No. _____

In The

Supreme Court of the United States

BEN BRINKMANN, HANK BRINKMANN,
MATTITUCK 12500 LLC.,

Petitioners,

v.

TOWN OF SOUTHOLD, NEW YORK,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Second Circuit, in a 2-1 decision over a dissent by Judge Menashi, held that the Public Use Clause does not prohibit taking property when the asserted public use is a sham. The panel agreed that the complaint alleges "facts sufficient to support a finding" that Respondent Town of Southold's "decision to create a park was a pretext" for stopping Petitioners from opening a hardware store. But the majority held that, as long as the Town puts a park on the land, it does not matter that the government's true purpose is to run an otherwise law-abiding property owner out of town.

Judge Menashi would have held that "the Constitution contains no Fake Park Exception to the public use requirement of the Takings Clause." A park does not satisfy the public-use requirement when its actual purpose and but-for cause is illegitimate, as stopping lawful activity is. Judge Menashi would have "adhere[d] to precedent providing that a pretextual, bad faith taking violates the public use requirement." He recognized that "the court's decision creates a split with decisions of several state supreme courts," including Connecticut, meaning that the Takings Clause rights of Connecticut citizens now depend entirely on whether the case is in state or federal court.

As framed by the majority below, the question presented—indeed "[t]he only question"—is "whether the Takings Clause is violated when a property is taken for a public amenity as a pretext for defeating an owner's plans for another use."

PARTIES TO THE PROCEEDING

Petitioners are Ben Brinkmann, Hank Brinkmann, and their company Mattituck 12500 LLC. Respondent is the Town of Southold, New York.

CORPORATE DISCLOSURE STATEMENT

Petitioner Mattituck 12500 LLC is a nongovernmental corporation. It has no parent corporation, and no publicly held company owns 10 percent or more of its stock.

RELATED PROCEEDINGS

The following proceedings are directly related to this case:

- *Brinkmann et al.* v. *Town of Southold*, No. 22-2722, 2d Cir. (Mar. 13, 2024) (affirming grant of defendant's motion to dismiss);

- *Brinkmann et al.* v. *Town of Southold*, No. 2:21-cv-02468, E.D.N.Y. (Sept. 30, 2022) (granting defendant's motion to dismiss);

- *Brinkmann et al.* v. *Town of Southold*, No. 21-2644, 2d Cir. (Dec. 6, 2021) (recognizing stipulated withdraw of appeal of denial of request for a preliminary injunction); and

- *Brinkmann et al.* v. *Town of Southold*, No. 2:21-cv-02468, E.D.N.Y. (Sept. 20, 2021) (denying plaintiffs' motion for a preliminary injunction).

Other proceedings that are not directly related to this case but involve the same parties are:

- *In re Brinkmann Hardware Corp. et al.* v. *Southold*, No. 02790-2019, N.Y. Sup. Ct. Suffolk County (Jan. 13, 2023) (stipulation of discontinuance); and

- *In re Southold* v. *Mattituck 12500, LLC*, No. 608406-2021, N.Y. Sup. Ct. Suffolk County (still pending).

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

OPINIONS BELOW

The opinion of the court of appeals, App. 1a, is reported at 96 F.4th 209. The district court's order, App. 57a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 2024. This petition is timely filed on June 11, 2024. Petitioners invoke this Court's jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides, in relevant part, "nor shall private property be taken for public use without just compensation."

INTRODUCTION

Can the government use eminent domain to turn your property into a park simply because it wants to drive you out of town? Does the Takings Clause allow pretextual, bad-faith condemnations?

The Second Circuit said yes to both questions, holding that the Takings Clause is satisfied if the taking isn't done to confer a private benefit. As long as the seized land becomes a park, the inquiry is over—

even if the sham park was dreamed up on the fly to inflict harm on law-abiding citizens; even if the park would never exist were the government not trying to thwart a property owner's lawful use of their land.

As Judge Menashi recognized in dissent, five state supreme courts answered the same questions no, and four of those said no in factually identical cases involving sham parks. Those high courts held that the Takings Clause forbids pretextual, bad-faith takings—even for parks—when the actual purpose is *not* a public use, such as, in this case, stopping a family from opening a hardware store.

That unambiguous split over sham parks includes the worst kind of split: a federal court of appeals versus a state supreme court within the same circuit. The Takings Clause rights of Connecticut citizens now turn on whether the citizens are in state or federal court. In square conflict with the Second Circuit, the Connecticut Supreme Court held, in a case about sham "playing fields" to block affordable housing, that "a government actor's bad faith exercise of the power of eminent domain is a violation of the takings clause[.]" *New England Estates, LLC* v. *Town of Branford*, 294 Conn. 817, 854 (2010). The Connecticut court expressly rejected the Second Circuit's narrower interpretation: "[T]here is no merit to the [government]'s claim that a violation of the public use requirement is limited to situations in which the government takes private property for a use that is not a public use." *Ibid.* That split is untenable.

And the problem isn't just the split. The panel's reasoning allows the government to nullify an

enumerated right by lying about what it is doing. As Judge Menashi explained in dissent, the majority "appears to recognize that preventing a landowner from lawfully using his own property is not a valid public purpose." App. 24a. "That," he explains, "is why the court's decision depends on the Town lying about its purpose." *Ibid.* "If the Town of Southold had—openly and honestly—explained that the reason it seized the Brinkmanns' property was to stop the owners from using their property in a lawful way, it would not be possible for the court to say that the taking was for a 'public amenity.'" *Ibid.*

Meaningful protection for constitutional rights—under the First Amendment, the Equal Protection Clause, the Takings Clause, or another provision—requires courts to examine whether the government acts with an unconstitutional purpose. Indeed, as Judge Menashi observed, "[c]ourts frequently examine the purpose of government action when evaluating constitutional claims." *Id.* at 26a (collecting cases). And it could not be otherwise. The Constitution's guarantees would mean nothing if courts simply accepted the government's stated purposes at face value.

Allowing the Second Circuit's decision to stand threatens the Takings Clause's protections and provides a roadmap for the subversion of other fundamental rights any time government is willing to pay the price for a sham park. This case offers the Court an ideal, single-question vehicle to resolve the split between the Second Circuit and five state supreme courts on the scope of the Public Use Clause—and ensure that Connecticut citizens have the same right to

use Section 1983 to challenge a sham public use regardless of whether they are in state or federal court. The petition should therefore be granted.

STATEMENT

This case is about a family's efforts to build a new hardware store and a town's abuse of eminent domain to stop them by seizing their land for a park.

A. Factual Background

Brinkmann's Hardware is a family-owned business on Long Island. App. 76a. Since 1976, the Brinkmanns have run neighborhood hardware stores, a staple of American main streets for generations. *Ibid.* Brinkmann's Hardware started as a literal mom-and-pop shop of only 1,200 square feet in Sayville, New York. *Ibid.* By 2021, the Brinkmanns' children were running the business with that original location and three other stores on central Long Island. *Ibid.*

To build a new hardware store, the Brinkmanns bought long-vacant property in Southold, New York. App. 77a–78a, 87a. But Respondent Town of Southold, for reasons that continue to baffle the Brinkmanns, was determined to stop them.

The Town used every tool at its disposal to drive the family out of Southold. The Town put the Brinkmanns on a years-long bureaucratic carousel, repeatedly demanding revisions to the hardware store plan. App. 78a–81a. When the Brinkmanns hung on, the Town ratcheted up the pressure with exorbitant fees, such as $30,000 for a dubious "market impact study"

that the Town never actually conducted, even after the Brinkmanns paid for it. App. 82a–83a. Then, Town officials, first the Town Supervisor[1] and later the Town Attorney, called the property's previous owner and demanded it breach the contract of sale to the Brinkmanns. App. 86a–87a.

Exasperated by the Brinkmanns' refusal to go away, the Town concocted a phony "moratorium" on building permits and then dished out exceptions to anyone not named "Brinkmann." App. 88a, 90a–91a. The Town twice extended the moratorium in violation of state law and over the objections of Suffolk County. App. 89a–90a The Brinkmanns persevered, suing to end the moratorium. App. 89a. The state trial court denied the Town's motion to dismiss. App. 91a.

With the moratorium gambit on the rocks, the Town suddenly decided that it needed a new park—a "passive use park," in fact, one without any improvements. App. 91a–92a. And it needed this park, which it had never thought about before, right now. And it needed a park of the exact dimensions of the Brinkmanns' property. Only the Brinkmanns' property would do—the vacant property for sale literally next door was not even considered. App. 91a. Out of

[1] Under New York Law, a town supervisor is typically the presiding officer of the town board and the chief executive officer of the town. Information for Town Officials, N.Y. State Comptroller, https://www.osc.ny.gov/files/local-government/publications/2020/pdf/information-for-town-officials.pdf (Jan. 2024), at 11.

legitimate options for stopping the Brinkmanns, the Town used eminent domain to take their property.

