No. 06-652

IN THE

Supreme Court of the United States

BART DIDDEN, DOMENICK BOLOGNA, CABERNET 119 REALTY CORP., OPUS 113 CORP., PAUILLAC 115 REALTY CORP., AND 117 NORTH MAIN STREET CORP.,

Petitioners,

v.

THE VILLAGE OF PORT CHESTER ET AL.

Respondents.

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

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND BRIEF OF LAW PROFESSORS D. BENJAMIN BARROS, ERIC R. CLAEYS, VIET D. DINH, STEVEN J. EAGLE, JAMES W. ELY, Jr., RICHARD A. EPSTEIN, ADAM MOSSOFF, AND ILYA SOMIN AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS.

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December 8, 2006

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Pursuant to Rule 37.2(b) of the Rules of this Court, law professors D. Benjamin Barros, Eric R. Claeys, Viet D. Dinh, Steven J. Eagle, James W. Ely, Jr., Richard A. Epstein, Adam Mossoff, and Ilya Somin respectfully move for leave to file the attached brief as amici curiae in support of the Petitioners. Both Petitioners and Respondents have consented to the filing of this brief.

For the foregoing reasons, amici curiae respectfully request that they be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Does the Public Use Clause of the Fifth Amendment, which permits condemnation of property only for a "public use," permit pretextual takings initiated for the purpose of advancing private interests?

2. Does *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) permit the condemnation of property as part of a scheme to extort money from the current owners in order to benefit other private parties merely because the property in question is located in a "redevelopment area"?

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INTERESTS OF AMICI CURIAE[1]

The amici are law professors specializing in property law, constitutional law, or both. Each of us has written extensively on property rights, eminent domain, or economic development, and several have written on *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) and its implications. Although we differ amongst ourselves about the proper role of the judiciary in enforcing constitutional limits on the takings power, we are united in our belief that *Didden* presents an important opportunity for this Court to make clear that *Kelo* is not a blank check for pretextual condemnations.

Each of the amici has read and considered the contents of this brief, suggesting revisions where necessary. The law professor amici are D. Benjamin Barros, Widener University School of Law; Eric R. Claeys, Saint Louis University School of Law; Viet D. Dinh, Georgetown University Law Center; Steven J. Eagle, George Mason University School of Law; James W. Ely, Jr., Vanderbilt University Law School; Richard A. Epstein, University of Chicago Law School and the Hoover Institution; Adam Mossoff, Michigan State University College of Law; and Ilya Somin, George Mason University School of Law.

STATEMENT OF THE CASE

Amici adopt the statement of the case presented in the Petition. Throughout the discussion we shall assume in accordance with established rules of civil procedures that all these allegations are true. *See* Federal Rule of Civil Procedure 12(b)(6).

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[1] Consistent with Rule 37.6, this brief has not been authored in whole or in part by counsel for a party. No person, other than *amici* or their counsel, has made a monetary contribution to the preparation or submission of this brief.

REASONS FOR GRANTING THE PETITION

The present case addresses an important ambiguity in this Court's decision in *Kelo v. City of New London*, 125 S. Ct. 2655 (2005). *Kelo* requires courts to defer to legislative judgments of public use in cases where property is condemned in the context of an "integrated development plan." *Id.* at 2667. Although this Court's decision in *Kelo* moved the margin on permissible public use, it did not eliminate the ban on pretextual takings. To the contrary, *Kelo* reiterated the rule that courts should invalidate condemnations undertaken "under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." *Id.* at 2661.

A pretextual taking is one where the "ostensible public use" is in reality just a cover for "the desire to achieve the naked transfer of property from one private party to another." *99 Cents Only Stores v. Lancaster Redev. Agency*, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001), *app. dismissed as moot*, 2003 WL 932421 (9th Cir. Mar. 7, 2003). One powerful sign of that form of political abuse is the unilateral decision by a single person to take the property for its own use under authority delegated by the state, without any form of hearing and without any pretense that the taking in question will advance some comprehensive plan that otherwise would not be implemented.

