RECORD NO.

22-2722

In The

United States Court of Appeals

For The Second Circuit

BEN BRINKMANN, HANK BRINKMANN, MATTITUCK 12500 LLC,

***Plaintiff – Appellants*,**

v.

TOWN OF SOUTHOLD, NEW YORK,

***Defendant – Appellee*.**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK (CENTRAL ISLIP)

BRIEF OF APPELLANTS

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Introduction

Plaintiff-Appellants Ben and Hank Brinkmann want to open a hardware store on a commercially zoned piece of property that they own in the Town of Southold, New York. Their proposed store would comply with all applicable laws. Nevertheless, the Town is determined to stop them from building their store, and it has tried every means at its disposal to do so: It tried to interfere with their purchase of the property. It demanded excessive fees. It imposed a selectively-enforced building moratorium centered on their land. And it has refused to act on their pending application for a building permit. The Brinkmanns were undeterred. They jumped through every hoop, and they paid every fee.

The Town, however, had one last trick up its sleeve: eminent domain. The Town has declared that it needs the Brinkmanns' property for a "passive use park"—*i.e.,* a vacant plot of land with no improvements. This is a shameless ruse. The Town never considered the Brinkmanns' property for a "park" until the Town ran out of options for stopping the Brinkmanns from developing their property. During years of back-and-forth with the Brinkmanns regarding the proposed hardware store, no Town officials ever suggested that the Town might want a park on the

property. And as of 2016, the Town had a list of 957 properties that it was considering acquiring, but the Brinkmann's property wasn't on that list.

The Town's condemnation charade violates the Fifth Amendment. The Supreme Court and courts around the country have held that eminent domain may not be used where the government's stated public use is a mere pretext for some other, illegitimate objective.

The district court accepted the Brinkmanns' allegations—as it was required to do at the 12(b)(6) stage—but the court erroneously narrowed the pretext doctrine, holding that eminent domain may be used for absolutely any purpose, so long as (1) the government lies about what it is doing and (2) the taking is not to benefit a private party. According to the district court's reasoning, the Fifth Amendment allows government to seize property even for purposes of spite or animus. No other court has ever so held, and affirming the decision below would create a split with the Seventh Circuit and at least five state high courts, including a court within this circuit. This Court should reverse the radical decision below.

Jurisdiction Statement

The district court had subject-matter jurisdiction over this action alleging a violation of the Fifth Amendment of the United States Constitution under 28 U.S.C. § 1331.

On September 30, 2022, the United States District Court for the Eastern District of New York, the Honorable LaShann DeArcy Hall presiding, granted the Town of Southold's motion to dismiss and dismissed the Brinkmanns' complaint under Federal Civil Procedure Rule 12(b)(6). *See* SJA-1; SJA-12.

The Brinkmanns timely filed a notice of appeal on October 18, 2022.

This Court has appellate jurisdiction under 28 U.S.C. § 1291 because the district court entered a final judgment that disposed of the Brinkmanns' only claim. *See* SJA-12.

Statement of the Issues Presented

Does the Fifth Amendment's public-use requirement protect private property owners from a government taking where the stated purpose of the taking is a pretext to cover up an illegitimate purpose, if there is no allegation that the taking is to bestow a private benefit?

Statement of the Case

I. Local Rule 28.1 Statement

This is a Fifth Amendment lawsuit brought under 42 U.S.C. § 1983, challenging the Town of Southold's attempt to take private property from Ben and Hank Brinkmann via eminent domain. The Brinkmanns allege that the Town violated the Public Use Clause by using its eminent-domain power to prevent the Brinkmanns from building and operating a lawful business, under the pretextual purpose of creating a park. As described in detail below, the Honorable LaShann DeArcy Hall of the United States District Court for the Eastern District of New York granted the Town's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), concluding that the Public Use Clause only protects against pretextual takings when the actual purpose was to "bestow a private benefit." *See Brinkmann v. Town of Southold*, No. 21-CV-2468 (LDH), at *2, 2022 WL 4647872 (E.D.N.Y. Oct. 1, 2022); *see also* SJA-1, SJA-3. This appeal followed.

II. The Brinkmanns planned to expand their hardware business to the Town of Southold.

Brinkmann's Hardware is a family-owned-and-operated business on Long Island. A-14. Founded in 1976 by Tony and Pat Brinkmann, Brinkmann's Hardware is now owned and managed by their children Mary, Ben, and Hank. A-14. Since 1976, the Brinkmanns have added three more stores to their original store. A-14.

Brinkmann's Hardware stores are neighborhood stores, the kind that have been a staple of American main streets for generations. A-15. The Brinkmanns have proved that small hardware stores can still compete with big box stores like Home Depot. A-15. To do so, the Brinkmanns prioritize customer service and convenience—especially a convenient location. A-15. The Brinkmanns' stores are in downtown areas and on well-exposed corners whenever possible, so customers can easily access their knowledgeable staff and competitive prices. A-15.

In 2011, Ben and Hank found an ideal location for a new store: a vacant, commercially zoned lot for sale on a main street corner in Southold, New York. A-15. But at that time the Brinkmanns could not afford the sale price, and the property ended up being purchased by Bridgehampton National Bank for a new branch location. A-15. The bank

never built a new branch on the Property because it established its Southold branch in an existing building that unexpectedly became available. A-16. So the Property remained vacant for years. A-16.

In 2016, Brinkmann's Hardware was in a better position to expand. A-16. Ben and Hank therefore approached the Bank to purchase the lot, and the Bank agreed. A-16. Ben and Hank contracted to purchase the Property for $700,000 on December 2, 2016. A-16. The Brinkmanns' contract included a long due-diligence period to give them time to confirm that they could build a new hardware store on the Property. A-16.

Neither in 2011 when the Property was for sale, during the five years that the Property sat vacant under the bank's ownership, nor when the bank contracted to sell the Property to the Brinkmanns in 2016 did the Town try to acquire the Property or have any plans to use the Property for a park. A-15–16.

After securing the right to buy the Property, Ben and Hank immediately began planning their new store. They met with Town officials and other stakeholders to begin permitting, zoning review, and then construction. A-16. They also contacted the owner of the existing Southold hardware store, Rich Orlowski, to propose buying his business.

A-16. The Brinkmanns and Orlowski agreed that when the new Brinkmann's Hardware opened, Orlowski would close his store in exchange for the value of his inventory, approximately $350,000, and then Orlowski would work as the manager of the new Brinkmann's Hardware store. A-16–17.

Throughout 2017, the Brinkmanns completed steps necessary to open a hardware store on the Property, while also trying to stay in tune with the community's needs. They engaged a local architect to design a store that would "match the surrounding neighborhood design aesthetic." A-17. In May, they met with the Southold Planning Department to discuss the hardware store plans. A-17. Based on these discussions, the Brinkmanns twice revised their plans before submitting a formal application. A-18.

In July and September 2017, the Brinkmanns held two meetings with the local civic association—one of which was attended by the Southold Town Supervisor. A-17. To address traffic concerns voiced by some Southold residents, the Brinkmanns promised that they would pay for any intersection improvements deemed necessary by traffic studies. A-18. A traffic study was completed in September 2020, and nothing in

the study revealed that the Brinkmanns' hardware store would cause any traffic problems. A-18.