The Town's plan for a park was ginned up out of thin air. The Town made no effort to acquire the property or had any plans to use it for a park when the property had previously been listed for sale in 2011. App. 77a. During the five years that the property sat vacant under the prior owner, the Town took no steps to plan for a park. App. 78a. When the Brinkmanns contracted to purchase the property, the Town wasn't even considering the land for a park. *Ibid.* During the three years that the Brinkmanns worked to bring their hardware store to life—meeting with Town officials and then revising and submitting plans—no Town official ever suggested that the Town might want the property for a park. App. 79a–83a, 87a. Nor did any Town official mention potential plans for a park when the Brinkmanns funded a traffic study, paid a special permit fee, and paid $30,000 for an impact study the town never did. App. 80a, 82a.

That's because the Town did not have any plans to use the Brinkmanns' property for a park, at least not until it looked like the Brinkmanns might win their challenge to the Town's building moratorium. App. 77a, 79a–83a, 85a.

B. Proceedings Below

After the Town started the process to take the Brinkmanns' property, the Brinkmanns filed a Section 1983 suit in federal court asserting that the taking violates the Fifth Amendment because a

pretextual, bad-faith taking for a sham park is not a public use. App. 96a–97a.

The Town filed a 12(b)(6) motion to dismiss, which the district court granted. App. 57a, 71a. The district court concluded that the Public Use Clause prohibits pretextual takings only when the actual purpose is to bestow a private benefit. App. 62a–64a. Because the Brinkmanns alleged that the true purpose of the Town's sham taking was to stop their otherwise lawful business, as opposed to conferring a private benefit, they failed to state a claim. App. 63a–64a.

In a 2-1 decision, the Second Circuit affirmed. App. 2a. The panel unanimously agreed that the Brinkmanns' "complaint alleges facts sufficient to support a finding that the decision to create the park was a pretext for defeating the Brinkmanns' commercial use" and that the decision to take the Brinkmanns' property for a park "was made after varied objections and regulatory hurdles that the Brinkmanns did or could surmount." App. 2a–3a, 23a. But that didn't matter.

"The only question is whether the Takings Clause is violated when a property is taken for a public amenity as a pretext for defeating the owner's plans for another use." App. 3a. The Second Circuit held that it is not: The Public Use Clause is only a "prohibition of takings for 'private' purposes[.]" App. 5a.

Observing that Supreme Court precedent "forecloses inquiry into whether a government actor had bad reasons for doing things," the court held that a condemning authority has "a complete defense to a

public-use challenge" if the taking will serve a "well-established" public use such as "the creation of a public, open space." App. 11a. Because the Brinkmanns did "not allege that the Town meant to confer any private benefit or intends to use the property for anything other than a public park," the Second Circuit held that the Brinkmanns had "not pointed to any Town purpose that violates the Takings Clause." App. 8a.

Judge Menashi dissented. App. 23a. Highlighting how the majority's decision "creates a split with the decisions of several state supreme courts," he observed that "the Constitution contains no Fake Park Exception to the public use requirement of the Takings Clause." App. 24a, 29a. Judge Menashi rejected the idea that government can take property for "a public amenity as a pretext for defeating the owner's plans for another use." App. 24a. And he warned that the majority decision "grants governments virtually unlimited power over private property—as long as the governments are willing to act in bad faith." App. 25a.

Judge Menashi would therefore have held that the Brinkmanns stated a viable Takings Clause claim: "A taking of property must be for a public use—or at least for a public purpose—and thwarting the rightful owner's lawful use of his property is not a public purpose." App. 24a (cleaned up).

REASONS FOR GRANTING THE PETITION

I. The Second Circuit squarely split with five state supreme courts on the scope of the Public Use Clause's protection against pretextual, bad-faith takings.

A. The Second Circuit split with Connecticut, Massachusetts, Pennsylvania, Georgia, and Rhode Island on whether the Public Use Clause prohibits pretextual, bad-faith takings.

Five state courts of last resort have held that the Public Use Clause protects property owners from takings where the stated purpose conceals an illegitimate actual purpose. Four of those courts rejected pretextual, bad-faith takings for a sham park, just like the one in this case.

1. Connecticut: The supreme court invalidated a sham-park taking whose actual purpose was to stop affordable housing. "It is well established * * * that a government actor's bad faith exercise of the power of eminent domain is a violation of the takings clause" and "there is no merit to the town's claim that a violation of the public use requirement is limited to situations in which the government takes private property for a use that is not a public use." *New England Estates*, 294 Conn. at 854.

2. Pennsylvania: The supreme court invalidated a sham-park taking whose actual purpose was to stop residential development. "[T]he true purpose must

primarily benefit the public" because "the government is not free to give mere lip service to its authorized purpose or to act precipitously and offer retroactive justification." *Middletown Twp.* v. *Lands of Stone*, 595 Pa. 607, 617 (2007).

3. Massachusetts: The supreme judicial court invalidated a sham-park taking whose purpose was to stop affordable housing. Where the town was "concerned only with blocking the plaintiffs' development," pretext claims are "not limited to action taken solely to benefit private interests." *Pheasant Ridge Assocs. Ltd. P'ship* v. *Town of Burlington*, 399 Mass. 771, 776–777 (1987). They also "include[] the use of the power of eminent domain solely for a reason that is not proper, although the stated public purpose or purposes for the taking are plainly valid ones." *Id.* at 776.

4. Georgia: The supreme court invalidated a sham-park taking whose actual purpose was to stop a waste-disposal facility. The court examined "whether the action of the county commissioner in condemning this parcel of land was taken for the purpose of building a public park or whether this was a mere subterfuge utilized in order to veil the real purpose of preventing the construction of a hazardous waste disposal facility." *Earth Mgmt., Inc.* v. *Heard County*, 248 Ga. 442, 446–447 (1981). In striking down the condemnation, the court acknowledged having "repeatedly held" that pretextual takings can take two forms: (1) "private property may not be taken for a private purpose"; and (2) "a condemning authority may not act in bad faith in the exercise of the right of eminent domain." *Id.* at 446.

5. Rhode Island: The supreme court invalidated the taking of a private garage for the stated purpose of airport parking when the actual purpose was a desire to increase revenue. "[B]ased on the record developed," the court "conclude[d] the principal purpose for the taking in this case was not a valid public use." *R.I. Econ. Dev. Corp.* v. *The Parking Co., L.P.*, 892 A.2d 87, 103–104 (R.I. 2006).[2]

Each of these state court cases—all won by the property owner in the end—would have failed at the outset under the decision below. Federal courts in the Second Circuit must now dismiss Takings Clause claims and reject Takings Clause defenses asserting that the government's stated public use is a pretext concealing an illegitimate purpose, unless the alleged illegitimate purpose is a private benefit.

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[2] The decision below also squarely conflicts with other state-court decisions that enforce protections against pretextual takings. A Colorado intermediate appellate court rejected a taking for the stated purpose of "open space buffer" where the true purpose was to stop development of a grocery store. *City of Lafayette* v. *Town of Erie Urb. Renewal Auth.*, 434 P.3d 746, 750–753 (Colo. App. 2018). A New Jersey trial court invalidated a sham park to stop the expansion of a rehabilitation center. *Borough of Essex Fells* v. *Kessler Inst. for Rehabilitation, Inc.*, 673 A.2d 856, 858 (N.J. Super. Ct. Law Div. 1995). On the flip side, a federal trial court recently dismissed a pretext challenge to a taking for a park and public works to stop a mobile-home-park expansion. *Garvey Farm LP* v. *City of Elsmere*, No. CV 2:23-015-DCR, 2023 WL 3690229, at *6 (E.D. Ky. May 26, 2023) (relying on Second Circuit precedent).

B. A Connecticut citizen's Section 1983 claim against a pretextual, bad-faith taking depends solely on state versus federal court.

The split with the Connecticut Supreme Court warrants special comment because it is the worst kind of split—federal circuit court versus state supreme court within the same circuit. The viability of a Section 1983 claim now turns on state versus federal court.

The property owners in *New England Estates* and the Brinkmanns here filed Section 1983 actions claiming that a pretextual taking for a sham park violated the Public Use Clause. The Connecticut property owners did not simply get past a motion to dismiss; they prevailed on the merits. 294 Conn. at 853–854, 861. The Brinkmanns brought the exact same claim in federal court here but were dismissed for failing to state a claim.

For Connecticut citizens, the viability of a Section 1983 pretextual takings claim now depends solely on venue. They can assert pretext as a defense in state court and win. And they can bring a Section 1983 pretext claim in state court and win. But a Section 1983 pretext claim adjudicated originally in federal court or removed there under 28 U.S.C. 1441 can't get off the starting line. That irreconcilable split calls for this Court's review.