This case presents a textbook example of the kind of conduct that the *Kelo* decision recognized to be subject to judicial oversight under the Public Use Clause. *Didden* involves an alleged pretextual taking within an official "redevelopment area." The condemnation does not advance the objectives of any integrated plan. Before the taking, Petitioners had determined at their own expense that the site was appropriate for a new pharmacy. After condemnation, another pharmacy is scheduled to be put on the site after the defendant exercised its eminent domain power to in effect

expropriate the Petitioners' business plans. It is highly doubtful that the municipality could have engaged in such highhanded treatment of property owners on its own initiative. It is manifestly outrageous that it could transfer the power of eminent domain so to a private developer and allow him to use it to advance his own interests without any benefit to the public. Yet that is precisely what happened when Gregg Wasser, the designated developer, decided that the Petitioners' property should be taken because they refused to pay him the $800,000 he demanded as the price for avoiding condemnation.

The Second Circuit's decision to uphold this pretextual taking did not probe any of the reasons why the public use requirement remains, even after *Kelo*, an important bulwark against condemnations that "raise a suspicion that a private purpose [is] afoot." *Kelo*, 125 S. Ct. at 2667. Its perfunctory opinion gave Wasser a free pass merely because his use of the condemnation power occurred in a redevelopment area. That holding creates a circuit split with the Ninth Circuit, which in *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (en banc), held that pretextual condemnations in redevelopment areas are not permitted. This Court should act to resolve this important disagreement.

The root of the Second Circuit's error is its implicit conflation of condemnations that are part of an "integrated development plan" with ones that merely occur within a redevelopment area. *Kelo*, 125 S. Ct. at 2667. *Kelo* does not explicitly address the question of whether such a conflation is proper. If the Court allows clearly pretextual condemnations to go forward merely because they occur within a redevelopment area, then the proliferation of these areas will open the door to widespread abuses of political power. Self-interested private parties would bid and lobby local governments to create redevelopment areas that they could then turn into cash cows for themselves. The threat of condemnation to extort money from property owners would

not be the exclusive province of Gregg Wasser. He would become a role model for others.

Judicial deference does not apply to pretextual takings when local governments simply defer to the self-interested agendas of private parties. The expertise of municipal governments offers no protection when they make no effort to decide which condemnations best serve "public needs." *Kelo,* 125 S. Ct. at 2664. One-to-one pretextual takings of this kind, where there is no change in land use, do not raise any hint of the "holdout" problems that may justify resort to eminent domain in other situations. *Id.* at 2668 n.24.

ARGUMENT

I. THIS CASE OFFERS AN EXCELLENT OPPORTUNITY TO ADDRESS THE IMPORTANT QUESTION OF WHETHER *KELO* PERMITS PRETEXTUAL TAKINGS IN ANY SITUATION WHERE THE CONDEMNATION OCCURS IN A "REDEVELOPMENT AREA."

The present case tests the limits of *Kelo v. City of New London*, 125 S. Ct. 2655 (2005), as the Court has yet to resolve the crucial question of whether pretextual takings are permissible within a "redevelopment area." It is difficult to imagine a clearer example of a pretextual condemnation in a redevelopment area than *Didden*. The challenged condemnation occurred only because the Petitioners refused to pay a private developer the $800,000 he demanded as the price for avoiding the taking of their property. Pet. Cert. at 5. If in fact, the compensation awarded in such cases left the property owner indifferent to the condemnation, then this threat would never be credible. The property owner would instead welcome the condemnation in order to save the $800,000 or to get full value for his full property rights in the project. But the credible nature of this threat shows

conclusively that the condemnation figures offered are typically too low, for they do not protect the value of the business plans embodied in the site. The low measure of compensation therefore make it imperative to limit the threat advantage that private parties can obtain by gaining control over local development plans. It seems clear that the municipality could not make that threat itself. Nor then should it be able to delegate this power to a private party. The case presents an excellent opportunity to address whether pretextual takings are constitutionally permissible within a redevelopment area.

A. *Kelo* requires judicial deference in cases where a taking is part of an integrated development plan, but forbids pretextual takings.

1. *Kelo* does not sanction pretextual takings.

