No. 07-1247

In The Supreme Court of the United States

DANIEL GOLDSTEIN, et al.,

Petitioners,

v.

GEORGE E. PATAKI, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF AMICUS CURIAE INSTITUTE FOR JUSTICE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
DANA BERLINER*
SCOTT G. BULLOCK
ROBERT J. MCNAMARA
901 North Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320

**Counsel of Record*

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTEREST OF AMICUS[1]

The Institute for Justice ("IJ") was founded in 1991 and is our nation's only libertarian public interest law firm. IJ is committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. IJ seeks a rule of law under which individuals can control their destinies as free and responsible members of society. IJ works to advance its mission through both the courts and the mainstream media, forging greater public appreciation for economic liberty, private property rights, school choice, free speech, and individual initiative and responsibility versus government mandate. This case centers around the abuse of eminent domain to transfer property from one private owner to another, a practice representing one of the gravest threats to private property rights in our nation today.

---

[1] All counsel of record received notice of amicus's intention to file this brief at least ten days before this brief was due. 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 Amicus, has made a monetary contribution to the preparation or submission of this brief. All parties have consented to amicus's filing of this brief.

STATEMENT OF THE CASE

Amicus adopts the statement of the case presented in the petition. Throughout the discussion, as required by the rules of civil procedure, it shall assume that all of Petitioners' allegations are true. *See* Fed. R. Civ. P. 12(b)(6).

SUMMARY OF ARGUMENT

In affirming the dismissal of Petitioners' complaint, the Second Circuit held that taking property from *A* just to transfer it to *B* is constitutional – as long as the government refuses to admit what it is doing. The Court of Appeals held, in other words, that there is no cause of action for a purely pretextual taking and thus any claim that an asserted justification is only a pretext can be dismissed under Fed. R. Civ. P. 12(b)(6). This is not simply error, but a direct result of lower-court confusion over the scope and nature of judicial review following *Kelo v. City of New London*, 545 U.S. 469 (2005).

ARGUMENT

I. LOWER COURTS ARE CONFUSED ABOUT THE EXTENT OF THE PUBLIC-USE INQUIRY AFTER *KELO*.

In *Kelo*, this Court held that the Fifth Amendment permits takings for the purpose of economic

development pursuant to a "carefully considered development plan . . . [that] was not adopted to benefit a particular class of identifiable individuals." 545 U.S. at 478 (internal quotation marks and citations omitted).

The decision below reflects confusion over the scope of this holding – specifically whether *Kelo* intended to narrow the Public Use Clause's application in circumstances where bad faith or pretext are alleged. In essence, this Petition for Certiorari presents the question of whether a plaintiff who has raised a plausible allegation of improper favoritism in the exercise of the eminent domain power is entitled to introduce evidence to prove his claim, or whether courts must credit any and all asserted justifications for a taking before any evidence can be adduced. Because nothing in *Kelo* or this Court's other precedents suggests an intent to depart from the standard practice of scrutinizing questions of public use in their particular factual context, the Court should grant *certiorari* to confirm the continued invalidity of takings made in bad faith or for pretextual reasons, and the importance of factual development in making those determinations.

A. The Constitution forbids pretextual takings.

In *Kelo*, this Court reaffirmed a fundamental tenet of its Public Use jurisprudence: a condemnor cannot take property "for the purpose of conferring a

private benefit on a particular private party. . . . [or] under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." 545 U.S. at 477-78 (citations omitted). Nothing in the Court's opinion purports to alter the longstanding rule that effecting a transfer of property from *A* to *B* is an illegitimate governmental purpose – even if presented under the pretext of a different purpose.