II. The Second Circuit misread this Court's precedent and got the Public Use Clause wrong.

The Second Circuit narrowly construed the Public Use Clause as only protecting property owners from sham takings involving a private benefit, but not when a sham taking aims at another illegitimate purpose. This holding misunderstands the Clause, and it is based on misreading a specific passage of *Kelo* v. *City of New London*, 545 U.S. 469 (2005). Here's the relevant language:

> [T]he [government] would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party. See [*Haw. Hous. Auth.* v.] *Midkiff*, 467 U.S. [229,] 245 [(1984)] ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void") * * * 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.

545 U.S. at 477–478.

True, *Kelo* talks about private benefit, but that is what the case was about—taking Susette Kelo's home to give it to private developers. This passage cannot be over-read to mean that this Court implicitly restricted pretext claims solely to takings involving a private benefit.

Yet, remarkably, that is just what the Second Circuit concluded. And it went even further. Without explanation, the Second Circuit concluded that *Kelo* overruled, *sub silentio*, the longstanding federal and state consensus that the Takings Clause forbids pretextual, bad-faith takings, including those that do not involve a private benefit. App. 19a ("That may have been so in 1966, but it is not so now. The Supreme Court's current pronouncement on 'pretext' concerns *only* the pretext of non-public (that is, private) use.") (emphasis in original).

The Second Circuit got the Public Use Clause wrong. Reaching the opposite conclusion of the Second Circuit, the Connecticut Supreme Court in *New England Estates* rejected the government's argument (the same one that the Town made below) that *Kelo* forbids pretextual, bad-faith takings unless a private benefit is alleged. 294 Conn. at 854 n.28. To believe that *Kelo* implicitly restricted pretextual takings to facts involving a private benefit would be to "interpret[] that decision overbroadly." *Ibid*. To the contrary, "there is no merit to the [government]'s claim that a violation of the public use requirement is limited to situations in which the government takes private property for a use that is not a public use." *Id.* at 854.

Judge Menashi thought that Connecticut's high court got it right. In *Kelo*, the "Supreme Court's mention of private benefits reflected the record before it. It cannot be read to sweep away the pre-existing body of federal or state law that other types of pretextual takings violate the public use requirement." App. 41a. "If the alleged illegitimate purpose in *Kelo* had not

been the bestowal of a private benefit but the obstruction of the owner's lawful use, then the trial court and the Connecticut Supreme Court [in *Kelo*] would have considered whether there was evidence of *that* impermissible purpose." *Ibid.*

Judge Menashi is correct. *Kelo* got a lot wrong[3] but one thing it did not disturb is that, under the Takings Clause, the public use must be the actual and legitimate purpose of a condemnation. The public must want and need the public use. The asserted public use cannot be a smokescreen for a nefarious true purpose. That is why this Court has repeatedly said that the government must act in good faith when it condemns property, and that the government's objectives must be legitimate. See *Haw. Hous. Auth.* v. *Midkiff*, 467 U.S. 229, 245 (1984) (approving the legislature's purpose as "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

[3] Members of this Court and commentators alike have called for *Kelo* to be overturned. See, *e.g.*, *Eychaner* v. *City of Chicago*, 141 S. Ct. 2422, 2423 (2021) (Thomas, J., joined by Gorsuch, J., dissenting in denial of cert.) ("[T]his petition provides us the opportunity to correct the mistake the Court made in *Kelo*."); Jordan Brewington, Note, *Dismantling the Master's House: Reparations on the American Plantation*, 130 Yale L.J. 2160, 2198 (2021) ("Subsequent judicial decisions and scholarly evaluation support the notion that *Kelo* effectively removed most constitutional limits on the 'public use' requirement of eminent domain power." (footnotes omitted)); Ilya Somin, *Putting* Kelo *in Perspective*, 48 Conn. L. Rev. 1551, 1551 (2016) ("Going forward, the best way to rectify *Kelo*'s errors is to overrule it completely, rather than rely on half-measures[.]").

scope of the constitution."); see also *United States* v. *Carmack*, 329 U.S. 230, 243 (1946) (suggesting that a bad-faith, capricious, or arbitrary taking would be set aside).[4] Review is necessary to correct the Second Circuit's misreading of *Kelo* and the Public Use Clause.

III. Correcting the Second Circuit's error is important.

The Second Circuit got the Public Use Clause wrong in a way that causes further damage to that provision and sets up sham parks as a surefire way to suppress lawful activity and other constitutional rights. What Justice Thomas wrote in dissent in *Kelo* could be said of the majority ruling below: "Today's decision is simply the latest in a string of our cases construing the Public Use Clause to be a virtual nullity." *Kelo*, 545 U.S. at 506 (Thomas, J., dissenting). The panel held that a "condemning authority * * * has 'a *complete defense*'" to a pretext claim as long as the taking is for a traditional public use like "creation of a public, open space[.]" App. 11a (emphasis added). In the Second Circuit's view, if the government is willing to pay for a park it does not genuinely want and lie

[4] Lower courts, too, have long agreed that takings can only be done for a good-faith, legitimate purpose. See, *e.g.*, *S. Pac. Land Co.* v. *United States*, 367 F.2d 161, 162 (9th Cir. 1966) (collecting cases); see also 1 Nichols on Eminent Domain § 1.11 (3d ed. 2024 update) ("[I]t should be pointed out that from the very beginning of the exercise of the [eminent-domain] power the concept of the 'public use' has been so inextricably related to a proper exercise of the power that such element must be considered as essential in any statement of its meaning.").

about its actual purpose, courts should not care what that actual purpose is.

A. The government's true purpose for taking property matters.

Courts should be as concerned about a malicious, bad-faith purpose for a taking as they are about such purposes in the context of other enumerated rights. Eminent domain is destructive, literally and figuratively. It bulldozes buildings and can bulldoze lives. That is why it has long been called the "despotic power." *E.g.*, *Vanhorne's Lessee* v. *Dorrance*, 2 U.S. (2 Dall.) 304, 311 (C.C.D. Pa. 1795) (Patterson, J.). For the words "public use" to constrain the despotic power, they must function as a meaningful check on abuse—a check the Second Circuit rejected.

The exercise of eminent domain can have dramatic effects that are not remedied by "just compensation" at fair market value. Discussing abuse of eminent domain against minority communities during the era of "urban renewal," Justice Thomas observed that "no compensation is possible for the subjective value of these lands to the individuals displaced and the indignity inflicted by uprooting them from their homes." *Kelo*, 545 U.S. at 521 (Thomas, J., dissenting). And both Justice Thomas and Justice O'Connor warned that the judiciary's failure to give teeth to the Public Use Clause results in losses that "fall disproportionately on poor communities" and other vulnerable demographics such as the elderly. *Ibid.*; see also *id.* at

505 (O'Connor, J., joined by Rehnquist, C.J., and Scalia and Thomas, JJ., dissenting).[5]

Without the Public Use Clause's substantive check on eminent-domain abuse, government can do things that this Court previously said were off limits, compounding injury to vulnerable groups. Consider two well-known decisions in which local government sought to drive out unwanted minorities by using local ordinances for a seemingly benign stated purpose while concealing an illegitimate actual purpose.

First, in *City of Cleburne* v. *Cleburne Living Center*, the local government denied a permit to "a group home" for the mentally handicapped for stated reasons such as being on a "five hundred year flood plain" and "the size of the home." 473 U.S. 432, 435, 450 (1985). This Court struck down the permit denial under the Equal Protection clause because the stated purposes were a pretext for an illegitimate purpose—"an irrational prejudice against the mentally [handicapped]." *Id*. at 450.

Second, in *Church of the Lukumi Babalu Aye* v. *City of Hialeah*, the local government passed an ordinance prohibiting animal cruelty that was "complian[t] with the requirement of facial neutrality" for the stated pretext of public health. 508 U.S. 520, 534

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[5] Empirical evidence confirms minorities, the poor, and other vulnerable groups are inordinately hurt by eminent-domain abuse. See, *e.g.*, *Kelo*, 545 U.S. at 522 (Thomas, J., dissenting) (collecting scholarship); Dick M. Carpenter II & John K. Ross, Institute for Justice, *Victimizing the Vulnerable: The Demographics of Eminent Domain Abuse* (2007).

(1993). The actual reason was that the "prospect of a Santeria church in their midst was distressing to many members of the Hialeah community" and the anti-cruelty ordinance was intended to prevent Santaria's ritual animal sacrifice. *Id.* at 526. The Court struck down the ordinance because the "Free Exercise clause protects against governmental hostility which is masked as well as overt." *Id.* at 534.

The Second Circuit has given cities like Cleburne and Hialeah a free pass as long as they use eminent domain for a sham park when they want to harm or banish unpopular minorities. Under the decision below, if Cleburne had seized the group home for a sham park, it would be irrelevant that the actual purpose was driving the mentally handicapped out of town. If Hialeah had seized the property of Santeria practitioners for a sham park, it would have been irrelevant that the actual purpose was driving a religious group out of town. Under the Second Circuit's unambiguous holding, those cities using eminent domain to create sham parks would have a "complete defense" because "[i]n this area, the Supreme Court wisely forecloses inquiry into whether a government actor had bad reasons for doing good things." App. 11a.