Kelo upheld the constitutionality of condemnations for purposes of "economic development" on the ground that that condemnations executed as part of an "integrated development plan" deserve a high degree of judicial deference. *Id.* at 2667. But it also emphasized that government may not condemn property "under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." *Id.* at 2661. Its illustration of this point was the kind of case we have here: a "one-to-one transfer of property, executed outside the confines of an integrated development plan." *Id.* at 2667. That kind of self-dealing is suspect because it "raises the suspicion that a private purpose was afoot." *Id.* at 2665.

Justice Kennedy's concurring opinion—written by the swing voter in a 5–4 decision[2]—also underscores the need to rein in pretextual takings. Justice Kennedy reiterated the principle that "transfers intended to confer benefits on particular, favored, private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause." *Id.* at 2669 (Kennedy, J., concurring). He also emphasized that courts must "strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits." *Id.* In cases where there is "a plausible accusation of impermissible favoritism to private parties," he would require courts to "treat the objection as a serious one and review the record to see if it has merit." *Id.*

2. Pre-*Kelo* precedents also do not endorse pretextual takings.

The Supreme Court's pre-*Kelo* public use decisions also do not permit pretextual takings. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) required courts to defer to legislative judgment in cases where there is a legitimate public use, but also reiterated the principle that "'one person's property may not be taken for the benefit of another private person without a justifying public purpose.'" *Midkiff*, 467 U.S. at 241 (quoting *Thompson v. Consol. Gas Util. Corp.*, 300 U.S. 55, 80 (1937)). There is no true "justifying public purpose" for pretextual takings that only serve the self-interested machinations of a private party.

In this connection, the Court's earlier decision in *Cincinnati v. Vester*, 281 U.S. 439, 447 (1930), emphasized that "a bare recital" of an alleged public use by a local government fails to satisfy constitutional requirements.

[2] Because Justice Kennedy chose to sign on to the majority opinion rather than concurring in judgment only, his opinion is not a binding precedent. *See Marks v. United States*, 430 U.S. 188, 193 (1977) (noting the rules that apply to cases with multiple opinions).

Property cannot be condemned on the basis of claimed public uses that are "foreign to the actual purpose of the appropriation." *Id.* at 446. *Vester* was favorably cited in *Kelo* and remains good law. *See Kelo*, 125 S. Ct. at 2667 n.17 (citing *Vester* as a case that justifiably invalidated a condemnation for which no "reasoned explanation" was offered).

B. The present case presents an ideal opportunity to reexamine the law of pretextual takings within a redevelopment area.

1. Petitioners' property was condemned because of their refusal to pay a private party $800,000 in order to avoid condemnation.

Pretextual takings are cases where the "ostensible public use" that supposedly justifies a condemnation is just a cloak for the "the desire to achieve the naked transfer of property from one private party to another." *99 Cents Only Stores v. Lancaster Redev. Agency*, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001), *app. dismissed as moot*, 2003 WL 932421 (9th Cir. Mar. 7, 2003). The condemnation of the Petitioners' property is an unusually blatant example of that phenomenon.

Gregg Wasser, the developer who was awarded the contract to rebuild the Redevelopment Area, decided to condemn the Petitioners' property because they refused his demand that they either pay him $800,000 or make him a 50% partner in their plan to build a CVS store on site. Pet. Cert. at 5.

On these facts, the Court therefore must assume that there is "a plausible accusation of impermissible favoritism to private parties." *Kelo*, 125 S. Ct. at 2669 (Kennedy, J., concurring). Wasser's planned use for the property—a

Walgreens drug store—is virtually identical to the Petitioners' plan to build a CVS drug store. *See* Pet. App. at 22-24. There is no indication that the Village went ahead with the condemnation because its planners somehow believed that a Walgreens would better promote local economic development than a CVS; nor does the record reveal any other public interest that would be served by condemning the property and transferring it to Wasser.