B. Lower courts are confused over the scope of judicial review.

The confusion in the lower courts that led to the holding below is based on the deferential standard of review developed in *Kelo*. That standard, however, was developed in reliance on three distinct characteristics of the takings at issue. First, "[t]he takings . . . would be executed pursuant to a carefully considered development plan." *Id.* at 478 (internal quotation marks and citation omitted). Second, a fully-developed factual record, reviewed by the courts below, indicated no reason to suspect any questionable purpose to the taking other than economic development. *Id.* Finally, the fact that the plan was adopted before the identity of its private beneficiaries was even known made it unquestionably clear that it was not intended to benefit a particular individual or class of individuals. *Id.* & n.6. In light of this entire context, the Court found that New London's determination that its program of economic development was necessary should be accorded substantial deference. *Id.* at 483.

Justice Kennedy's concurrence made even more plain the importance of the specific context of the takings, reinforcing the fact that the Public Use Clause forbids "transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits. . . ." *See id.* at 490 (Kennedy, J., concurring). While Justice Kennedy agreed that a presumption of invalidity should not be applied to economic-development takings *generally*, *id.* at 493, his concurrence made abundantly clear the importance of the factual findings made below to any meaningful rational basis review, particularly the finding (undisputed by any members of the Connecticut Supreme Court below) that the "plan was intended to revitalize the local economy, not to serve the interests of . . . any other private party." *Id.* at 492.

Despite the fact that this Court's opinion turned on the specific context presented and on factual findings, a number of states and localities took *Kelo* as a blank check to use eminent domain for private-to-private transfers. *See generally* Dana Berliner, *Opening the Floodgates: Eminent Domain Abuse in the Post-*Kelo *World* (2006), *available at* http://www.castlecoalition.org/pdf/publications/floodgates-report.pdf (detailing the condemnation or threatened condemnation of more than 5,000 properties in the year following *Kelo*). With the decision below, the Second Circuit has apparently signed on to this incredibly permissive view of *Kelo*, abandoning a longstanding

tradition of making public use determinations in the light of a factual record.

C. Courts have traditionally examined the question of public use in light of all the facts surrounding a taking.

The decision below, in holding that the alleged existence of blight – anywhere – grants the government *carte blanche* to condemn property without further review, reflects a rising confusion in the lower courts regarding the scope (or, rather, the existence) of the judicial role in evaluating individual citizens' claims under the Public Use Clause of the Fifth Amendment in the wake of *Kelo*.

Prior to *Kelo*, it was commonly accepted that a simple governmental assertion of public use did not end the constitutional inquiry if a property owner could establish that this assertion was pretextual or made in bad faith. *See, e.g., Shaikh v. City of Chicago*, 341 F.3d 627, 632-33 (7th Cir. 2003) (noting that constitutional "public-use protections would resolve [an owner's] concerns that the City was not motivated to take his property for [its] stated intention. . . ."); *United States v. 397.51 Acres of Land*, 692 F.2d 688, 692 (10th Cir. 1982) ("*In the absence of bad faith*, a condemnation for a public use is a matter for the legislative branch and not open to judicial determination.") (emphasis added); *United States v. 101.88 Acres of Land*, 616 F.2d 762, 767 (5th Cir. 1980) ("The court may ask in this [public use] inquiry whether the

authorized officials were acting in bad faith. . . .") (citing cases); *United States v. 58.16 Acres of Land*, 478 F.2d 1055, 1058 (7th Cir. 1973) ("The determination of whether the taking of private property is for a public use may appropriately and materially be aided by exploring the *good faith* and rationality of the governmental body in exercising its power of eminent domain.") (emphasis added); *99 Cents Only Stores v. Lancaster Redev. Agency*, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001), *appeal dismissed as moot*, 60 F.App'x 123 (9th Cir. 2003). This Court did not purport to overturn this long-established practice in *Kelo*. *See* 545 U.S. at 478 ("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.").