Indeed, at oral argument below, the Town "frankly acknowledged that, under its view of the public use requirement"—the interpretation now endorsed by the Second Circuit—the government could seize the homes of disfavored minorities "out of animus toward those minorities and a desire to drive them out * * * as long as the Town said it would build parks where the minorities' homes once stood." App. 55a (citing Oral Argument Audio Recording at 15:50 to 17:10).

To be sure, the Second Circuit suggested in dicta that one could challenge improper purposes with other kinds of constitutional claims. App. 21a ("[O]ther statutory and constitutional provisions *do* allow courts to examine allegedly invidious or discriminatory motivation." (emphasis in original)).

But the Takings Clause isn't a second-class citizen. As the Court recently made clear, 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*, 597 U.S. 1, 18 (2022). Property owners shouldn't have to rely on other constitutional provisions to challenge bad-faith takings. Forcing property owners to use other constitutional provisions to protect themselves from bad-faith takings would again "relegate[] the Takings Clause to the status of a poor relation among the provisions of the Bill of Rights." *Knick* v. *Twp. of Scott*, 588 U.S. 180, 189 (2019) (cleaned up).

Yet the Second Circuit's rely-on-other-constitutional-rights approach nullifies a whole category of Takings Clause claims simply because other constitutional claims might exist in some situations. That is not how constitutional claims work. Each claim stands on its own. "The proper question is not which Amendment controls but whether either Amendment is violated." *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 50 (1993).

For example, if the Town were using its eminent-domain power to take property from a religious group for the true purpose of stopping a church, synagogue,

or temple from being built, that would not be a "public use" because the public has no legitimate interest in violating the Free Exercise rights of religious minorities. So, yes, maybe the Second Circuit is right and that religious group would also have Free Exercise or Establishment Clause claims. But the existence of those claims does not cancel out the Takings Clause claim or mean that a sham-park taking for the actual purpose of naked religious discrimination would be a valid "public use" simply because a park would exist. To the contrary, when it comes to takings, the Takings Clause should be the primary protection. Cf. *County of Sacramento* v. *Lewis*, 523 U.S. 833, 843 (1998) (recognizing that multiple constitutional claims can be brought concerning the same conduct but the "standard appropriate" to the more "specific constitutional provision" governs (cleaned up)).

But even assuming courts will hear other kinds of claims about the actual purpose behind a taking, that may matter only when the plaintiff can invoke heightened scrutiny, such as for an equal-protection claim alleging discrimination against a suspect class like race (a strategy, incidentally, that did not seem to stop racially motivated urban renewal takings). The holding below still declares open season on everyone else, including vulnerable non-suspect classes such as the poor, the elderly, the sick, and the mentally handicapped (as in *Cleburne*). That's because under the Second Circuit's holding alleged violations of the Public Use Clause trigger only rational-basis review—even though the Clause protects the enumerated right that private property won't be taken except for a legitimate public use. See App. 11a. It surely

surprises no one to read in cases like *New England Estates* that the actual purpose of the sham taking was to fence out the poor by fencing out affordable housing.

The decision below also declares open season on hardworking, law-abiding Americans like the Brinkmanns. They want to open a hardware store as part of their family's American dream. They want to employ other hardworking people and provide valuable goods and services to the community. They bought property. They complied with all applicable laws—a formidable obstacle course that took years to run. Yet, in the end, after doing everything a responsible citizen should do, the Town vindictively took their property for a bogus park. That is not a public use. That is *despotism*.

The government cannot use its eminent-domain power to accomplish an illegitimate end like driving out politically unpopular businesspeople, the disabled, religious minorities, or anyone else who might fall afoul of the town fathers in a backroom meeting. The substantive constraint within the phrase "public use" stops the despotic power from being truly despotic, a last resort when someone won't play ball or a first resort when the powers that be don't want someone around at all. The state supreme courts that the Second Circuit is now in conflict with have long understood what the Public Use Clause actually means.

B. Identifying actual purposes is just as workable in the takings context as in other contexts because legitimate takings have an objective order of operations.

The Second Circuit rejected inquiry into the actual purpose of bad-faith takings for sham parks by reciting a laundry list of rationales for judicial inaction: "federalism," "separation of powers," "competence," "prudence," and the notion that looking at objective evidence of actual purpose invariably results only in a futile effort to "gauge the purity of motives." App. 10a. But the majority's blunt assertions, which are either thinly reasoned or not reasoned at all, are contradicted by the majority opinion itself and the whole of constitutional law.

An inquiry into actual purpose is entirely workable, something the majority straight-up concedes. The majority agreed that such an inquiry is proper where there is a plausible allegation of private benefit. App. 8a. In other words, if a Section 1983 plaintiff says, "Here is objective evidence that the town condemned my property for a sham park to stop me from building a hardware store, because the mayor's brother owns a hardware store," the majority below agreed that courts can inquire into whether the actual purpose of the park is to benefit the mayor's brother. But if a Section 1983 plaintiff says, as the Brinkmanns did, "Here is objective evidence that the town condemned my property for a sham park, because it wants to drive me out of town," the panel below seemed to think that ascertaining actual purpose is impossible. That makes no sense.

And identifying the actual purpose of a bad-faith taking isn't daunting because legitimate takings have a long-established order of operations. As demonstrated by centuries of eminent-domain history, step one is identifying a public use that the public needs and wants for its own sake. Step two is identifying possible locations and evaluating their viability across economic, environmental, recreational, and other dimensions. Step three, often required by state law, is negotiating with the property owner. Step four is condemnation.[6]

Step one for legitimate takings should never be what happened here—identify a legitimate and legal use of property that you want to stop (or lawful businesspeople who you want to drive out of town). And step two should never be what it was here—hastily sketch out the design for a bare-bones park on the back of a metaphorical envelope and then pretend that you want the park. There is a reason why sham takings are typically for "passive use park[s]," App. 92a, "open space buffers," or "playing fields." This is the cheapest kind of park, so it is what you do when you don't actually want a park.

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[6] For an illustration of the general process, see *United States* v. *Carmack*, 329 U.S. 230 (1946). Congress (and the Constitution) had identified the public need, the establishment of post offices. *Id.* at 239. Congress then designated certain officials "to use their best judgment in selecting post office sites" and then "acquire by condemnation the site[s] thus lawfully selected." *Id.* at 242. See also, *e.g.*, N.Y. Em. Dom. Proc. Law §§ 201–514 (mandating the steps for using eminent domain in the state).

Take the cases in which several state supreme courts rejected pretextual takings under the Takings Clause. The state high courts in those cases rejected the bad-faith takings based on objective evidence of irregularities by public officials, the lack of planning tied to the asserted public use, and, importantly, the timing of the decision to use eminent domain—the same type of evidence that the Brinkmanns allege exists here.

In *New England Estates*, for example, the town board of selectmen started the eminent-domain process three weeks after learning the property owners intended to build affordable housing; the board then—after starting the process to take the property—asked the town engineer to "prepare a 'sketch' of the property that depicted playing fields[.]" 294 Conn. at 826. Similarly, in *Pheasant Ridge*, the town voted, without following "its usual practices" or consulting the town agencies it "normally" consulted, to condemn a property after its owner applied for an affordable housing permit (under the state's "Anti-Snob Zoning Act"). 399 Mass. at 772–773, 778. Under these sorts of facts, the sort the Brinkmanns alleged and will develop on remand, identifying a sham taking is not difficult.

Indeed, it is typically so obvious that sham takings are shams that the government must nakedly lie about what it is doing and, in the Second Circuit, reviewing courts must now pretend to believe those obvious lies. As Judge Menashi's dissent pointed out, the "majority appears to recognize that preventing a landowner from lawfully using his own property is not

a valid public purpose." App. 24a.[7] "That," he explains, "is why the court's decision depends on the Town lying about its purpose." *Ibid.* "If the Town of Southold had—openly and honestly—explained that the reason it seized the Brinkmanns' property was to stop the owners from using their property in a lawful way, it would not be possible for the court to say that the taking was 'for a public amenity.'" *Ibid.* In *New England Estates*, the town brazenly argued to the Connecticut Supreme Court that it "did not violate the public use requirement by being dishonest about the reasons for which it took the land." 294 Conn. at 854. It is not hard to identify sham takings.