III. The Town began raising "insurmountable hurdles" to the Brinkmanns' new hardware store.

In January 2018, the Brinkmanns submitted their first permit application to the Town Building Department. A-18–19. The Building Department denied this application because no site plan had been approved by the Planning Department. A-19. Although the Brinkmanns had understood that they had Planning Department approval, they again revised their plan and submitted the plan to the Planning Department. A-19. But a month later, in June 2018, the Town, for the first time, claimed that the Brinkmanns' project required a "Special Exception Permit," which included a $1,000 application fee, because the planned store was over 6,000 square feet. A-19. Also in June 2018, the Town notified the Brinkmanns that their project would require a "Market and Municipal Impact Study" with a cost to be determined. A-20.

Around the same time, the Town's former attorney, Martin Finnegan, began representing Orlowski, the owner of the existing hardware store. A-20. Suddenly, Finnegan informed the Brinkmanns

that Orlowski was "renegotiating the agreement" and demanding double the money, $700,000, to buy out his existing store. A-21.

And a week later, the Town informed the Brinkmanns that the fee for the impact study would be $30,000. A-21. Three days after the Town told the Brinkmanns about the high cost of the impact study, Finnegan again contacted the Brinkmanns, revising Orlowski's demand to $450,000—an amount that was still $150,000 greater than what the Brinkmanns and Orlowski had originally agreed—stating that the Brinkmanns needed to pay up to "eliminate . . . insurmountable hurdles" that the Brinkmanns were facing with permitting because "upgrading your status to the existing local hardware store should shed a favorable light on your application." A-21–22. The Brinkmanns rejected both demands seeking more than the originally agreed price with Orlowski. A-22.

Even though the Brinkmanns informed the Town of their plans to build a hardware store on the Property in 2017, regularly communicated with Town officials, repeatedly sought feedback from Town departments, applied for a permit from the Building Department, submitted a revised plan to the Planning Department, and were notified of more fees they

would have to pay, the Town never stated that the Brinkmanns' plans conflicted with any existing Town plans for a park—because no such plans existed. A-17–21.

In September 2018, one year and four months after the Brinkmanns' first meeting with the Town's Planning Department, the Town Board called for a vote to try to buy the Property from the Brinkmanns. A-22. Before approving an attempt to purchase, the Town had not engaged in any planning for a park on the Property; had not tasked any Town committee with evaluating the possibility of a new park on the Property; had not tasked any Town planning staff with evaluating the possibility of a new park on the Property; had not conducted any financial analyses of creating a new park on the Property; had not evaluated any alternative location for a new park somewhere other than the Property (including, for example, the possibility of purchasing the undeveloped land for sale next to the Property); had not surveyed Town citizens or held stakeholder meetings with citizens about purchasing the Property for a new park; had not conducted any geotechnical survey of the Property to determine its suitability for a park; had not held any public hearings about creating a new park on the Property; had not

retained any outside consultants to evaluate the Property as a location for a new park; and had not retained any architects, contractors, traffic engineers, or landscapers to evaluate the Property or design and build a new park on the Property. A-22–24. And as of 2016, the Brinkmanns' property was not even included on a list of 957 parcels that the Town had identified as possible targets for acquisition for, among other things, a park. A-175–87. (It was not added to the list until 2019, *after* the Town had already voted to condemn the property.) In short, the Town never had plans for a park on the Brinkmanns' Property and never took any steps to acquire the Property until after the Brinkmanns remained committed to building the hardware store in Southold despite "insurmountable obstacles." A-21–24.

The following month, in October 2018, the Town Supervisor called the president of the bank and demanded that the bank breach its real estate contract with the Brinkmanns by selling the Property to the Town instead of the Brinkmanns. A-24. After the bank president stated that the bank was committed to honoring the contract with the Brinkmanns, the Town Supervisor threatened that he would "never allow anything to be built on that property." A-24. Later, a Town attorney called the bank's

attorney and similarly pressured him to back out of the sales contract with the Brinkmanns. A-24. On neither call did the Town Supervisor or the town attorney indicate that the Town had plans for a park on the Property. A-24.

Honoring their contract with the bank, the Brinkmanns closed on the Property on November 20, 2018. A-24. A few weeks later, at the beginning of 2019, the Brinkmanns paid the $30,000 fee for the impact study. A-25. Having paid the Town's fees and complied with all the zoning requirements, the Brinkmanns believed the Town Planning Board would have to act on their application within 120 days, as provided in § 280-45(B)(10)(b) of the Town of Southold City Code. A-25. But the Town tried another tactic to prevent the Brinkmanns from building their hardware store: Shortly after the Brinkmanns paid the $30,000 fee, the Town enacted a six-month moratorium on any new building permits for a one-mile stretch of road centered on the Brinkmanns' property. A-25. After the Town enacted the moratorium, the Town performed no work on the impact study for which the Brinkmanns had paid despite being required to complete the study and issue a decision within 120 days under its own code. A-25–26.

The Town has twice extended its moratorium, and each time Suffolk County recommended that the moratorium be disapproved for lack of evidentiary support. A-26–27. The Town has ignored the County's recommendations. A-26–27. Moreover, the Town selectively enforced its moratorium, granting at least three waivers to other building applicants. A-27–28. But because the Brinkmanns knew the moratorium was targeted at them, they never applied for a waiver. A-28. After all, they already had a permit application pending, and the Town was processing other applications during the moratorium—just not the Brinkmanns' application. A-28.

The Brinkmanns therefore sued in state court to invalidate the moratorium. A-26. That litigation is ongoing, but on June 22, 2020, a New York trial court denied the Town's motion to dismiss and allowed the Brinkmanns' challenge to proceed. A-26.

IV. When it looked like the Brinkmanns might successfully jump the Town's hurdles, the Town said it would take the Property via eminent domain for a park.

With the moratorium under threat in court, the Town turned to its trump card: eminent domain. In July 2020, Southold held a public hearing, as required by N.Y. EM. DOM. PROC. LAW § 203, to determine

whether a park would constitute a public use for purposes of eminent domain. A-29. Two months later, the Town issued its "findings and determinations," concluding that taking the Property for a park would be a public use. A-29. The Town then authorized taking the Brinkmanns' Property via eminent domain, ostensibly for a "passive use park"—a park without significant facilities or improvements to the land. A-29.

It was widely understood the Town was not taking the Property for a park but merely to stop the Brinkmanns from building their hardware store. A-29–30. Town board member Sarah Nappa confirmed the Town's true motive. A-29–30. Writing in a guest column in the Suffolk Times, Ms. Nappa stated, "I can't help but wonder, if this application had been filed by anyone but an outsider, if this business was owned and operated by a member of the 'old boys club,' would the town still be seizing their private property? The use of eminent domain by Southold Town to take private property from an owner because it doesn't like the family or their business model is dangerous precedent to set." A-29–30.

V. The district court dismissed the Brinkmanns' lawsuit, concluding that the Public Use Clause does not protect property owners from pretextual takings unless the alleged true purpose is to bestow a private benefit.

The Brinkmanns timely filed this lawsuit, alleging that the Town's proposed taking violates the Fifth Amendment's Public Use Clause because the purported use for a park is a sham. A-13, A-30. The Brinkmanns claim that the Town's true purpose is to stop the Brinkmanns from building a hardware store on their property, an illegitimate purpose. A-33.

The day after the Brinkmanns filed this suit, the Town filed a condemnation action in New York state court—after sitting on the authorization to take the Brinkmanns' property via eminent domain for almost a year. A-980, A-983. The Brinkmanns then moved for a preliminary injunction, asking the district court to enjoin the Town from exercising eminent domain during this case. A-36. The district court denied the Brinkmanns' motion. A-1129, A-1137.