Despite *Kelo*'s effective silence on the continued propriety of developing a factual record, however, lower courts have been thrown into confusion over the continued scope of their public use inquiry. Some courts continue to conduct a factual inquiry to determine whether an asserted public purpose is merely offered as cover for an attempt to confer a benefit on a private party. *See, e.g., MHC Fin. Ltd. P'ship v. San Rafael*, No. 00-cv-3785, 2006 WL 3507937, at *14, 2006 U.S. Dist. LEXIS 89195, at *42-*43 (N.D. Cal. Dec. 5, 2006) (denying city's motion for summary judgment in order to conduct inquiry into whether asserted purpose was pretextual); *Franco v. Nat'l Capital Revitalization Corp.*, 930 A.2d 160, 174-75

(D.C. 2007) (holding that a property owner's affirmative defense of pretext could not be resolved on the pleadings). These courts, in essence, follow the traditional principle that – however deferential review may be – "what is a public use frequently and largely depends on the facts and circumstances surrounding the particular subject-matter" at issue. *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 159-60 (1896).

D. The holding below conflicts with this longstanding tradition.

The allegations in this case are simple. The property owners alleged that taking their land would violate the Constitution because the government's asserted purpose is a mere pretext designed to conceal an illegitimate transfer from *A* to benefit *B*. In its motion to dismiss, the government said these allegations were false. The Second Circuit found for the government. In so doing, the panel below transformed the deference required by *Kelo* into a ruling that the government's asserted purpose is sacrosanct – and that a pretextual taking can only be found where the government itself admits to the pretext.

In essence, the Second Circuit ruled that Petitioners were limited to a *facial* challenge to the taking – that if the government can plausibly assert a "public use" for the taking, the judicial inquiry must end there. *See Goldstein v. Pataki*, 516 F.3d 50, 62 (2d Cir. 2008). This turns on its head the ordinary standard

of review on a 12(b)(6) motion: rather than drawing every reasonable inference in favor of a plaintiff, the court will draw every reasonable inference in favor of a defendant – applying a presumption the plaintiff is given no chance to factually rebut.[2] If the holding below is allowed to stand, federal courts in the Second Circuit will essentially be taken out of the business of hearing claims under the Public Use Clause; aggrieved citizens will have no chance to even present evidence of the government's bad faith in taking their homes.[3]

This confusion in the lower courts marks a significant departure from this Court's public-use jurisprudence. Indeed, public-use challenges considered by this Court in the past have uniformly been decided on a factual record that allowed the Court to evaluate the facts and circumstances surrounding the taking. *See Kelo,* 545 U.S. at 475-76; *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 234-35 (1984); *Berman v. Parker*, 348 U.S. 26, 30-31 (1954);[4] *Brown v. United*

---

[2] The panel below is not alone in applying this backwards standard. *See, e.g., Didden v. Vill. of Port Chester*, 173 F.App'x 931, 933 (2d Cir. 2006) (unpub.) (determining on a motion to dismiss that an alleged extortionate demand was merely a "voluntary attempt to resolve [the plaintiffs'] demands").

[3] It is worth noting that the Second Circuit encompasses both New York and Connecticut, two of the country's worst offenders when it comes to the use of eminent domain for private-to-private transfers. *See* Berliner, *supra*, at 21-22, 80-85.

[4] While the lower court in *Berman* purportedly decided the case on a motion to dismiss, both parties had moved for summary judgment, and the court expressly considered the exhibits

(Continued on following page)

States, 263 U.S. 78, 80 (1923); *Hairston v. Danville and Western R.R. Co.*, 208 U.S. 598, 605 (1908); *Clark v. Nash*, 198 U.S. 361, 367-68 (1905). In other words, the Second Circuit has adopted a rule that not only departs from this Court's public-use jurisprudence, but renders impossible the sort of review conducted in every case this Court has decided under the Public Use Clause.

Simply put, the question presented in the petition is whether the presence of some degree of public purpose serves to end the judicial inquiry in a Public Use claim or whether citizens are entitled to present evidence that the purported public purpose is merely a veneer cast over a broader scheme to convey a windfall on a private individual.