The Village simply rubberstamped the activities of the private developer. This form of unthinking validation has already drawn the ire of state courts, For example, in *Southwestern Illinois Development Authority v. National City Environmental, LLC*, 768 N.E.2d 1 (Ill. 2002), *cert. denied*, 537 U.S. 880 (2002) (hereinafter "*SWIDA*"), the Supreme Court of Illinois held that the decision of a local planning authority to condemn private property in order to furnish a nearby race track with additional parking facilities did not meet public use requirements under state law. That case featured the same willingness of public bodies to defer private parties that is involved in this case. The Illinois decision noted that "SWIDA's true intentions were not clothed in an independent, legitimate governmental decision to further a planned public use." *Id.* at 10. "Rather, this action was undertaken solely in response to [the racetrack owner's] expansion goals," which had no connection to the supposed public use put forward to justify condemnation. *Id.* The present case is strikingly similar, and perhaps involves even greater abdication of public responsibility to a self-interested private party.

2. The Second Circuit's decision to uphold this pretextual condemnation creates a circuit split.

The Second Circuit's cursory decision to permit the pretextual condemnation of the Petitioners' land, Pet. App. at 4, creates a circuit split with the Ninth Circuit's 1996 holding in *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (en banc).

In *Armendariz*, owners of low income housing alleged that the City of San Bernardino sought to condemn their property to build a privately owned shopping mall. *Id.* at 1314-15, 1321. The City claimed that its objective was to serve the public purpose of "the reduction of urban blight." *Id.* at 1314. The Ninth Circuit refused to defer to the City's assertion because "the Takings Clause would lose all power to restrain government takings" if officials "could take private property . . . simply by deciding behind closed doors that some other use of the property would be a 'public use,'" and "later justify their decisions in court" by concocting "'a conceivable public purpose' to which the taking is rationally related." *Id.* at 1321.

While *Armendariz* partly depended on the finding that the alleged public use was decided "behind closed doors" after the fact, *id.*, the Ninth Circuit also held that Supreme Court precedent did not require deference to the City of San Bernardino's claim of alleviating "blight" because the evidence indicated that this rationale was a mere pretext for "a scheme . . . to deprive the plaintiffs of their property . . . so a shopping-center developer could buy [it] at a lower price." *Armendariz*, 75 F.3d at 1321.

A primarily pretextual claim of public use does not deserve deference because it cannot be considered a true "legislat[ive] judgment of what constitutes a public use," but is rather a mere cover for condemnations designed to benefit private interests. *Midkiff*, 467 U.S. at 240. Numerous state

courts have also refused to defer to condemning authorities in cases where the asserted public use was pretextual.[3] Three United States district courts have since relied on *Armendariz* and refused to defer to pretextual takings that transfer condemned property to private interests.[4] One of these

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[3] *See, e.g.*, *AvalonBay Cmtys., Inc. v. Town of Orange*, 775 A.2d 284, 299-303 (Conn. 2001) (upholding injunction against condemnation of private property allegedly to alleviate blight because it was a pretext to preventing the construction of affordable housing); *Denver West Metro. Dist. v. Geudner*, 786 P.2d 434, 436-37 (Colo. Ct. App. 1989) (finding that flood control was a pretext for enabling sale of government property); *Wilmington Parking Auth. v. Land With Improvements*, 521 A.2d 227, 232-34 (Del. 1986) (finding parking construction was a pretext for extending benefit to private party); *Casino Reinvestment Dev. Auth. v. Banin*, 727 A.2d 102, 103-05 (N.J. Super. Ct. Law Div. 1998) (rejecting pretextual taking intended to benefit casino owned by Donald Trump); *City of Miami v. Wolfe*, 150 So. 2d 489, 490 (Fla. Dist. Ct. App. 1963) (affirming finding that extending roadway was a pretext for the acquisition of valuable riparian rights); *Earth Mgmt., Inc. v. Heard County*, 283 S.E.2d 455, 460-61 (Ga. 1981) (blocking condemnation nominally for a park but actually intended to prevent construction of waste disposal site); *Pheasant Ridge Assocs. Ltd. P'ship v. Town of Burlington*, 506 N.E.2d 1152, 1157 (Mass. 1987) (holding that the construction of a park and moderate income housing was a pretext for excluding low income housing); *Essex Fells v. Kessler Inst.*, 673 A.2d 856, 858 (N.J. Super. Ct. Law Div. 1995) (disallowing borough from condemning property in order to prevent owner from constructing a nursing facility); *Redev. Auth. v. Owners*, 274 A.2d 244, 252 (Pa. Commw. Ct. 1971) (finding land taken on pretext of removing blight was actually to benefit another private party); *S.W. Ill. Dev. Auth. v. Nat'l City Env.*, 768 N.E.2d 1, 9-11 (Ill. 2002), *cert. denied*, 537 U.S. 880 (2002) (hereinafter "*SWIDA*") (striking down taking where the claimed public purpose was a pretext for an effort to benefit a private racetrack owner).