The Town then moved to dismiss, arguing that the Brinkmanns failed to state a claim under the Fifth Amendment because they did not

allege a private benefit. A-1180, A-1195.[1] The district court agreed, concluding that the Public Use Clause of the Fifth Amendment only invalidates takings performed to bestow a private benefit. SJA-1. This appeal followed.

Summary of the Argument

The Fifth Amendment does not allow the government to seize private property under the mere pretext of a public use. When the evidence demonstrates that the government has lied, and the asserted public use is simply a sham, the condemnation must be set aside.

The district court disagreed. According to the decision below, the government can seize property for any purpose except for one: conferring a benefit on a private party. Any other purposes, even blatantly illegal ones, are fair game—so long as the government falsely claims to be pursuing a legitimate objective. This holding is totally unprecedented, and it finds no support in the decisions of this Court or the Supreme Court. It is also squarely inconsistent with decisions by the Seventh Circuit and the high courts at least five states, including one within this

[1] The district court also granted the Town's motion for a stay of discovery while resolution of the motion to dismiss was pending. A-7–8.

circuit. Every other court to confront a case like this one has ruled for the property owner.

The decision below is also inconsistent with the text, history, and tradition of the Fifth Amendment, which clearly show that private property ownership was considered a fundamental right, such that the government must bear the burden of justifying any interference with it. The district court's approach gets this rule backwards, treating governmental seizure of private property as presumptively allowable.

Finally, the decision below permits and encourages egregious abuses of power. If pretextual takings are allowed, then the government could condemn property for countless illegitimate reasons, including mere animus or spite. History demonstrates that these concerns are serious.

This court should reverse the judgment below, hold that the government cannot justify condemnations with lies, and allow the Brinkmanns the opportunity to prove their case.

Standard of Review

This Court reviews "*de novo* a grant of a motion to dismiss pursuant to Rule 12(b)(6), accepting the complaint's factual allegations as true and drawing all reasonable inferences in the plaintiff's favor." *Pettaway v. Nat'l Recovery Sols., LLC*, 955 F.3d 299, 304 (2d Cir. 2020) (quotation omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* (quotation omitted).

Argument

I. The district court erred in dismissing the Brinkmanns' pretextual takings claim.

The Fifth Amendment prohibits the government from taking private property except for "public use." U.S. CONST., amend. V. As the Supreme Court and courts around the country have universally recognized, the Public Use Clause requires the government's stated objective to be genuine, and not a pretext for some other, illegitimate purpose. *See, e.g.*, *Kelo v. City of New London*, 545 U.S. 469, 478 (2005). In other words, the government isn't allowed to lie when it takes private property. The government does not have a legitimate interest in executing a bad-faith taking to prevent the lawful use of property, and

covering up an illegitimate taking with a recognized public use (like a park) cannot make the taking rationally related to the fake public use.

The district court disagreed. The court accepted the truth of the Brinkmanns' allegations—that the Town of Southold had lied, that it had never had any interest in using their property as a park, and that the Town's true objective was simply to stop them from building and operating a lawful business. Yet, according to the court below, this was all irrelevant because the Brinkmanns "d[id] not allege that their property was taken to bestow a private benefit." SJA-6. In the district court's view, the Public Use Clause only "guarantees that one person's property may not be taken for the benefit of another private person without a justifying public purpose." SJA-5 (quotation omitted). The government therefore can take property for any purpose except one: conferring a private benefit on some favored party. *See* SJA-5–7. Indeed, the district court expressly rejected the Brinkmanns' argument that "they need not allege that their property was taken to bestow a private benefit because it is sufficient to allege that the public purpose is pretextual and that the true purpose is to prevent them from expanding their business to Southold." SJA-6. Refusing to "giv[e] close scrutiny to

the mechanics of a taking" or "gauge the purity of the motives of various government officials who approved [the taking,]" the district court said the Town's mere assertion that the taking was for a "classic public use" was enough to satisfy the public-use requirement. SJA-7 (quotation omitted). The district court thus held that the Public Use Clause does not prohibit condemnations initiated only out of spite or animus—so long as the government lies about its purpose. *See* SJA 5–7.

Prior to the ruling below, no court in this country had ever embraced such a radical view of the Fifth Amendment. Yet numerous other federal and state courts—including a state high court within this circuit—have rejected the district court's position. Many of these courts have found constitutional violations in situations materially identical to the present case, where the government asserted that it was taking property for a traditional public use such as a park, but where the evidence clearly demonstrated that the purpose was simply to stop a property owner from making a perfectly lawful use of her property. Notably, these cases were decided at summary judgment or trial, not on a motion to dismiss.

And while the Supreme Court has not squarely confronted a pretextual taking, it has repeatedly affirmed in dicta that pretextual takings are illegal, that the government must act in good faith when it condemns property, and that the government's objectives must be legitimate. *See Kelo*, 545 U.S. at 478 ("[T]here was no evidence of an illegitimate purpose in this case."); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) (concluding that the legislature's purpose in authorizing takings was "to attack certain perceived evils of concentrated property ownership in Hawaii—a *legitimate* public purpose" (emphasis added)); *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 681 (1896) ("The end to be attained, by this proposed use . . . is legitimate, and lies within the scope of the constitution."); *cf. United States v. Carmack*, 329 U.S. 230, 243 (1946).

A. Pretextual or bad faith takings have never been limited to situations where the condemnor is attempting to confer a "private benefit."

In dismissing the Brinkmanns' Fifth Amendment claim, the district court acknowledged that pretextual takings are unconstitutional, yet the court narrowed the doctrine to apply only to situations where the condemnor's true objective is to confer a private benefit on some favored

entity. SJA-6–7. Because the Brinkmanns had alleged that the Town of Southold's purpose was simply to stop their development and had "not allege[d] that their property was taken to bestow a private benefit," the court concluded that their claim must fail. SJA-6. The district court's holding is both wrong and unprecedented. It squarely conflicts with the decisions of numerous other courts, including the Connecticut Supreme Court, and it should be reversed.

The district court premised its holding on a misreading of a passage in *Kelo*, in which the Supreme Court acknowledged the uncontroversial principle that it would violate the Fifth Amendment "to take property under the mere pretext of a public purpose, when [the] actual purpose was to bestow a private benefit." 545 U.S. at 478; *see also* SJA-6–7. The district court read this language to imply that the *only* impermissible purpose for eminent domain is to "bestow a private benefit." SJA-5–7. Everything else is apparently fair game. But the Supreme Court said no such thing. The reason it referred to impermissible private benefits in *Kelo* is straightforward: The petitioners' entire argument in *Kelo* concerned private benefits and private uses. That the Court discussed the doctrine in terms relevant to facts of the case does not imply that the

doctrine is limited to those facts. *See Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2471 (2019) (confirming that the "obvious explanation" for a prior case's statements about the Commerce Clause prohibiting discrimination against out-of-state products or producers was the context of that case, not that the Commerce Clause or its history was limited to only protecting products or producers).