The fact that a facially-valid public purpose has been articulated has not prevented other courts from examining that reason's legitimacy.[5] For example, in *R.I. Econ. Dev. Corp. v. The Parking Co., L.P.*, 892 A.2d 87 (R.I. 2006), the Rhode Island Development Corporation[6] (RIDC) sought to condemn (on behalf of

---

and affidavits of both parties. *See Schneider v. Dist. of Columbia*, 117 F. Supp. 705, 708-09 (D.D.C. 1953).

[5] Indeed, a "pretext[ual]" reason is a "false or weak reason," not necessarily a wholly imaginary reason. *Black's Law Dictionary* 1206 (7th ed. 1999).

[6] Similar to Respondent Empire State Development Corporation, the Rhode Island Development Corporation is a quasigovernmental entity tasked with encouraging economic development in the state. *Compare* N.Y. Unconsol. L. Ch. 252, § 4 *with* R.I. Gen. L. § 42-64-4.

its subsidiary) a temporary easement in an airport parking garage with the expressed (and uncontested) intention of converting its use from valet parking to daily public parking. 892 A.2d at 93. Recognizing, however, that the transition from valet to public parking would not create *additional* parking spaces, the Supreme Court of Rhode Island found that this was a "pretextual and inappropriate device" designed to circumvent the terms of a lease agreement between the RIDC's subsidiary and the condemnee. *Id.* at 105-07. *Cf. Middleton Township v. Lands of Stone*, 939 A.2d 331, 338-40 (Pa. Dec. 28, 2007) (finding that town's asserted purpose of condemning land for government-owned recreational space was "post-hoc or pretextual" because the town had no plan for any actual recreational uses and had failed to even mention recreation at the time it invoked the power of eminent domain); *Matter of 49 WB, LLC, v. Village of Haverstraw*, 44 A.D.3d 226, 241-43 (N.Y. App. June 19, 2007) (rejecting proffered public purpose of "the construction of affordable housing" after finding proposed project would actually result, on net, in less available affordable housing).

In essence, the Second Circuit, by rejecting the approach of the District of Columbia in *Franco* and the traditional approach of this Court, has replaced the presumption that a government's actions are legitimate with a conclusive presumption of legitimacy that takes hold *before* facts or evidence may be introduced. Rather than deference, the Second Circuit

has adopted a rule of abdication, confusing the standard of review with the existence of review at all. *Cf. Kelo*, 545 U.S. at 492 (Kennedy, J., concurring).

II. THIS CASE FURTHER PRESENTS AN OPPORTUNITY TO CLARIFY THAT *TWOMBLY* DID NOT EFFECT A SWEEPING CHANGE IN THE LAW.

Granting *certiorari* in this case would further provide the Court with an opportunity to clarify its holding last term in *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007). In *Twombly*, the Court held that, to state a claim under section 1 of the Sherman Act, a complaint must allege facts that suggest an agreement was made among competitors. *Id.* at 1965.

A number of courts have already expressed uncertainty over the scope of this Court's holding in *Twombly*. *See, e.g., Anderson v. Sara Lee Corp.*, 508 F.3d 181, 188 (4th Cir. Nov. 19, 2007) ("In the wake of *Twombly*, courts and commentators have been grappling with the decision's meaning and reach.") (citing *Igbal v. Hasty*, 490 F.3d 143, 155 (2d Cir. 2007)); *Commer. Money Ctr., Inc. v. Ill. Union Ins. Co.*, 508 F.3d 327, 337 n.4 (6th Cir. Nov. 14, 2007) ("We have noted some uncertainty concerning the scope of *Twombly*."). Far from representing a radical change in the law, however, *Twombly* leaves the fundamental rules of pleading unchanged. *See, e.g., Twombly*, 127 S. Ct. at 1964-65 (summarizing general standards). Rather, *Twombly* merely stands for the proposition

that when assessing plausible inferences to be drawn from a complaint, a court need not make extravagant logical leaps. *See id.* at 1971 (finding no reason to infer conspiracy where complaint alleged only "parallel decisions to resist competition" that one could expect to find in "almost any group of competing businesses").