[4] *See Aaron v. Target Corp.*, 269 F. Supp. 2d 1162, 1174-76 (E.D. Mo. 2003) (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), *rev'd on other grounds*, 357 F.3d 768 (8th Cir. 2004); *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 Stores v. Lancaster Redev. Agency*, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001),

district court decisions was favorably cited by the majority opinion in *Kelo* as an example of a case where a pretextual condemnation was rightly invalidated. *See Kelo*, 125 S. Ct. at 2667 n.17 (citing *99 Cents Only Stores v. Lancaster Redev. Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), *app. dismissed as moot*, 2003 WL 932421 (9th Cir. Mar. 7, 2003)).

The supposed public use in the present case is even more blatantly pretextual than that in *Armendariz*. In the latter case, the municipal government made no condemnations solely because the owners of the relevant property had refused to pay a large sum of money to another private party. This circumstance further exacerbates the circuit split created by the Second Circuit's decision.

C. This case raises the important issue of whether all takings within a development area should be conclusively deemed to be part of an integrated development plan.

Kelo does not explicitly consider whether all condemnations within a redevelopment area, including pretextual ones, should be considered part of an "integrated development plan." The Second Circuit completely ignored this critical distinction, despite the manifest risk that private condemnations in redevelopment areas create many opportunities for pretextual takings. Pet. Cert. at 13.

If the Second Circuit is not overruled, private developers will be handed a blueprint on how to take private property for their own benefit, irrespective of any public interest. They will therefore lobby local governments to obtain these valuable rights, and in so doing undermine the security of expectations that allows redevelopment to take place without government intervention. The creation of such

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app. dismissed as moot, 2003 WL 932421 (9th Cir. Mar. 7, 2003) ("No judicial deference is required . . . where the ostensible public use is demonstrably pretextual.").

areas will usher in a vast new arena for political intrigue by private interests seeking to extract money from current owners by threatening them with condemnation if they refuse to pay.

In *Kelo*, this Court noted that a condemnation executed for the purpose of implementing "an integrated development plan" deserves considerable judicial deference, and that courts should not "second-guess the City's considered judgments about the efficacy of its development plan." *Kelo*, 125 S. Ct. at 2667-68. However, the Court did not hold that a taking in a redevelopment area should receive a high degree of judicial deference if undertaken for purposes of pure private enrichment.

The unconstitutionality of pretextual takings is well illustrated by the case of *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), *app. dismissed as moot*, 2003 WL 932421 (9th Cir. Mar. 7, 2003), a decision favorably cited in *Kelo* as a case where a court justifiably invalidated "a one-to-one transfer of property, executed outside the confines of an integrated development plan." *Kelo*, 125 S. Ct. at 2267 & n.17.

In *99 Cents*, the challenged condemnation, like that in the present case, occurred within a redevelopment area. *See 99 Cents*, 237 F. Supp. 2d at 1125–26, 1130 (noting that the condemnation was part of the "Amargosa Redevelopment Plan" in the "Amargosa Project Area"). Yet the district court invalidated the taking because its true purpose was not to promote the objectives of the redevelopment plan, but to advance the private interests of Costco, the intended new owner of the condemned property. *Id.* at 1128-29. As the court put it, "No judicial deference is required . . . where the ostensible public use is demonstrably pretextual." *Id.* at 1129. The court rejected the City of Lancaster's claim that the purpose of the condemnation was to prevent "future blight" because the true purpose of the taking was "nothing more than the desire to achieve the naked transfer of property from one private party to another." *Id.* at 1129-30.