Indeed, the Connecticut Supreme Court has explicitly rejected the district court's interpretation of *Kelo*. In *New England Estates, LLC v. Town of Branford*, a property owner had proposed constructing 354 affordable housing units. 988 A.2d 229, 237 (Conn. 2010). The Town, however, was "not receptive" to this proposal, and it ultimately decided to condemn the property for the ostensible purposes of environmental remediation and constructing playing fields. *Id.* Yet fourteen years of data indicated that there was no need for environmental remediation, and the town had never previously "indicat[ed] that . . . [it] had any interest in developing playing fields or establishing any other use on the property." *Id.* at 237–38. The design for the playing fields was simply an informal "sketch" drawn by the town engineer *after* the town board of selectmen proposed to acquire the property. *Id.* The property owner filed

a § 1983 suit, arguing that the condemnation had been initiated in bad faith and that the asserted public uses were pretexts for the illegitimate purpose of stopping the development. *Id.* at 238. The jury agreed, and the Connecticut Supreme Court affirmed, holding that "a pretextual or bad faith taking violates the takings clause." *Id.* at 253 n.27.[2]

The present case closely tracks the facts of *New England Estates*. Like the Town of Branford, the Town of Southold had never previously considered the Brinkmanns' property for a park. Indeed, their parcel is not even listed among the *957 parcels* that the Town included on a potential acquisition list in 2016. A-175–87. Their property was not added to the Town's Community Preservation Project Plan until 14 days *after* the Town voted to condemn the land in 2019. Town of Southold,

[2] The labels of a "bad faith" taking and a "pretextual" taking generally convey the same meaning and are shorthand for the inquiry into whether the true objective of the taking is illegitimate. *New England Ests.*, 988 A.2d at 253 n.27 ("As we explain in this part of the opinion, a pretextual or bad faith taking violates the takings clause."). The term "pretext" has become more prevalent in recent years because that is how the Supreme Court discussed the concept 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."). But prior to *Kelo*, most courts, including federal courts, used the term "bad faith" to describe the same constitutional inquiry. *See, e.g.*, *Heirs of Guerra v. United States*, 207 F.3d 763, 767 (5th Cir. 2000) (recognizing a bad faith defense under the Fifth Amendment).

N.Y., Resolution RES-2019-725 (Aug. 13, 2019), https://perma.cc/D7H4-CB95. Nor did the Town, in two years of back-and-forth planning with the Brinkmanns, ever inform them that their plans for a hardware store conflicted with Town plans for a park (though the Town did repeatedly reject the Brinkmanns' proposals with ever-changing rationales and requirements). A-18–21. That is because the Town never had plans for a park, and when it began to pursue the park as a pretext for stopping the Brinkmanns, it was only for a park with no improvements. A-29.

That is not all. The facts of the present case are actually more compelling than the facts of *New England Estates* because here, there is also an undeveloped plot of land next to the Brinkmanns' property, which was listed for sale at the time this lawsuit was filed. The Town did not consider that alternative plot of land, nor did it consider acquiring the Brinkmanns' property during the entire period of time that it was sitting vacant and was owned by Bridgehampton National Bank. The Town Supervisor even tried to stop the former owner of the property from selling to the Brinkmanns, claiming he would "never allow anything to be built on that property" if it was sold to them. A-24.

Even prior to discovery, these facts are so damning that the Town of Southold has not bothered to dispute that its proposed "park" is simply a pretext for stopping the Brinkmanns. Instead, the Town of Southold relies on the exact same argument that the Town of Branford unsuccessfully advanced in the *New England Estates* case: that *Kelo* stood "for the proposition that only a taking for the purpose of conferring a benefit on a private party constitutes a violation of the public use requirement." *Id.* at 253 n.28. In other words, so long as a condemnor *asserts* that it is taking property for a public use, it is irrelevant that the condemnor's true purpose might be illegitimate. *Id.* at 235, 252. The Connecticut Supreme Court explicitly rejected that interpretation, calling it "overbroad[ ]" and noting that *Kelo* did not have the opportunity to consider a bad faith condemnation, where the stated purpose was different from the true purpose. *Id.* at 253 n.28; *see also Wellswood Columbia, LLC v. Town of Hebron*, No. 3:10-CV-01467 (VLB), 2013 WL 5435532, at *4–5 (D. Conn. Sept. 30, 2013) (accepting that a bad faith taking claim is a distinct, viable claim under the Takings Clause where there was no allegation that the taking was for a private purpose).

The same, of course, is true for other cases that have discussed the pretext or bad faith doctrine in terms of private benefits.[3] It is customary for a court to discuss legal doctrine in the context of the case before it, but the fact that courts have said that private benefits are illegal in pretext cases does not mean that any other secret purpose is fair game.

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[3] *See Armendariz v. Penman*, 75 F.3d 1311, 1321, 1324 n.9 (9th Cir. 1996) (en banc) (reversing denial of summary judgment on a substantive due process claim and stating it should be brought as a takings claim because the official rationale of blight alleviation 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"); *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) ("No judicial deference is required . . . where the ostensible public use is demonstrably pretextual"); *County of Hawaii v. C & J Coupe Fam. Ltd. P'ship*, 198 P.3d 615, 648 (Haw. 2008) ("Thus, even where the government's stated purpose is a 'classic' one," such as the construction of a public road, "where the actual purpose is to 'confer[ ] a private benefit on a particular private party[,]' the condemnation is forbidden."); *Franco v. Nat'l Cap. Revitalization Corp.*, 930 A.2d 160, 169 (D.C. 2007) ("*Kelo* recognized that there may be situations where a court should not take at face value what the legislature has said. 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."); *Casino Reinvestment Dev. Auth. v. Banin*, 727 A.2d 102, 103 (N.J. Super. Ct. Law Div. 1998) ("Where, however, a condemnation is commenced for an apparently valid public purpose, but the real purpose is otherwise, the condemnation may be set aside.").

"Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Villanueva v. United States*, 893 F.3d 123, 131 (2d Cir. 2018) (citing *Webster v. Fall*, 266 U.S. 507, 511 (1925)).

The court below also purported to base its holding on this Court's decision in *Goldstein v. Pataki*, which examined a pretextual taking claim but found the allegations lacking. 516 F.3d 50, 52–53 (2d Cir. 2008). But *Goldstein* offers no support for the district court's holding. In *Goldstein*, the property owners raised a pretext challenge to the Atlantic Yards redevelopment project. This Court concluded that the property owners' factual allegations to support the challenge were insufficient, determining that the property owners made only conclusory allegations that the public officials who approved the project were "actually—and improperly—motivated by a desire to confer a private benefit on" the developer because the cost of the project was likely to outweigh its benefits. *Id.* at 62. This Court found that allegation was facially implausible and the only concrete fact that the property owners could marshal in support of their pretextual challenge was that the developer

had proposed the project himself. *Id.* at 64. Because the project targeted a "long-blighted area" and because the property owners were unable to identify any "illegality in the elaborate process by which the Project was approved, any specific illustration of improper dealings . . . , or any specific defect in the Project that would be so egregious as to render it, on any fair reading of precedent, palpably without reasonable foundation," this Court concluded that the "lawsuit [was] animated by concerns about the wisdom" of the project rather than supported allegations of a pretextual taking. *Id.* at 64–65 (quotation omitted).

In short, *Goldstein* is a case about the factual sufficiency of pretext challenge; it says nothing about "private benefits" being a necessary element of a pretext claim. Like *Kelo*, *Goldstein* discussed the doctrine in terms relevant to the case before it and found the pretext allegations lacking. By contrast, and as discussed above, the Brinkmanns have offered pretext allegations that are specific, detailed, and overwhelming.

