [a private party's] land for the purpose of conferring a private benefit on a particular private party") (citing *Midkiff*, 467 U.S. at 245; *Missouri Pacific R. Co. v. Nebraska*, 164 U.S. 403 (1896); and *Calder v. Bull*, 3 Dall. 386, 388 (1798)).

These two principles create a clear analytical divide in Public Use Clause cases. On one side are cases in which the facts present sufficient indicia of legitimate public purpose such that no further intrusion into the legislative prerogative can be countenanced. On the

other side are cases that have none, or almost none, of these important indicia of legitimacy, thereby vitiating any judicial deference that otherwise would presumptively apply.

In the years since *Kelo* was decided, none of the courts faced with a Public Use Clause claim alleging a pretext has managed to bridge this divide. Instead, courts have uniformly chosen to either: (1) ignore *Kelo*'s references to "purpose," "motive," "intent," and "pretext" (as did the courts that evaluated the sufficiency of petitioners' complaint in this case) in favor of the "rationally related to a conceivable public purpose" language in *Midkiff*; or (2) essentially ignore *Midkiff* and focus instead on *Kelo's* language, thereby justifying discovery into legislative motives, *see Franco*, 930 A.2d at 173-75, or the denial of summary judgment and a trial, *see MHC Financing,* 2006 WL 3507937, at *13-14.

While no courts have expressly addressed the *quantum* of indicia of legitimacy necessary to warrant substantial deference to a takings decision, this Court's cases identify what those indicia are.

Substantial deference was afforded, and the takings were upheld, in *Kelo, Midkiff*, and *Berman*. A careful examination of these cases reveals that such deference is afforded when specific indicia of legitimacy are present.

When a taking is challenged on public use grounds, substantial deference should be given to the decision to condemn private property where all factors indicate

that the decision was driven by a desire to benefit the public. These factors include:

- **Legislative Decision.** *See supra* Point II.

- **Public Purpose Goal Identified at the Outset.** The specific public need or purpose is identified before the possibility of seizing private property is considered. *Kelo,* 545 U.S. at 473 (state designated entire City a distressed municipality two years before the City approved a redevelopment plan and four years before authorizing the use of eminent domain); *Midkiff*, 467 U.S. at 233 (before deciding to "redress these problems," the "legislature concluded that concentrated land ownership was responsible for skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare"); *Berman,* 348 U.S. at 28-29 (first Congress approved the use of eminent domain in general and then the local commissioners approved the specific map of targeted properties).[17]

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[17] In *Berman*, the takings were authorized in the first instance by Congress, followed by the consideration of multiple plans before final approval by the local legislative body (the District Commissioners), followed by the solicitation of "proposals to negotiate for the purchase or lease of land in the project area [and a]fter due consideration the Agency accepted the proposals of five bidders." *Schneider v. District of Columbia*, 117 F. Supp. 705, 708 (D.D.C. 1953) (three-judge court), *aff'd sub. nom.*, *Berman v. Parker*, 348 U.S. 26 (1954).

- **Carefully Considered Comprehensive Plan.** A legislative body develops or approves a comprehensive plan to advance the predetermined public purpose. *Kelo,* 545 U.S. at 475; *Midkiff,* 467 U.S. at 233; *Berman,* 348 U.S. at 28-29.

- **Consideration of Multiple Plans.** Multiple plans or options are considered prior to settling upon the plan that maximizes public benefit. *Kelo,* 545 U.S. at 491-92; *Berman* (as detailed in *Schneider*, 117 F. Supp. at 708).

- **Comprehensive Plan Includes Takings Map.** The comprehensive development plan created or approved by the legislative body selects the property or series of properties that must be taken to advance the public purpose—*i.e.,* it draws the takings map. *Kelo,* 545 U.S. at 474 n.2 ("evaluated six alternative development proposals . . . which varied in extensiveness and emphasis"); *Berman*, 348 U.S. at 28-29.

- **Private Beneficiaries Unknown.** The private beneficiaries of the taking, particularly the private parties to whom the seized property will be transferred, are unknown when the comprehensive plan is developed and the properties needed to fulfill the plan are selected. *Kelo,* 545 U.S. at 491-492 (city council "reviewed a variety of development plans and chose a private developer from a group of applicants rather than picking out a particular transferee beforehand"); *id.* at 478 & n.6; *Berman* (as

detailed in *Schneider*, 117 F. Supp. at 708 ("accepted proposals of five bidders")).