Furthermore, as Judge Menashi explained, there is no reason to believe that inquiring into actual purposes is impossible in the eminent-domain context when it is routine across the spectrum of constitutional claims. App. 26a. He identified religion cases, speech cases, equal protection cases. *Ibid.* Using objective evidence to identify actual purposes is normal. And it could not be otherwise. Our country would look very different if judges refused across the board to look at actual purposes and took the government's

[7] Implicit in the Second Circuit's decision is the notion that, because the Town has a general police power to enact and enforce zoning ordinances of general applicability (all of which the Brinkmanns satisfied), the Town can also use eminent domain as a tool of last resort for eliminating legal but unwanted uses like hardware stores. That assumption is wrong. Historically and doctrinally, the "question whether the State can take property using the power of eminent domain is * * * distinct from the question whether it can regulate property pursuant to the police power." *Kelo* v. *City of New London*, 545 U.S. 469, 519 (2005) (Thomas, J., dissenting).

asserted purpose at face value when laws impact race, political opinion, religious worship, firearms ownership, access to counsel, or the right to direct the upbringing of one's own children. There is no reason to believe, and the Second Circuit certainly did not supply one, that what is ordinary in every other context is unworkable for bad-faith takings.

IV. This case offers a clean, single-question vehicle.

This case is an ideal vehicle to resolve the narrow question presented—and only the question presented.

The case comes to the Court following a dismissal on a Rule 12(b)(6) motion for failure to state a claim. The panel below, both majority and the dissent, agreed that "[t]he complaint alleges facts sufficient to support a finding that the decision to create the park was a pretext for defeating the Brinkmanns' commercial use[.]" App. 3a, 23a. The "*only question* is whether the Takings Clause is violated when a property is taken for a public amenity as a pretext for defeating the owner's plans for another use." App. 3a (emphasis added).

That means there is no dispute that Petitioners stated a viable claim if the claim exists. This case thus offers the Court a distraction-free opportunity to address the purely legal question about the scope of pretextual takings prohibited by the Takings Clause. The petition should therefore be granted.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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JUNE 11, 2024

APPENDIX

TABLE OF APPENDICES

Appendix A

22-2722
Brinkmann v. Town of Southold, New York

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2022
Argued: May 3, 2023
Decided: March 13, 2024

No. 22-2722

BEN BRINKMANN, HANK BRINKMANN, MATTITUCK 12500 LLC.,

Plaintiffs-Appellants,

v.

TOWN OF SOUTHOLD, NEW YORK,

Defendant-Appellee.

Before: KEARSE, JACOBS, and MENASHI, Circuit Judges.

Plaintiffs appeal from the judgment of the United States District Court for the Eastern District of New York (DeArcy Hall, J.), which dismissed their

complaint alleging that the taking of their land for a public park was a pretextual and bad faith exercise of the Takings Clause of the Fifth Amendment and therefore unconstitutional, because the real motive was to prevent construction of the Plaintiffs' hardware store.

For the reasons below, we **AFFIRM.** Judge Menashi dissents in a separate opinion.

JEFFREY REDFERN (William Aronin, Institute for Justice, Arlington, VA; Arif Panju, Christen Mason Hebert, Institute for Justice, Austin, TX, on the brief), for Plaintiffs-Appellants.

BRIANNA WALSH (James M. Catterson, Danielle Stefanucci, Pillsbury Winthrop Shaw Pittman LLP, New York, NY, on the brief), for Defendant-Appellee.

DENNIS JACOBS, Circuit Judge:

The Defendant Town of Southold ("Southold" or the "Town") authorized the creation of a park on a parcel to be taken by eminent domain from Ben and Hank Brinkmann, who planned to build there a big-box hardware store with an 80-car parking lot. The complaint alleges facts sufficient to support a finding that the decision to create the park was a pretext for defeating the Brinkmanns' commercial use, and was made after varied objections and regulatory hurdles

that the Town interposed and that the Brinkmanns did or could surmount.

The Brinkmanns and their company Mattituck 12500 LLC (collectively, "Plaintiffs") appeal from a judgment of the United States District Court for the Eastern District of New York (DeArcy Hall, J.) dismissing the complaint under Fed. R. Civ. P. 12(b)(6). The only question is whether the Takings Clause is violated when a property is taken for a public amenity as a pretext for defeating the owner's plans for another use.

On appeal, Plaintiffs argue that the exercise of eminent domain violates the Takings Clause if that public use, though real, is pretextual. We conclude that when the taking is for a public purpose, courts do not inquire into alleged pretexts and motives. Since a park is a public amenity that serves a public purpose, we affirm.

I

Ben and Hank Brinkmann own a chain of hardware stores on Long Island. In 2016, they contracted to buy (through plaintiff Mattituck 12500 LLC) a parcel of land on which to expand that chain in a commercial hub of Southold, New York. In response to objections by some residents "about the impact that the proposed store would have on traffic at the intersection," J.A. at 77 (Compl. ¶ 39), the Brinkmanns funded a traffic study which found that the store would not cause traffic problems, and agreed to pay for improvements to the intersection that the Town

deemed necessary. The Town next demanded that the Brinkmanns fund a "Market and Municipal Impact Study," and apply for special permits. When the Brinkmanns undertook to comply, Southold unsuccessfully attempted to purchase the site before the Plaintiffs closed.

After closing, Southold imposed a six-month moratorium on building permits in a one-mile area centered on Plaintiffs' property and twice extended the moratorium despite the county government's finding that the moratorium lacked supportive evidence. In July 2020, Southold convened a public hearing to consider whether a park on the parcel would constitute a public use. Formal findings to that effect were made in September 2020, and acquisition was authorized for a "passive use park."

Plaintiffs brought a § 1983 challenge alleging a pretextual taking in violation of the Takings Clause of the Fifth Amendment. The district court denied the Plaintiffs' motion for a preliminary injunction and granted Southold's motion to dismiss.

Plaintiffs now appeal.

II

We review de novo a district court's grant of a motion to dismiss, "construe[ing] the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." Palin v. New York Times Co., 940 F.3d 804, 809 (2d Cir. 2019) (quoting Elias v. Rolling

Stone LLC, 872 F.3d 97, 104 (2d Cir. 2017)).

III

The Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." U.S. CONST., amend. V. There are only "two limitations on the sovereign's right to exercise eminent domain: the property taken must be for public use, and the owner must receive just compensation." Brody v. Vill. of Port Chester, 434 F.3d 121, 127 (2d Cir. 2005). The Plaintiffs, without contesting that a public park is a public use, allege that Southold is using the park as a cover for its true motive, which is to thwart the Brinkmanns' plan for a hardware store. According to Plaintiffs, under Kelo v. City of New London, 545 U.S. 469 (2005), "the Public Use Clause requires the government's stated objective to be genuine, and not a pretext for some other, illegitimate purpose." Appellants' Br. at 19.

But Kelo cannot support that reading; the Takings Clause is not an overarching prohibition against any and all purposes alleged to be "illegitimate." As we have previously observed, the Kelo opinion includes only "a passing reference to 'pretect' . . . in a single sentence." Goldstein v. Pataki, 516 F.3d 50, 61 (2d Cir. 2008). And the context of that sentence is a passage of Kelo describing the Takings Clause's parameters and its prohibition of takings for "private" purposes:

> Two polar propositions are perfectly clear. On the one hand, it has long been accepted that the sovereign may not take

> the property of *A* for the sole purpose of transferring it to another private party *B,* even though *A* is paid just compensation. On the other hand, it is equally clear that a [government] may transfer property from one private party to another if future "use by the public" is the purpose of the taking . . . .
>
> As for the first proposition, the [government] would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party. See [Hawaii Hous. Auth. v.] Midkiff, 467 U.S. [229,] 245 [(1984)] ("[a] purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void") . . . . Nor would the [government] be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit.

Kelo, 545 U.S. at 477–78 (internal citation and footnote omitted).

"Subject to specific constitutional limitations, when the legislature has" decided that something is a public use, "the public interest has been declared in terms well-nigh conclusive." Berman v. Parker, 348 U.S. 26, 32 (1954). Accordingly:

> In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia . . . or the States legislating concerning local affairs. . . . This principle admits of no exception merely because the power of eminent domain is involved. . . ."

Midkiff, 467 U.S. at 239–40 (quoting Berman, 348 U.S. at 32). Midkiff goes on to say:

> There is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use . . . . But the Court in Berman made clear that it is "an extremely narrow" one. [348 U.S.] at 32. The Court in Berman cited with approval the Court's decision in Old Dominion Co. v. United States, 269 U.S. 55, 66 (1925), which held that deference to the legislature's "public use" determination is required "until it is shown to involve an impossibility." . . . . [T]he Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use "unless the use be palpably without reasonable foundation." United States v. Gettysburg Electric R. Co., 160 U.S. 668, 680 (1896).
>
> . . . . [W]here the exercise of the eminent

> domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.

Midkiff, 467 U.S. at 240–41.

There can be no dispute that a public park, even an unimproved one, is a public use. Public parks have been recognized as a "public use" for more than a century. See, e.g., Shoemaker v. United States, 147 U.S. 282, 297, 13 S. Ct. 361, 390 (1893) ("The validity of the legislative acts erecting [public] parks, and providing for their cost, has been uniformly upheld."); Rindge Co. v. Los Angeles Cnty., 262 U.S. 700, 707–08 (1923) ("condemnation of lands for public parks is now universally recognized as a taking for public use").