This case represents a simple opportunity to clarify the basic, unchanged rules of pleadings because of the numerous and specific allegations in Petitioners' complaint that lead directly to a natural inference that the overwhelming purpose of the proposed project is to bestow a financial windfall upon respondent Bruce Ratner:

- ***Timing***: Petitioners allege that Ratner developed his plan to redevelop much of central Brooklyn *prior to* the government's taking any action, and that Ratner's plan was then adopted by the government. Pet. for Cert. at 5-6. This permits an inference that the driving force behind the project was Ratner, rather than any public entity.

- ***Political Support***: Petitioners allege that Ratner was a friend and significant political contributor of then-New York Governor George Pataki. Pet. for Cert. at 7. This explains why it might be plausible that government entities would use their power to gain profits for Ratner.

- ***Actual Political Favoritism*:** Petitioners allege that the Metropolitan Transit Authority bypassed its ordinary procedures to convey its property to Ratner.[7] Pet. for Cert. at 8-9.

- ***Pretextual Justifications*:** Petitioners allege, in great detail, that the public uses that would purportedly be advanced by the project are incapable of withstanding even the slightest scrutiny – and, indeed, were not even mentioned until years after the government had adopted and begun advancing the project. Pet. for Cert. at 9-13. Even under a deferential standard of review, Petitioners are entitled to at least attempt to introduce evidence to clearly establish the bankruptcy of the purported public uses. *Cf. Twombly*, 127 S. Ct. at 1965.

- ***Enormous Private Benefit*:** Finally, Petitioners allege that Ratner stands to profit enormously from the completion of the project, wholly swamping the (at

---

[7] The panel below seemed to diminish this allegation by noting that the MTA was "not a defendant in this case." 516 F.3d at 56. Petitioners, however, do not appear to seek any remedy with respect to the MTA; rather, they appear to rely on this allegation to make even more reasonable the inference that Ratner was, in fact, able to persuade government agents to exercise their power in order to increase his profits without regard for the public interest. Further, Petitioners alleged that the MTA was at all relevant times controlled by Pataki, meaning its conduct should be imputed to Pataki. *See* Pet. for Cert. at 6.

best) *de minimis* public benefits. Pet. for Cert. at 13.

Given the difference between the logical inferences required in this case (namely, that government officials have advanced a project that does little to benefit the public in order to help out a friend and political ally) and the logical leaps demanded by the complaint at issue in *Twombly* (namely, that entities that were individually acting exactly as one would expect them to act, given their economic incentives, should be presumed to have *conspired* to act that way), this petition represents a straightforward opportunity to clarify the true, narrow scope of this Court's holding in *Twombly* – assuming, of course, that the Court resolves the split among the lower courts by reaffirming the historical importance of factual development to resolving disputes under the Public Use Clause.

CONCLUSION

While this Court undeniably held in *Kelo* that economic development could fall within the meaning of "public use," it did not change the *process* by which courts determine whether a use is "public" – nor did it change the fundamental importance of facts to that inquiry. The decision below reflects a fundamental confusion over the degree to which courts are required to credit the superficial appearance of a taking

and the post-hoc justifications of a would-be condemnor. This question does not center around how deferential a court's scrutiny should be – rather, it centers around whether a court may engage in any scrutiny in the first place. For all of the foregoing reasons, Amicus respectfully asks this honorable Court to grant *certiorari* in order to clarify that *Kelo* did not remove the federal courts' power to hear and adjudicate – on their merits – claims of bad-faith or pretextual takings under the United States Constitution.

Respectfully submitted,

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
DANA BERLINER*
SCOTT G. BULLOCK
ROBERT J. MCNAMARA
INSTITUTE FOR JUSTICE
901 North Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320

**Counsel of Record*

Counsel for Amicus Curiae