The Supreme Court and the Second Circuit have never considered, much less approved, taking property for a park that the government has no actual interest in, and wants only to possess to stop otherwise lawful behavior. No one can seriously believe that the eminent-domain power

allows the government to impose sham park condemnations on people it doesn't like, and expect the courts to rubberstamp those takings on the ground that parks are a quintessential public use. Imagine a Jewish community complying with all zoning and building requirements for a new synagogue while under the fire of intense opposition from local officials, and then, after failing to thwart the synagogue by every lawful means, those same officials seized the parcel for a park that no one at the condemning authority wanted until the land was about to become a synagogue. Of course courts would want to look behind the veil of that taking. And the reason is not simply because the condemnation violates the Jewish community's free-exercise rights. It is because the power of eminent domain exists only to acquire property for legitimate public uses that the public affirmatively needs. It is not a tool of last resort to be used when frustrated officials want to lash out at citizens but have no lawful way to do so. If it were such a tool, the nation would be littered with one-parcel parks created by vengeful officials like those in Southold. We are not such a nation.

Until the present case, no court had ever held that a taking satisfies the public-use requirement of the Fifth Amendment so long as it is not

for a purely private benefit. Yet, in addition to the Connecticut Supreme Court, many courts around the country have invalidated proposed condemnations as pretextual or initiated in bad faith, without any allegation of an impermissible private benefit.

For instance, less than a year after *Kelo*, the Rhode Island Supreme Court invalidated the condemnation of an easement in a parking garage. *R.I. Econ. Dev. Corp. v. The Parking Co., L.P.*, 892 A.2d 87, 104 (R.I. 2006). There, the condemning authority argued that it needed to condemn the easement to provide for public parking and promote economic development. *Id.* at 104. But the court concluded, based on the record, that the taking was "motivated by a desire for increased revenue[,]… was not undertaken for a legitimate public purpose," and that the taking was "arbitrary and bad-faith." *Id.* at 104, 106. There were no allegations that the taking was for the benefit of a private party, yet the pretext doctrine applied. *See also Shaikh v. City of Chicago*, 341 F.3d 627, 632–33 (7th Cir. 2003) (stating that an allegation that a taking was motivated by discrimination would be actionable under the Public Use Clause); *United States v. 58.16 Acres of Land*, 478 F.2d 1055, 1056, 1059 (7th Cir. 1973) (asserting that "courts are empowered to determine if the

taking of private property is for public use" where there are "questions of bad faith, arbitrariness, and capriciousness"). And, as discussed in more detail below, at least five other state courts, three of them high courts, have found pretextual or bad faith takings in circumstances materially identical to the present case.

B. Every other court to address the issue has concluded that eminent domain may not be used to stop property owners from lawfully using their property.

As discussed above, the Connecticut Supreme Court ruled for the property owner in a case remarkably similar to the present case—where the condemnor asserted that it was taking property for a traditional public use, but where it was clear that the true purpose was simply to stop the landowner from making a legal but disfavored use of the property. *New England Ests., LLC*, 988 A.2d, 237. This fact pattern is not unusual, and in *every* other case in which it has arisen, the courts have held that the condemnation was unlawful. A condemnation cannot be built on a lie, and courts are not required to gullibly accept lies. Notably, each of these cases was decided on a full record, not on motions to dismiss. The nature of the evidence in these cases demonstrates that the need for discovery in pretext cases makes them particularly unsuitable for

disposition at the 12(b)(6) stage. This Court should remand so that this case can be decided on the basis of a full record, as in each of the cases discussed below.

The district court erroneously treated these state court cases as irrelevant because it assumed (1) that all these cases were decided only under state constitutions and (2) that all of these states had interpreted their constitutions as more protective than the federal constitution. SJA-8. Both assumptions are incorrect. To be sure, the Supreme Court has noted that states *may* interpret their own constitutions to provide for greater property protection than the federal constitution. *Kelo*, 545 U.S. at 489 ("We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power."). And when litigants specifically ask state courts to interpret state constitutions independently of the U.S. Constitution, courts frequently oblige, particularly when the applicable federal precedent provides insufficient protection for private property rights. *See, e.g*, *Norwood v. Horney*, 853 N.E.2d 1115, 1141 (Ohio 2006) ("[T]he analysis by . . . the dissenting justices of the United States Supreme Court in *Kelo* are better models for interpreting . . . Ohio's Constitution."). But unless a state

court explicitly clarifies that its interpretation is independently based on state law, the Supreme Court presumes that states are interpreting their constitutions in lockstep with the federal constitution. *See Michigan v. Long*, 463 U.S. 1032, 1042–44 (1983) (stating that unless there is "a 'plain statement' that a decision rests upon adequate and independent state grounds[,]" the Court assumes that a state interpreted its constitution consistently with federal law). Most of these cases below cite federal and state precedents interchangeably, and none of them suggest that the outcome turned on any unique aspect of state law. When states choose to interpret their constitutions independently of the United States Constitution, they say so. *See, e.g.*, *Bd. of Cnty. Comm'rs v. Lowery*, 136 P.3d 639, 651 (Okla. 2006) ("In other words, we determine that our state constitutional eminent domain provisions place more stringent limitation on governmental eminent domain power than the limitations imposed by the Fifth Amendment of the U.S. Constitution.").

Of course, none of these state court cases are binding on federal courts, and the Brinkmanns have never contended otherwise. These cases do, however, demonstrate a broad and thoroughly reasoned consensus on the constitutional limits of the power of eminent domain.

Rejecting these cases would create a massive split of authority, including a split with a state high court within the Second Circuit—Connecticut. That would mean that the scope of the federal right protected by the Public Use Clause would be different in federal versus state courts, leading to inevitable uncertainty for both property owners and condemnors.

Pennsylvania: In *Middletown Township v. Lands of Stone*, 939 A.2d 331 (Pa. 2007), the owner of a 175-acre farm was attempting to partition the land and potentially sell it so that housing developers could build a residential subdivision. The township was opposed to the possibility of development, but it had no legal authority to prevent it, so it attempted to acquire the land by eminent domain. The stated public purpose for the taking was for recreation—in other words, a park. The Pennsylvania Supreme Court acknowledged that recreational uses were unquestionably public uses for which property could be taken. But that did not end the inquiry. The Court held that "[r]ecreational use must be the true purpose behind the taking . . . . This means that the government is not free to give mere lip service to its authorized purpose or to act

precipitously and offer retroactive justification." *Id.* at 337–38 (citing *Kelo*).

Looking at the record, the Pennsylvania Supreme Court easily concluded that the proposed taking was pretextual. The court noted that the township's long-term plans had not contained any references to future recreational uses on the property. *Id.* at 339 ("The record is devoid of any suggestion that the Township has considered, let alone created, such a plan."). The court also observed that the timeline of events strongly suggested pretext, in that the township only considered condemnation *after* it became aware that the property might be developed. *Id.*; *see also Pheasant Ridge Assocs. Ltd. P'ship v. Town of Burlington*, 506 N.E.2d 1152, 1157 (Mass. 1987) (invalidating a public use as pretextual when "[t]he manner in which the town dealt with the attempted acquisition of the subject parcel was not in accord with its usual practices."). The Pennsylvania Supreme Court explicitly relied on both the Fifth Amendment and *Kelo* in holding that this taking was unconstitutional. *Land of Stone*, 939 A.2d at 337–38 (citing *Kelo*, 545 U.S. at 478).