While in some cases there may be plausible allegations that the exercise of eminent domain supposedly for a park had been pretext for an intention to use taken property for a different--and private--purpose, Plaintiffs' complaint does not allege that the Town meant to confer any such private benefit or intends to use the property for anything other than a public park. To the contrary, the complaint quotes the Town's Supervisor as stating, "I will never allow anything to be built on that property." J.A. at 24 (Compl. ¶ 75). Plaintiffs have not pointed to any Town purpose that violates the Takings Clause.

This Court's holding in Goldstein confirms that understanding. Goldstein involved a post-Kelo challenge to takings made to build a basketball stadium and

several high-rise apartment buildings in Downtown Brooklyn. Goldstein, 516 F.3d at 53. Plaintiffs' contention was "that the project's public benefits are serving as a 'pretext' that masks its actual raison d'être: enriching the private individual who proposed it and stands to profit most from its completion," id. at 52–53--and that "all of the 'public uses' the defendants have advanced for the Project are pretexts for a private taking that violates the Fifth Amendment," id. at 54. Rejecting that argument, this Court held 1) that the resulting economic development of Brooklyn was a public benefit, and 2) that "review of a legislature's public-use determination is limited such that where the exercise of the eminent domain power is rationally related to a conceivable public purpose, . . . the compensated taking of private property . . . is not proscribed by the Constitution." Id. at 58–59 (internal quotation marks omitted).

As Goldstein demonstrated, a pretext-based challenge to a taking has a "dubious jurisprudential pedigree." Goldstein, 516 F.3d at 62. Assessing the same lone sentence from Kelo on which the Brinkmanns attempt to build their hardware store, this Court "reject[ed] the notion that in a single sentence, the Kelo majority sought *sub silentio* to overrule Berman, Midkiff, and over a century of precedent[.]" Id. "We do not read Kelo's reference to 'pretext' as demanding, as the appellants would apparently have it, a full judicial inquiry into the subjective motivation of every official who supported the Project, an exercise as fraught with conceptual and practical difficulties as with

state-sovereignty and separation-of-power concerns." Id. at 63.

Thus it is demonstrated that judicial deference is justified by federalism, Kelo, 545 U.S. at 482 ("Our earliest cases [on the Public Use Clause] in particular embodied a strong theme of federalism[.]"); by separation of powers, Berman, 348 U.S. at 32 ("[T]he legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation[.]"); by competence, Midkiff, 467 U.S. at 244 ("[L]egislatures are better able to assess what public purposes should be advanced by an exercise of the taking power."); and by prudence, Kelo, 545 U.S. at 499 (O'Connor, J., dissenting) (it would be "unworkable" for courts to "decid[e] . . . what is and is not a governmental function" (quoting Midkiff, 467 U.S. at 240–41)).

A "pretext" limitation that invalidates a taking for a public park would undo this "longstanding policy of deference to legislative judgments in this field," id. at 478, 480, by inviting courts "in all cases to give close scrutiny to the mechanics of a taking rationally related to a classic public use as a means to gauge the purity of the motives of the various government officials who approved it," Goldstein, 516 F.3d at 62. Such motives are by nature fragmented--and rarely, if ever, pure. Different legislators may vote for a single measure with different goals. See, e.g., Edwards v. Aguillard, 482 U.S. 578, 636–37 (1987) (Scalia, J., dissenting) ("[W]hile it is possible to discern the objective 'purpose' of a statute . . . discerning the subjective motivation of [a legislative body] is, to be honest, almost

always an impossible task. The number of possible motivations, to begin with, is not binary, or indeed even finite."). So members of a town council who are hostile or indifferent to a hardware store or other commercial use may vote for a park (in whole or part) because they favor open space (there or elsewhere) for reasons of aesthetics, and for playgrounds, athletics, fresh air, dog-runs, and whatnot.

In this area, Supreme Court precedent wisely forecloses inquiry into whether a government actor had bad reasons for doing good things. A condemning authority, therefore, has "a complete defense to a public-use challenge" if, "viewed objectively, the Project bears at least a rational relationship to . . . well-established categories of public uses, among them . . . the creation of a public, open space[.]" Goldstein, 516 F.3d at 58–59.

IV

Plaintiffs point to a series of state and federal court decisions which purportedly endorse a generalized "pretext" limitation on the Takings power. They are undaunted by the fact that this limitation has never presented itself as the dispositive issue in either this Circuit or before the Supreme Court. The cases which supposedly suggest otherwise are uniformly inapposite: they are nearly all decided on the principle that has been articulated in some state courts--but is unknown to federal takings law--that instrumentalities of the states lack the power to act (variously) "in bad faith," or "arbitrarily and capriciously."

For example, in United States, Department of Interior v. 16.03 Acres of Land, More or Less, Located in Rutland County, Vermont, 26 F.3d 349 (2d Cir. 1994) ("Rutland County"), while we began by noting that "condemnation decisions by governmental entities to which Congress has delegated eminent domain authority are subject to judicial review," we explained that an inquiry at the outset is needed as to whether officials authorized to effect a taking for a public purpose have "acted outside the scope of their taking authority," id. at 355. Rather than suggesting that there is a generalized pretext limitation on takings, we emphasized that "a reviewing court may only set aside a takings decision as being arbitrary, capricious, or undertaken in bad faith in those instances where the court finds the [official's] conduct so egregious that *the taking at issue can serve no public use*." Id. at 356 (emphasis added). We thus applied the principle enunciated in Berman that the narrow role of the judiciary in a Takings Clause case is to determine whether the purpose was a "public use."

Plaintiffs also rely on a New Jersey rule that forbids takings "motivated by fraud, bad faith, or other manifest abuse of [a municipality's] accorded power of eminent domain." E. Windsor Mun. Utilities Auth. v. Shapiro, 270 A.2d 410, 411 (N.J. 1970). But that rule is actually derived from a state law doctrine which provides that "[s]o long as [a municipal] corporation operates within the orbit of its statutory authority, it is well established that the courts will not interfere with the manner in which it exercises its power in the absence of bad faith, fraud, corruption, manifest

oppression or palpable abuse of discretion[.]" City of Newark v. New Jersey Tpk. Auth., 81 A.2d 705, 707 (N.J. 1951). In other words, the kind of bad faith taking discussed in the New Jersey cases relied upon by the Plaintiffs are *void ab initio* acts that are beyond the municipality's statutory authority. Those cases do not concern the Fifth Amendment's Takings Clause. For example, in Borough of Essex Fells v. Kessler Institute for Rehabilitation, Inc.,673 A.2d 856 (N.J. Super. Ct. Law Div. 1995), the court included a citation to that clause of the federal Constitution along with its citation to the New Jersey Constitution, see id. at 860; but it cited no federal cases, and it referred only to having researched New Jersey and other state law cases, see id. at 861. As the court found, there were as of 1995 "no reported New Jersey decisions upholding a bad faith challenge to a public body's authority to condemn[.]" Id.

Further, the decision in Essex Fells did not represent application of a generalized prohibition of pretext. Rather, the court concluded that the plaintiff Borough had failed to show that its taking was for a public use. Although the Borough stated, in accordance with New Jersey's Eminent Domain Law, that "this property is needed for public use[,] specifically park land and recreational use," id. at 860 (internal quotation marks omitted), the court found that the Borough in fact "had *not* determined that it should proceed to condemn Kessler's land *for any authorized public purpose*," id. at 862 (emphasis added). There was ample basis in the record for this finding, including evidence that when the property had been part of

an approximately 15-acre parcel owned by a college and offered to the Borough, the Borough had opted to purchase only 2.53 acres, "stat[ing] that the [B]orough's need for any additional recreational space was [thereby] fully met"; that the Borough believed that it would "have some control over who purchased the balance of the subject property"; that the Borough had a "gentlemen's agreement" with the college to "sell the balance of the property 'to the right people'"; and that the "Borough officials were actively soliciting residential developers to acquire" "the balance of the property" "for development of single family residences"; according to the mayor, the Borough "had never wanted anything but single family housing at this site." Id. at 858, 861–62 (internal quotation marks omitted). This is the polar opposite of the acknowledgement in the Plaintiffs' complaint that Southold's Town Supervisor said he would "never allow anything to be built on th[e subject] property." J.A. at 24 (Compl. ¶ 75).