The present case is a more blatantly "naked" transfer than *99 Cents*. In *99 Cents*, Costco did not seek to condemn the property of the 99 Cents store merely because the latter refused to knuckle under to a threat of extortion. Rather, Costco apparently believed that expansion of its operations into the property occupied by the 99 Cents store would increase the profitability of its own business, a result that the City of Lancaster might find conducive to economic development in the area. *Id.* at 1130-31. In *Didden*, by contrast, Wasser's and the Village's sole motive for condemning the Petitioners' property was the refusal of the latter to pay Wasser the $800,000 he demanded.

D. The Second Circuit erred in holding that the Petitioners' suit is time-barred.

The Second Circuit's holding that the Petitioners' claim is time-barred is no obstacle to granting the petition for writ of *certiorari.* Pet. App. at 3. The Second Circuit held that the petitioners' claim accrued on July 14, 1999 when the Village of Port Chester Board of Trustees declared that the properties in question would be part of a "redevelopment area" where condemnation is permissible. *Id*. at 2. Its holding credits the Petitioners' with the clairvoyance to know in 1999 that Gregg Wasser would make crude efforts at extortion some four years later in 2003. The uncertain course of events in 1999 would have, moreover, likely precluded any federal challenge on the ground that the suit would not be ripe because of the incompleteness of the factual record. The Second Circuit thus puts petitioners in an untenable position by holding that the statute of limitations expired before the case was ripe. It is an evident denial of the most elementary forms of procedural due process to have *no* proper time for bringing suit.

1. The procedural holding that the Petitioners' case is time-barred is dependent on the substantive holding that there is no difference between pretextual and non-pretextual condemnations within a redevelopment area.

The Second Circuit's conclusion that the Petitioners' claim is time-barred is completely dependent on the Second Circuit's substantive ruling that there is no meaningful difference between a condemnation enacted as part of an integrated development and a pretextual condemnation enacted within a redevelopment area. Pet. App. at 2. While the Village of Port Chester Board of Trustees made Petitioners' property part of a "redevelopment area" on July 14, 1999, *id*., the Petitioners at that time had no inkling of Gregg Wasser's extortionate demands, which were only made four years later, in November 2003. *Id.* Faced with this concrete threat of condemnation, the Petitioners filed suit in federal court two months later, in January 2004, well within the three year statute of limitations. *Id.* at 3. Thus, their claims could be considered time-barred only if the mere possibility of future condemnation as part of an integrated development plan is identical to the pretextual condemnation that in fact occurred.

2. The claim is not time-barred because Petitioners did not know that their property would be condemned until Wasser demanded that they pay him $800,000 to avoid condemnation.

When the Redevelopment Area was established in 1999, no steps were taken to condemn the Petitioners'

property. They therefore had nothing to oppose. The statute of limitations does not begin to run until all elements of the claim have accrued in order to avoid the spectacle of tens or hundreds of individual lawsuits with respect to properties that may never be taken it all. Indeed, if the Petitioners had tried to file a suit to block the Village's actions before November 2003, it might have been dismissed for lack of ripeness. "[F]ederal courts are precluded from adjudicating a claim of a taking for a private purpose" unless the property owner has "demonstrate[d] that he or she received a 'final decision' from the relevant government entity." *Daniels v. Area Plan Comm'n*, 306 F.3d 445, 454 (7th Cir. 2002). Similarly, this court in *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001) noted that "a takings claim challenging the application of land-use regulations is not ripe unless the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." The law cannot ban all challenges to government action on the ground that they are either too soon or too late. The usual rule that requires all elements of the claim to accrue before the statute of limitations begins to run avoids that impossible dilemma.

If New York law, as interpreted by the Second Circuit, is so perverse as to require the filing of federal challenges to condemnations before those claims are ripe under federal law, that strengthens the case for granting the petition for writ of *certiorari*. The conflict between New York's requirements and federal ripeness standards would be an additional important issue for this Court to resolve.

II. PRETEXTUAL TAKINGS INTENDED TO BENEFIT PRIVATE PARTIES SHOULD NOT RECEIVE DEFERENCE FROM THE JUDICIARY.

Pretextual takings do not deserve judicial deference of the sort extended to "economic development" takings by the *Kelo* majority. *Kelo*, 125 S. Ct. at 2663-69. Unlike some economic development takings, one-to-one pretextual transfers of property do not involve holdout problems or other complex public policy issues that might justify judicial deference.