Massachusetts: The Supreme Judicial Court of Massachusetts decided a remarkably similar case in 1987. *See Pheasant Ridge Assocs. Ltd. P'ship v. Town of Burlington*, 506 N.E.2d 1152 (Mass. 1987). The property owner in *Pheasant Ridge* had proposed a development that would include a substantial number of low and moderate income housing units. Although the proposed development would comply with all of the applicable zoning rules, it generated considerable local backlash. *Id.* at 1154 n.3. After the proposal was announced, the Town decided to condemn the property, for the ostensible purpose of building a park. *Id.* at 1154. The court concluded that, on the record, it was clear that the proposed park was a mere pretext. The town's actual objective was to prevent the construction of a proposed low-income housing development. The court pointed out:

> that in recent years the town had studied its needs for parks and recreation and that neither the [site of the proposed taking] nor any parcel in the general vicinity of that site had been considered for acquisition for park or recreational uses. . . . The matter of taking the subject site came forward only when the plaintiffs' proposal became known.

Id. at 1157. Accordingly, the court rejected the proposed taking, notwithstanding that parks are usually considered classic examples of

public uses. *Id.* ("The record requires the inference that the town, acting through its town meeting, was concerned only with blocking the plaintiffs' development.").

In support of its ruling, the *Pheasant Ridge* court cited precedents from Massachusetts state courts, federal courts, and from other state courts. *Id.* at 1155–56 (citing *Southern Pac. Land Co. v. United States*, 367 F.2d 161 (9th Cir. 1966); *United States v. Carmack*, 329 U.S. 230 (1946); *Carroll County v. Bremen*, 347 S.E.2d 598 (Ga. 1986); *Earth Mgmt., Inc. v. Heard County*, 283 S.E.2d 455 (Ga. 1981)). Under *Michigan v. Long*, when a state court cites federal and state cases interchangeably, the decision is presumptively based on federal law unless there is a clear statement to the contrary. 463 U.S., at 1041 ("If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.").

Georgia: Both the Massachusetts Supreme Judicial Court and the Connecticut Supreme Court relied on a Georgia Supreme Court case

involving a property owner who had intended to build a waste disposal facility. *Earth Mgmt., Inc. v. Heard County*, 283 S.E.2d 455, 459–60 (Ga. 1981). The County opposed this plan, so it attempted to condemn the land for the ostensible purpose of building a public park. (Noticing a pattern?) There was no dispute, of course, that parks are usually valid public purposes, but the real question was whether the park "was a mere subterfuge utilized in order to veil the real purpose of preventing the construction of a hazardous waste disposal facility." *Id.* The court agreed with the property owner, explaining that the record clearly demonstrated that the condemning authority had no previous interest in building a park and that it did not even evaluate the suitability of the condemned land for a park before seizing it. *Id.* Accordingly, the court invalidated the taking. *See also Carroll County v. City of Bremen*, 347 S.E.2d 598, 599 (Ga. 1986) ("The trial judge considered all of the evidence and found that the true reason for the condemnation was to prevent the construction of a public sewage-treatment facility by the City of Bremen.").

Although the *Earth Management* court relied on state law precedents in reaching its decision, it did not purport to interpret its own

constitution as distinct from its federal counterpart. The language of the state provision is very similar to the language of the Fifth Amendment, *see* Ga. Const. art. I, § 3, ¶ I ("private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid"), and although Georgia has subsequently enacted statutory and constitutional reforms to strengthen private property rights in the wake of *Kelo*, Georgia had historically interpreted its public use clause in conformity with its federal equivalent. *See, e.g.*, *Diversified Holdings, LLP v. City of Suwanee*, 807 S.E.2d 876, 885 (Ga. 2017); *Bowers v. Fulton County*, 183 S.E.2d 347, 349 (Ga. 1971).

Colorado: In *City of Lafayette v. Town of Erie Urban Renewal Authority*, 434 P.3d 746 (Colo. App. 2018), a property owner had proposed a commercial development that the City of Lafayette opposed. The City attempted to condemn the property at issue as an "open space buffer." *Id.* at 750. The record, however, left little doubt that the true purpose of the condemnation was to interfere with the development. *Id.* at 752. This amounted to "bad faith." *Id.* at 751–52. As the court explained, "[t]he stated public purpose of an open space buffer is valid, but blocking Erie's planned development—planning that predated Lafayette's

condemnation petition—is not lawful." *Id.* at 752. The court placed particular emphasis on the lack of prior planning for open space and the fact that the condemnation plans only materialized after the property owner planned to develop it. *Id.* at 753.

Although the district court attempted to distinguish *City of Lafayette* on the ground that it was supposedly decided under Colorado law, the Colorado Court of Appeals cited federal and state cases interchangeably, noting that federal and state cases both before and after *Kelo* have recognized that pretextual takings are unlawful. *Id.* at 750 n.5 (collecting cases). The court never suggested that it was interpreting Colorado law independently from federal law. *See Long*, 463 U.S. at 1041. And Colorado "has interpreted the Colorado takings clause as consistent with the federal clause." *Animas Valley Sand & Gravel, Inc. v. Bd. of Cnty. Comm'rs*, 38 P.3d 59, 64 (Colo. 2001).[4]

New Jersey: In *Borough of Essex Fells v. Kessler Institute for Rehabilitation, Inc.*, a property owner proposed expanding an existing

[4] At least with respect to the public use issues relevant to this case, the state and federal clauses are the same, though Colorado courts have held that a wider range of governmental interferences with property (*i.e.*, "regulatory takings") are compensable under the state constitution. *Pub. Serv. Co. v. Van Wyk*, 27 P.3d 377, 388 (Colo. 2001).

rehabilitation center to include a residential "Transitional Living Facility." 673 A.2d 856, 858 (N.J. Super. Ct. Law. Div. 1995). Because of public opposition to the expansion, the Borough of Essex Fells decided to condemn the property intended for the expansion. The stated purpose for the condemnation was, once again, to build a public park. The record made clear, however, that the true purpose was simply to stop the planned development. As the court explained:

> [W]here a condemnation is commenced for an apparently valid, stated purpose but the real purpose is to prevent a proposed development which is considered undesirable, the condemnation may be set aside. The extensive record in this case compels the inference that Essex Fells undertook this condemnation action for the sole purpose of preventing Kessler's development of a rehabilitation facility in the community. The credible evidence demonstrates that the public purpose articulated for taking Kessler's property, a public park, was selected not based on a true public need but in response to community opposition to Kessler's proposed use of the property.

Id. at 861. Accordingly, the court dismissed the condemnation complaint. In reaching this conclusion, the court cited both the U.S. and New Jersey constitutions, as well as decisions from numerous states. *Id.* at 860–61. Nothing in the opinion indicates that the court believed it was relying on any unique aspect of New Jersey constitutional law.

New York: Finally, over 50 years ago, a New York court held that it is a "perversion of the condemnation process" to use eminent domain as a means of preventing an owner from using property in a manner that "authorities regard as undesirable." *In re Real Prop. in Hewlett Bay Park*, 265 N.Y.S.2d 1006, 1009–10 (Sup. Ct. 1966). In that case, the property owner had proposed using the land as a parking lot, but the municipality attempted to condemn the land for "storage" purposes. The court noted that the condemnation occurred without any prior planning, "on the eve of the hearing" where the owner was seeking to get permission to use the land for parking. Moreover, the land at issue appeared far larger than what was needed for the town's storage needs. Accordingly, the court concluded that the condemnation was unconstitutional, and it dismissed the petition. This case was explicitly based on both "the Constitutions of the State of New York and of the United States of America." *Id.* at 834, 265 N.Y.S.2d at 1008.

II. This Court should not embrace the district court's radical public-use theory.

Affirming the district court would create a clear split with no fewer than five state high courts and the Seventh Circuit. If that were not reason enough to reverse, this Court should also reverse because the

district court's analysis conflicts with how courts protect constitutional and fundamental rights, and allowing the district court's holding to stand would permit egregious abuses of government power.