Rhode Island and Georgia likewise derive their prohibition on "bad faith" takings from similar doctrines of state law. (These cases are disposed of in the margin.[1])

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[1] **Rhode Island:** Rhode Island Economic Development Corp. v. The Parking Co., L.P., 892 A.2d 87 (R.I. 2006), speaks to whether a state "agency has exceeded its delegated authority by an arbitrary, capricious, or bad faith taking of private property," id. at 103 (internal quotation marks omitted) (citing Capital Properties, Inc. v. State, 749 A.2d 1069, 1086 (R.I. 1999) ("[A] showing that a [state] agency has exceeded its delegated authority by an

arbitrary, capricious or bad faith taking of private property is a matter properly cognizable by the judicial branch.")). True, the court goes on to say that "substantive due process" is in play "even when the [taking] is made through procedures that are in themselves constitutionally adequate.'" Id. at 104 (quoting Brunelle v. Town of South Kingstown, 700 A.2d 1075, 1084 (R.I. 1997)). But the case it cites for that proposition, Brunelle, itself relies on a hodgepodge of federal case law, most notably a Ninth Circuit case, Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398 (9th Cir. 1989), which took an exceedingly broad view of substantive due process generally, holding that it prohibits "arbitrary and capricious government action" in *any* context, id. at 1407, but which had been overruled by Armendariz v. Penman, 75 F.3d 1311, 1325-26 (9th Cir. 1996) (en banc)--a case that itself was later "undermined" in part, Crown Point Development, Inc. v. City of Sun Valley, 506 F.3d 851, 852–53 (9th Cir. 2007), by Supreme Court decisions, see id. at 854–56. See also Shannon v. Jones, 812 F. App'x 501, 503 (9th Cir. 2020) (describing Armendariz as "overruled in part . . . as recognized in Crown Point Dev[elopement]"). All this is to say that the Rhode Island case law is muddled both by state law on state agencies' authority to use the eminent domain power and by a reliance on vague and overbroad out-of-circuit authorities on substantive due process.

Georgia: Earth Management, Inc. v. Heard County, 283 S.E.2d 455 (Ga. 1981), invokes a bar on "bad faith" exercises of the eminent domain power in the context of municipalities' statutory inability to take *any* action in bad faith. Earth Management cites "[t]he most recent pronouncement of this court on the issue of bad faith," id. at 460, in City of Atlanta v. First National Bank of Atlanta, 271 S.E.2d 821 (Ga. 1980), a case which itself bases its holding on the premise that "[a] court should not interfere with an exercise of the discretion of a condemning authority determining the necessity of taking land for public purposes and selecting the location and amount of land reasonably necessary unless the condemning authority abused its discretion or exceeded its authority," id. at 822. For that proposition, City of Atlanta relies on authority from a 1908 holding that actions undertaken by municipal corporations "should not be interfered with

Other state cases relied on by the Plaintiffs invoke a rule against pretext without distinguishing between the Takings Clause of the Fifth Amendment and the state statutory analog. This conflation invites the misreading of the federal Takings Clause. For example, Plaintiffs cite Middletown Township v. Lands of Stone, 939 A.2d 331 (Pa. 2007), which offers dicta on the federal Takings Clause, but ultimately rests its decision on the far narrower ground that the township at issue was "authorized by statute to exercise eminent domain only for a single public purpose, that of recreation." Id. at 337. Thus, the court was obviously empowered to search the "true" purpose of the alleged taking because "[r]ecreational use must be the true purpose behind the taking or else the Township simply did not have the authority to act, and the taking was void ab initio." Id. at 337–38. Plaintiffs' cited Colorado case, City of Lafayette v. Town of Erie Urban Renewal Authority, 434 P.3d 746 (Colo. App. 2018), also has nothing to do with the Takings Clause: it interprets a Colorado statute granting the power of eminent domain to a condemning authority. That statute requires "the condemning entity to demonstrate, by a preponderance of the evidence, that the taking of private property is for a public use." Id. at

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or controlled by the courts, unless made in bad faith, or capriciously or wantonly injurious, or in some respect beyond the privilege conferred by statute or its charter." Piedmont Cotton Mills v. Georgia, Ry. & Elec. Co., 62 S.E. 52, 54 (Ga. 1908). The second Georgia case cited by Plaintiffs, Carroll County v. City of Bremen, 347 S.E.2d 598 (Ga. 1986), merely follows on from Earth Management. Under these cases, any issue as to bad faith was simply part of the inquiry into whether the taking was within the scope of statutory authority.

751 (quoting COLO. REV. STAT. ANN. § 38-1-101(2)(b)). At the risk of being obvious, where state takings are subject to statutes that prescribe uses and evidentiary standards, the courts have a role to play. But the scope of power to review comes from the standards set in the relevant statutes, not from the Takings Clause.

Finally, Plaintiffs rely on a single New York State trial court decision that was never appealed. In In re Hewlett Bay Park, 265 N.Y.S.2d 1006 (N.Y. Sup. Ct. 1966), the court rejected a pretextual taking and held that "when dealing with a legislative determination to condemn, it becomes especially important to scrutinize the purpose, for a proper purpose is the very essence of the right to condemn," id. at 1010. However, Hewlett Bay Park relied for that holding in part on Cuglar v. Power Authority of the State of New York, 163 N.Y.S.2d 902 (N.Y. Sup. Ct. 1957), which recognized the well-established principle that "appropriation of lands for public use is a legislative function, and the instrumentality in which it reposes such powers is the sole judge of the necessity, in lieu of any provision to the contrary,"[2] id. at 921.

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[2] Though the court in Cuglar acknowledges a single precedent to the contrary--Application of Port of New York Authority, 118 N.Y.S.2d 10 (N.Y. Sup. Ct. 1952)--application of that decision--like the majority of the state court cases Plaintiffs rely on--is based on state *statutory* grants of eminent domain powers to condemning authorities (in this case, the Port Authority) which in turn place limits on the condemning authority's ability to undertake "palpably unreasonable" condemnations, id. at 10–11 (citing, inter alia, Section 15, chapter 47, Laws of 1931, McK.

While federal courts--in dicta--have occasionally stated as a broad principle that takings will be upheld "in the absence of bad faith," see, e.g., United States v. 58.16 Acres of Land, More or Less In Clinton Cnty., State of Ill., 478 F.2d 1055, 1058 (7th Cir. 1973) (quoting United States v. Meyer, 113 F.2d 387, 392 (7th Cir. 1940)), no such "bad faith" rule has ever proved dispositive.[3] For example, the Seventh Circuit in 58.16 Acres of Land noted that it had "cited [cases] which hold that the courts are empowered to determine if the taking of private property is for a public use," and it issued a narrow ruling that, because "questions of bad faith, arbitrariness, and capriciousness, *all bearing upon the determination of public use*, ha[d] been raised by [landowners], the district court was required to resolve those questions," id. at 1059 (emphasis added). It did not announce a "bad faith" or "pretext" limitation on the power of eminent domain. Neither did the Ninth Circuit's decision in Southern Pacific Land Co. v. United States, 367 F.2d 161 (9th Cir. 1966), which merely stated in dicta that "the Supreme Court itself has declined to rule out the possibility of judicial review where the administrative decision to

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Unconsol. Laws, § 6485, Bridge and Tunnel Unification Act).

[3] The allusion to such a "bad faith" limitation appears to be purely aspirational. Most such references derive from Shoemaker. There, the Supreme Court cited approvingly to an older case which noted in dicta that "[i]t is to be assumed that the United States is *incapable of bad faith*" and that "the citizen may well confide in the ultimate justice of his government[]--the most generous, as it is the happiest and most powerful, on the earth." Shoemaker, 13 S. Ct.at 375 (emphasis added) (quoting Great Falls Manuf'g Co. v. Attorney General, 124 U.S. 581, 599 (1888)).

condemn a particular property or property interest is alleged to be arbitrary, capricious, or in bad faith," id. at 162 (discussing United States v. Carmack, 329 U.S. 230, 243–44 (1946)). That may have been so in 1966, but it is not so now. The Supreme Court's current pronouncement on "pretext" concerns *only* the pretext of non-public (that is, private) use. Kelo, 545 U.S. at 478. So long as the actual purpose for which the eminent domain power is exercised is a public one, there is no violation of the Takings Clause.

Of course, courts may intercede if an exercise of eminent domain runs afoul of some *other* constitutional or statutory provision which *does* permit an examination of motives, such as Title VII of the Civil Rights Act or the Equal Protection Clause. States--as well as Congress--are also free to place additional limitations on the power of their instrumentalities to exercise the power of eminent domain. And they may invite the courts to help police those limitations. But the Takings Clause itself includes no such limitations.

We have considered Plaintiffs' remaining arguments and find them to be unavailing.

* * *

The dissent endeavors to avoid or cloud our holding that a taking is permitted by the Takings Clause if the taking is for a public purpose--as a public park indisputably is. In so doing, the dissent commits two errors.

First, the dissent repeatedly conflates [i] the *purpose* for which the property was taken and is to be used--a public park--with [ii] the *motivation* for taking it. See, e.g., Dissent at 2 (". . . preventing an owner from lawfully using his own property is not a valid public purpose."). Thus the dissent treats the Takings Clause as an overarching prohibition against ulterior motives. See id. at 26. Such a doctrine would allow litigation to long delay and ultimately stifle the making of public infrastructure.