A. One-to-one pretextual takings do not deserve judicial deference.

The deference this Court afforded to integrated development plans in *Kelo* rested in large part on the Court majority's belief that condemnation decisions involve complex public policy judgments that justify giving legislatures "broad latitude in determining what public needs justify the use of the takings power." *Kelo*, 125 S. Ct. at 2664. The Court insisted that legislative authorities have greater expertise in determining public needs than the judiciary. *Id.* This rationale, however, cannot apply in cases where the claimed reason for condemnation is purely pretextual. If the condemning authority does not make a meaningful effort to "determine . . . public needs," it has not sought to apply the expertise that warrants judicial deference under *Kelo*. *Id.*

In the present case, Wasser only decided to condemn the Petitioners' property because they refused to meet his demand for $800,000 or 50% of the profits from the CVS venture. His threat negates any meaningful connection between the Village's claimed public use of promoting economic development and the taking of Petitioners' property. Neither the Village nor its residents could have

benefited from either the $800,000 or the 50% partnership interest if the Petitioners had caved in to Wasser. Nor did Village authorities explain why this condemnation would transfer the site to more valuable community uses than the Petitioners' planned CVS drug store. Indeed, Wasser's intended use for the land—opening a Walgreens drug store—was very similar to the Petitioners' plan to open a CVS. *See* Pet. App. at 22-24 (describing the two plans).

Ultimately, Port Chester left it up to Wasser to decide whether or not to condemn the Petitioners' property, Pet. Cert. at 5, without considering whether or not the resulting condemnation would actually serve "public needs." *Kelo*, 125 S. Ct. at 2664. No court should defer to a legislative judgment of public need when no such judgment has been made. Port Chester simply acquiesced in a thinly veiled pretextual rationale for a condemnation undertaken at the behest of a self-interested private party.

B. One-to-one pretextual takings are not needed to overcome holdout problems.

As this Court suggested in *Kelo*, local governments may sometimes properly resort to the use of eminent domain to overcome holdout problems. *Id.* at 2668 n.24. The majority opinion held that this was a "matter of legitimate public debate" best left to the political process, which is in the best position to determine when the eminent domain power is needed to prevent holdouts from blocking socially valuable projects. *Id.* In fact, private developers have often overcome holdout problems without the aid of eminent domain.[5] But

[5] *See* Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After* Kelo, 15 SUP. CT. ECON. REV. at 21-29 (forthcoming 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=874865 (visited Nov. 24, 2006) (explaining how private developers can prevent holdout problems by resorting to secret assembly and precommitment strategies); Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain*

even if condemnation is sometimes needed to avoid holdouts, that point is not at issue in this case because no holdout problem can arise in one-to-one takings such as that which occurred here.

Holdouts can occur in situations where large-scale projects require assembling a large number of lots owned by numerous different individuals. In such a scenario, even one "holdout" could potentially block an important development project or extract a prohibitively high price for acquiescence.[6] Even though the use of eminent domain may be desirable in those contexts, it is not so here, in the absence of any large-scale project that requires the acquisition of land held by many different owners. If Wasser genuinely values the property in question more than Petitioners do, he could easily acquire it through the ordinary workings of the real estate market. The current owners would have every incentive to sell, since they could get more money by selling the property than by using the land themselves. Wasser's attempted substitution of a Walgreens for a CVS store does not raise holdout issues nor any collective action problem that might potentially require the use of eminent domain. *Cf.* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND EMINENT DOMAIN 162-69 (1985) (explaining how condemnation may be justified when necessary to overcome collective action problems).

Law: A Rationale Based on Secret Purchases and Private Influence, 92 CORNELL L. REV. 1, 19-31 (2006) (showing how secret assembly is a better way to avoid holdout problems than eminent domain) .

[6] *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability Rules: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106-08 (1972) (classic description of the holdout problem); Lloyd R. Cohen, *Holdouts and Free Riders*, 20 J. LEGAL STUD. 351 (1991) (rigorously explaining the concept of the holdout); Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 81-82 (1986) (discussing the holdout rationale for eminent domain).

CONCLUSION

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

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