- **Competitive Selection Process**. Insofar as the public benefit project contemplates seizure of property that will then be transferred to a private party for redevelopment, those parties are selected through an open, competitive process. *Kelo,* 545 U.S. at 491-92; *Berman* (as detailed in *Schneider*, 117 F. Supp. at 708).

- **Funds Committed Before Beneficiary Known.** The legislative body commits public funds to the project before the private beneficiaries are known. *Kelo,* 545 U.S. at 491-92; *Berman* (as detailed in *Schneider*, 117 F. Supp. at 708).

- **Procedural Requirements That Facilitate Inquiry Into Purposes**. The decision to exercise eminent domain is subject to "elaborate procedural requirements . . . to facilitate . . . inquiry into the city's purposes." *Kelo*, 545 U.S. at 493.

Two things are clear. When all of the legitimacy factors identified by the Court in *Kelo* and outlined above are present, substantial deference should be paid to takings decisions, including the identification of the precise properties needed to accomplish a public purpose. *Berman*, 348 U.S. at 35-36 (stating that it "is not for the courts to oversee the boundary line" and that "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"). The court's role is limited and deferential. As long as the proposed taking will advance a "conceivable public purpose," it will be upheld.

Conversely, when none of the legitimacy factors are present, such circumstances give rise to a reasonable "suspicion that a private purpose [may be] afoot." *Kelo*, 545 U.S. at 487-88 & n.17 (noting that a "a one-to-one transfer of property outside the confines of an integrated development plan" would be "an unusual exercise of government power [that] would certainly raise a suspicion that a private purpose was afoot," and that such "aberrations" should be viewed "with a skeptical eye" and "can be confronted if and when they arise" (citing *99 Cents Only Store v. Lancaster Redevelopment Agcy.,* 237 F. Supp. 2d 1123 (C.D. Ca. 2001)). The presumption of deference must give way so that courts can exercise their constitutional "role . . . in reviewing a . . . judgment of what constitutes a public use." *Midkiff*, 467 U.S. at 240.

Even before *Kelo*, federal district courts recognized that public use challenges to takings that bore no indicia of legitimacy were exceptions to the normal deference required by *Berman* and *Midkiff*. *See Aaron v. Target Corp.,* 269 F. Supp. 2d 1162 (E.D. Mo. 2003), *rev'd on other grounds*, 356 F.3d 768 (8th Cir. 2003); *Cottonwood Christian Center v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203, 1215-16 (C.D. Cal. 2002); *99 Cents Only Stores v. Lancaster Dev. Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), *appeal dismissed*, 60 Fed. Appx. 123 (9th Cir. 2003).

In *Aaron*, Target had leased its store from the plaintiffs for almost thirty years when it decided it wanted to build a new store on the sight. *Id.* at 1166-67. It approached the plaintiffs with a proposal to demolish and replace the store. The plaintiffs agreed to the concept, but proposed that the prospective rent be based on a percentage of Target's future profits at the site. Target never responded to the plaintiffs' proposal and instead approached the town alderman whose ward included the property "and threatened to abandon the . . . store unless [the Alderman] induced the City to give Target full fee-simple ownership of the Properties through the use of the City's condemnation power." *Id.* at 1167.

Thereafter, Target and the City jointly prepared a redevelopment proposal appointing Target as the redeveloper; Target commissioned and then "beefed up" a self-serving blight study; the City then waited over two months before soliciting public counter-proposals; and the City designated Target as its chosen redeveloper only days after soliciting alternatives from the public. *Id.* at 1167-69. The district court was able to make factual findings based on evidence submitted by the plaintiffs that had been gathered during discovery in the state court condemnation proceeding where the plaintiffs "were given up to two weeks to conduct discovery, the opportunity to take seven depositions, and the right to obtain all of [LCRA]'s relevant and non-privileged documents." *Aaron v. Target*, 357 F.3d at 777. Based on those findings, the court enjoined the taking. *Id.*

The important legitimacy factors identified in *Kelo* were nowhere to be found in *Aaron* (or *99 Cents*). They

are absent here as well. The question of where on the continuum between significant indicia of legitimacy (*Kelo, Midkiff,* and *Berman*) and virtually none (*Aaron, 99 Cents*, *Armendariz*, and *Cottonwood Christian Center*) a case must fall to warrant substantial deference is not an easy one. Until it is answered and uniform standards are articulated, some courts will continue to arbitrarily apply *Berman* and *Midkiff*, as the Second Circuit did here, and others will countenance factual inquiries into the legislative motives behind a taking, as did the court of last resort for the District of Columbia in *Franco.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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