A. The lower court applied the wrong framework in analyzing the Public Use Clause.

Recent Supreme Court decisions have clarified that when fundamental constitutional rights are at stake, the government bears the burden of justifying its interference with those rights. Private property ownership is one of those "fundamental rights necessary to our system of ordered liberty." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2247 (2022).[5] The Fifth Amendment's mandate that property shall not "be taken for public use, without just compensation" is "an affirmance of

[5] For confirmation that private property ownership is deeply rooted in our Nation's history and tradition, see, e.g., *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (confirming that it would be a "flagrant abuse of legislative power" to take away security for private property "for the protection whereof the government was established"); James Madison, *Property*, Nat'l Gazette (Mar. 29, 1792) (stating that "[g]overnment is instituted to protect property of every sort" and the rights of individuals and confirming that "a just government . . . impartially secures to every man, whatever is his own."); 1 Records of the Federal Convention of 1787, at 302 (Max Farrand ed., 1911) (quoting Alexander Hamilton as recognizing that "[o]ne great obj[ect] of Gov[ernment] is personal protection and the security of property").

a great doctrine established by the common law for the protection of private property." *Chi., B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 236 (1897) (quotation omitted).

The protection of private property from government taking thus falls into the category of fundamental rights guaranteed by the Constitution. *See Dobbs*, 142 S. Ct. at 2246 (discussing the two categories of substantive rights, those guaranteed by the first eight Amendments and unenumerated rights). When an amendment's "plain text covers an individual's conduct"—here, the ownership of private property—"the Constitution presumptively protects that conduct." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2129–30 (2022). The government must then justify its interference with the constitutional right by demonstrating that its actions are consistent with the Constitution's text and a careful analysis of the right's history. *Id.* at 2129–30; *see also Timbs v. Indiana*, 139 S. Ct. 682, 687–89 (2019) (conducting a historical analysis of the Eighth Amendment's protection against excessive fines); *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2087 (2019) (plurality opinion) ("look[ing] to history for guidance" of the scope of rights under the Establishment Clause); *Giles v.*

California, 554 U.S. 353, 358 (2008) (approving "only those exceptions [to the Confrontation Clause] established at the time of the founding" (internal quotation marks omitted)).

Applying that framework, the text of the Fifth Amendment forbids the government from taking private property *unless* the two criteria are satisfied: "the taking must be for a 'public use' and 'just compensation' must be paid to the owner." *Brown v. Legal Found. of Washington*, 538 U.S. 216, 231–32 (2003). In other words, courts must protect private property from government taking except where the constitutional conditions are satisfied.

To refute the existence of the Brinkmanns' claim, the Town therefore bears the burden of proving the conditions on its exercise of eminent-domain power fulfilled by pointing to the Fifth Amendment's text and historical evidence. *See Bruen*, 142 S. Ct. at 2129–30 (confirming the standard for protecting constitutional rights); *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.").

Taking as true the Brinkmanns' allegation that the Town's professed purpose is a sham, as a court must at the motion-to-dismiss stage, the district court's task was to evaluate the scope of the right protected by the Fifth Amendment, which required examining the text and looking to history for guidance. *See, e.g.*, *Bruen*, 142 S. Ct. at 2134–38 (examining the text and history of the Second Amendment); *Timbs*, 139 S. Ct. at 687–89 (reviewing both the text and history of the Eighth Amendment).

But the district court didn't analyze the text or history, announcing that it would presume a taking is constitutional if the Town paid lip service to a "classic public use" and there was no allegation of a private benefit. SJA-6–7. Not only did the district court neglect the text-and-history methodology for discerning the scope of constitutional rights, but it also flipped the presumption afforded to textually enumerated rights. Instead of presuming that the Town's interference with the Brinkmanns' right was unconstitutional unless the Town could show otherwise, the lower court presumed that the Town's taking was permissible unless the

Brinkmanns could prove that the Constitution prohibited the Town's conduct.[6]

And if the district court had done a textual and historical analysis of the Fifth Amendment, it would have concluded that a facade of a public use is not enough to pass constitutional muster—like every other court to examine the issue. Interpreting the Public Use Clause as authorizing the government to take property even when the stated public use is a pretense would render the phrase "for public use" meaningless. *See Kelo*, 545 U.S. at 507 (Thomas, J., dissenting) ("If the Public Use Clause served no function other than to state that the government may take property through its eminent domain power—for public or private uses—then it would be surplusage.").

[6] Admittedly, in cases where there are no allegations of pretext, where a taking is "executed pursuant to a 'carefully considered' development plan . . . [and where] there [is] no evidence of an illegitimate purpose," *Kelo*, 545 U.S. at 478, the Supreme Court has indicated that legislative deference is appropriate. The factors that justified deference in *Kelo* are wholly absent here. And at this stage of litigation, the Brinkmanns' allegations that there is no carefully considered plan and showing that there is an illegitimate purpose must be accepted as true.

History, too, shows that the public-use requirement was meant to have teeth beyond simply invalidating takings for a private benefit.[7] There have generally been "two basic opposing views of the meaning of 'public use': (1) that the term means advantage to the public, (the so-called broad view); and (2) that it means actual use or right to use of the condemned property by the public (the so-called narrow view)." Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV.

[7] *See, e.g.*, *Horne v. Dep't of Agric.*, 576 U.S. 350, 358–59 (2015) (discussing the history of the Takings Clause and quoting colonial protections against takings, which included prohibiting personal property from being "pressed or taken for any publique use or service" without the payment of reasonable prices (Massachusetts) and allowing the seizure of livestock or meat for the military only upon compensation (Virginia)); *Yates v. City of Milwaukee*, 77 U.S. 497, 505 (1870) (concluding that a city cannot take a wharf by its "mere declaration" that a private wharf is an obstruction); *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 311 (C.C.D. Pa. 1795) (Patterson, J.) (referring to eminent domain as a "despotic power" that could only be exercised "when state necessity requires" it or "in urgent cases"); Del. Const. of 1792, art. I, § 8 (barring property from being "taken or applied to public use" without legislative consent and compensation); 1779 S.C. Acts No. 1140, § 4 (authorizing, "if it shall be judged requisite for the public service," the seizure of "necessaries" for the "public use"); *see also* William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 562–64, 579 (1972) (reviewing the Crown's power to take property to exercise royal prerogative in areas such as defense, navigation, foreign affairs, and dispensation of justice while Parliament generally took land under statutes concerning roads, bridges, fortifications, river improvements, and the draining of the fens).

203, 205 (1978).[8] But both views accept that eminent-domain power can only be used to serve the public good, disputing only how broadly to interpret "public use." Using the power as a tool for nefarious purposes—such as punishing disfavored individuals or preventing lawful uses—violates the Public Use Clause under either view.

In concluding the opposite, the district court emphasized the importance of deference to legislative judgment—refusing to look behind the curtain of a stated public use even when, as here, the property owners provided factually supported allegations that the public use was a pretext. SJA-6–7. But "it is not deference that the Constitution demands here." *Bruen*, 142 S. Ct. at 2131. The Fifth Amendment, like the Second Amendment, "is the very *product* of an interest balancing by the people," and it struck a balance by providing unqualified protection of private property rights unless the government actually seeks to take the property for a public use—and not merely under the pretense of a public use. *Id.*

[8] *See also, e.g.*, Buckner F. Melton, Jr., *Eminent Domain, "Public Use," and the Conundrum of Original Intent*, 36 NAT. RES. J. 59 (1996); ILYA SOMIN, *From Public Use to Public Purpose, in* THE GRASPING HAND: *KELO V. CITY OF NEW LONDON* AND THE LIMITS OF EMINENT DOMAIN, ch. 2 (2015).

It is therefore the Fifth Amendment's text that requires "unqualified" enforcement. *Id.*

B. Blessing pretextual takings if there is not a private benefit would foster government abuse of the eminent-domain power.

If this Court does not correct the lower court's narrow construction of the Public Use Clause, the government can use the eminent-domain power for any purpose—so long as it hides behind the mask of a public use like creating a park or preserving vacant space. The lie can be blatant, obvious, and shameless, yet there would be no constitutional impediment to the Town of Southold (or any other government entity) using eminent domain to punish political opponents or unpopular minorities, neither of which is a legitimate governmental objective. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446–47 (1985) ("[S]ome objectives-such as a bare desire to harm a politically unpopular group-are not legitimate state interests." (cleaned up)); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (no legitimate governmental interest in anti-hippie animus). Government could also use eminent domain to advance its own financial interests at the expense of a property owner, which, according to both the Seventh Circuit and the Rhode Island

Supreme Court, violates the Fifth Amendment. *See 58.16 Acres of Land*, 478 F.2d at 1059; *R.I. Econ. Dev. Corp.*, 892 A.2d at 104.

Or, as was proposed in the aftermath of *Kelo*, the government could seize the homes of unpopular judges, converting them to "museums" or "public parks."[9] Parks and museums, after all, are public uses, so it would be irrelevant under the district court's analysis that the true purpose of such takings would be to punish the judges for faithfully executing their public duties, albeit in a manner some people disliked.

The possibility of such egregious abuses is not fanciful. Consider the taking of Bruce's Beach by the City of Manhattan Beach in the early 20th century. *See City of Manhattan Beach, Bruce's Beach Task Force: History Subcommittee Report*, Apr. 13, 2021, https://perma.cc/HH7F-CM7T.[10] Mere decades after emancipation, Willa Bruce, a black woman, purchased a plot of beachfront property in Manhattan Beach and opened

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[9] *See* Sara Morrison, *The Supreme Court Decision that Threatened Justices' Own Homes*, Boston.com, June 29, 2015, https://perma.cc/HH7F-CM7T (detailing efforts to seize the homes of Justices Breyer and Souter, for the ostensible purposes of operating a public park and museum, but primarily for the impermissible purpose of retaliation for their *Kelo* votes).

[10] Manhattan Beach only recently issued its official report of this pretextual taking, and it puts on full display why this Court should reject the Town's invitation to limit the Fifth Amendment's protection.

"Bruce Beach Front." *Id.* at 5–6. There, she sold soda and lunches, rented bathing suits, and provided dressing tents. *Id.* Within a week of the business's opening, white landowners of adjoining property expressed agitation and began harassing guests. *Id.* at 6. Despite the animosity, Bruce's Beach flourished: Willa grew her business and upgraded from a portable stand to a two-story brick building to accommodate even more guests. *Id.* at 6–7. Several other African Americans purchased property nearby, and by the early 1920s, "Bruce's Beach had become a popular destination for Black families to enjoy the beach." *Id.* at 7.

In response to growing pressure by white residents, the City of Manhattan Beach, like the Town of Southold, tried to erect obstacles to the disfavored businesses. For example, Manhattan Beach enacted an ordinance "clearly designed to prevent any further development in Manhattan Beach by the Bruces or other African Americans." *Id.* at 11. When that strategy proved ineffective, city officials, like the Town officials here, reached for eminent domain, purporting to take property "for public park purposes." *Id.* And just like the Town of Southold, the City of Manhattan Beach had no plans for a park when it condemned

Willa's property and the surrounding parcels, which were owned by other African American families or vacant. *Id*.

Under the district court's version of the Fifth Amendment, Willa Bruce would have no valid claim that the taking of her land violated the Public Use Clause. Rather, the district court suggested the Fourteenth Amendment "provides sufficient protection of their right against a discriminatory state action, including a taking." SJA-10. That conclusion is flawed for multiple reasons.

First, it ignores that the Fifth Amendment provides stand-alone protection for private property ownership that long preceded the Fourteenth Amendment and therefore shouldn't be dependent on the Fourteenth Amendment's protections. Second, the Fifth Amendment's text prohibits the government from taking of private property except "for public use." If that language is interpreted as except "for *purported* public use," a government entity can slap a public-use label on *any* use, rendering the Public Use Clause effectively meaningless. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect").

Third, the Supreme Court has instructed lower courts to analyze problematic government conduct under the "explicit textual source of constitutional protection" rather through "the more generalized notion of 'substantive due process.'" *Graham v. Connor*, 490 U.S. 386, 395 (1989) (Fourth Amendment context).

Fourth, it is far more difficult for plaintiffs to establish a Fourteenth Amendment violation than to establish that a proposed condemnation violates the Fifth Amendment—as the very case cited by the district court explained. *See 49 WB, LLC v. Village Of Haverstraw*, 511 F. App'x 33, 35 (2d Cir. 2013) (summary order) ("[A] mere determination that there is no rational relationship between the condemnation and a valid public purpose is simply not the equivalent of a showing that the condemnation . . . rises to a substantive due process violation under the U.S. Constitution."). Actions under the Equal Protection Clause, which provides differing levels of protection to people depending on whether they are members of a protected class, must satisfy a high standard: Plaintiffs must prove they were treated "differently from others similarly situated." *Hu v. City of New York*, 927 F.3d 81, 90 (2d Cir. 2019). That standard is particularly hard to meet in

the condemnation context, where the condemnor can always argue that there is no similarly situated individual because of the "unique nature of real property." *United States v. Esposito*, 970 F.2d 1156, 1160 (2d Cir. 1992). And "allegations of racial animus involve defendants' state of mind," which are notoriously "difficult to prove." *White v. Frank*, 680 F. Supp. 629, 640 (S.D.N.Y. 1988).

By contrast, in the pretext cases discussed above in Part I(B), property owners did not have to prove the subjective motivations of public officials or identify similarly situated individuals. Rather, property owners pointed to objective indicia of illegitimate purpose. Such evidence included "[i]nternal communications among various town actors," and, crucially, "the timing of the town's [eminent domain] actions" after property owners announced a use the government disliked. *New England Ests.*, 988 A.2d at 237; *see also Pheasant Ridge Assocs. Ltd. P'ship*, 506 N.E.2d 1154 (highlighting evidence that the taking for a proposed park was only discussed after plaintiffs' proposed use became known).

Denying the Brinkmanns their day in court gives the Town—and any other government entity with eminent-domain power—permission to

take property for any improper purpose under the cloak of a purported public use as long as there is no private benefit.

Conclusion

The Public Use Clause protects property owners from government takings done under the guise of a public use. The Brinkmanns have stated a viable claim that the Town violated the Public Use Clause by pretending to take their property for a passive park when the Town was actually trying to block the Brinkmanns from lawfully developing their property. The Town cannot use its eminent-domain power to prevent lawful uses of property or expel disfavored individuals. The Brinkmanns therefore respectfully ask this Court to reverse the district court's decision holding.

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Respectfully submitted,

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Dated: December 13, 2022

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I hereby certify that on this 13th day of December, 2022, I caused this Brief of Appellants and Joint Appendix to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

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