The dissent relies on an entirely off-point case, concerning the ripeness and validity (or not) of a *regulatory* taking claim, in which no compensation is paid. Sherman v. Town of Chester, 752 F.3d 554, 561–65 (2d Cir. 2014); see Dissent at 5. It, therefore, mattered a lot whether the town had "suffocat[ed] [plaintiff] with red tape to make sure he could never succeed in developing" his property without the town ever exercising the eminent domain power or paying just compensation. Sherman, 752 F.3d at 565. At the risk of being obvious, different factors may come into play if a taking is attempted without compensation. So, nothing in Sherman undermines the well-settled proposition that "where the *exercise of the eminent domain* power is rationally related to a conceivable public purpose," as it undeniably was in this case, "the Court has never held a *compensated* taking to be proscribed by the Public Use Clause." Midkiff, 467 U.S. at 241 (emphases added). The "longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat

cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' *and vice versa*." Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 323 (2002) (emphasis added) (footnote omitted).

As our opinion observes, other statutory and constitutional provisions *do* allow courts to examine allegedly invidious or discriminatory motivation. Op. at 21; Berman, 348 U.S. at 32 ("*Subject to specific constitutional limitations*, when the legislature has" decided that something is a public use, "the public interest has been declared in terms well-nigh conclusive." (emphasis added) (quoted in Op. at 6–7)). Nothing in this opinion inhibits the enforcement of laws that prohibit invidious discrimination based on race or religion, or allows a taking to achieve such discrimination. But courts do not need to search the motives of public officials who prefer a public park to an eyesore in the form of a large hardware store with the prospect of 80 vehicles at a time parked and circling.

Second, the dissent attempts to cloud the issue of public purpose by positing that other motives for creating the park render the park itself a "Fake Park." Dissent at 2. The dissent dilates on this point elsewhere by calling the 1.7-acre passive-use park an "empty field." Id. at 1. This evasion betrays an urbanite prejudice that a park must contain a tennis court or a statue or a merry-go-round. And that evasion is needed to promote the central error of the dissent, that the jostle of motives common to all legislation has

not produced a public amenity. The evasion is critical to the dissent because it is the public amenity that constitutes the public use for which the government can pay due compensation for private property.

So long as public land is open to the air and to the people, it is a park; and that, of all things, cannot be faked. The author of the dissent may come to 12500 Main Road, Mattituck, NY, and he may walk the park, breathe its air, or spread his picnic upon it. There is nothing Fake about it.

The judgment of the District Court is **AFFIRMED**.

Appendix A

22-2722
Brinkmann v. Town of Southold

MENASHI, *Circuit Judge*, dissenting:

The court emphasizes that "[p]ublic parks have been recognized as a 'public use' for more than a century" and that a court should not "substitute its judgment for a legislature's judgment as to what constitutes a public use." *Ante* at 7-8. But no one disputes that a public park would be a public use. The plaintiffs instead argue that the Town of Southold *does not want a public park*. The court admits that the plaintiffs are right. The court acknowledges that the complaint in this case "alleges facts sufficient to support a finding that the decision to create the park was a pretext for defeating the Brinkmanns' commercial use" of their own property and that the Town decided to seize the Brinkmanns' property for a park only "after varied objections and regulatory hurdles that the Town interposed and that the Brinkmanns did or could surmount." *Id.* at 2. In other words, the Town did not like what the owners were doing with their property, but the Town was unable to muster the political support to pass a zoning law or to deny a permit. So the Town of Southold grabbed the land for itself.

The court excuses this evasion of lawful procedures on the ground that the Town announced it would turn the property it took away from the owners into an empty field—or, in the Town's preferred

language, a "passive use park."[1] The Constitution has nothing to say, according to the court, "when a property is taken for a public amenity as a pretext for defeating the owner's plans for another use." *Ante* at 3.

That is incorrect. In my view, the Constitution contains no Fake Park Exception to the public use requirement of the Takings Clause. A taking of property must be "for public use," U.S. Const. amend. V—or at least for "a public purpose," *Kelo v. City of New London*, 545 U.S. 469, 478 (2005)—and thwarting the rightful owner's lawful use of his property is not a public purpose. I dissent.

I

The court appears to recognize that preventing an owner from lawfully using his own property is not a valid public purpose. That is why the court's decision depends on the Town lying about its purpose. If the Town of Southold had—openly and honestly—explained that the reason it seized the Brinkmanns' property was to stop the owners from using their property in a lawful way, it would not be possible for the court to say that the taking was "for a public amenity." *Ante* at 3. But because the Town has said it will put a park on the Brinkmanns' property—at least initially, as there is no requirement that the Town *maintain* the park for any length of time—the

[1] A "passive use park" is "a park with no significant facilities or improvements." J. App'x 29.

court says it does not care about the actual purpose of the taking. In this way, the court's decision grants governments virtually unlimited power over private property—as long as the governments are willing to act in bad faith.

The court defends this new doctrine on the ground of workability. It invokes Justice Scalia describing the difficulty of ascribing subjective motivations to a multimember legislature. *See id.* at 11 ("[D]iscerning the subjective motivation of [a legislative body] is, to be honest, almost always an impossible task.") (alteration in original) (quoting *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting)). In fact, Justice Scalia wrote that "it *is* possible to discern the objective 'purpose' of a statute (*i.e.*, the public good at which its provisions appear to be directed)" but "discerning the subjective motivation of *those enacting the statute* is, to be honest, almost always an impossible task." *Edwards*, 482 U.S. at 636 (Scalia, J., dissenting) (emphasis added). In this case, the Brinkmanns rely on allegations that the objective purpose behind the Town's decision to seize the property was interference with their lawful use, and the court even agrees that their allegations are plausible. "Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor," and that is true here. *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring). The allegations describe the outward conduct of the Town, and the record does not reflect any divergent motivations among

the relevant public officials. *See infra* Part IV.

Courts frequently examine the purpose of government action when evaluating constitutional claims. *See*, *e.g.*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."); *Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rts. Comm'n*, 584 U.S. 617, 638 (2018) (describing "the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint"); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) ("There are, of course, many ways of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct."); *Allen v. Milligan*, 599 U.S. 1, 11 (2023) ("The Fifteenth Amendment … prohibits States from acting with a 'racially discriminatory motivation' or an 'invidious purpose' to discriminate."); *National Pork Producers Council v. Ross*, 598 U.S. 356, 364 (2023) ("[U]nder this Court's dormant Commerce Clause decisions, no State may use its laws to discriminate *purposefully* against out-of-state economic interests.") (emphasis added); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 476 (1981) (Powell, J., concurring in part and dissenting in part) (contrasting "the *avowed* legislative purpose of the statute" with "the legislature's actual purpose"); *Batson v. Kentucky*, 476 U.S. 79, 99 (1986) (concluding that judicial inquiries into the purpose of peremptory challenges would not "create serious administrative difficulties"); *Turner Broad.*

Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994) ("[A] content-based purpose may be sufficient in certain circumstances to show that a regulation is content based."); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) ("[T]he First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion."); *Smith v. Doe*, 538 U.S. 84, 92 (2003) ("If the intention of the legislature was to impose punishment, that ends the inquiry.").[2]

In short, "[i]nquiring into legislative purpose … is a common feature of judicial review, so there is no reason to expect such an inquiry to prove unworkable only in this context."[3] The court even concedes that the Takings Clause, like these other constitutional provisions, *requires* an inquiry into the purpose behind the taking—at least sometimes. The court recognizes that a taking would be unlawful if "the exercise of eminent domain supposedly for a park had been pretext for an intention to use taken property for a different—and private—purpose," that is, for a purpose "to confer [a] private benefit." *Ante* at 8. In this way, the court recognizes that an inquiry into purpose is both workable and appropriate when considering *some* claims under the Takings Clause.

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[2] In reviewing agency action under the Administrative Procedure Act, moreover, courts determine "when an improper motive has influenced the decisionmaking process." Merrick B. Garland, *Deregulation and Judicial Review*, 98 Harv. L. Rev. 505, 556 (1985).

[3] Steven Menashi & Douglas H. Ginsburg, *Rational Basis with Economic Bite*, 8 NYU J.L. & Liberty 1055, 1101 (2014).

When we consider a claim of a regulatory taking under the Takings Clause, we similarly consider whether "[t]he Town's alleged conduct was unfair, unreasonable, and in bad faith." *Sherman v. Town of Chester*, 752 F.3d 554, 565 (2d Cir. 2014) (applying the *Penn Central* factors). In particular, we must determine whether "the Town singled out [the owner's] development, suffocating him with red tape to make sure he could never succeed in developing [his property]." *Id.*[4] That inquiry parallels the Brinkmanns' claim in this case that the alleged purpose behind the pretextual park is the bad faith intention to prevent the owner's lawful use. There is no justification for deciding that this familiar type of judicial inquiry is unworkable in this case.

II

We know that identifying such a bad faith purpose is workable because a large body of case law establishes that courts must invalidate a pretextual taking in just these circumstances.

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[4] *See also MHC Fin. Ltd. P'ship v. City of San Rafael*, No. 00-3785, 2006 WL 3507937, at *12 (N.D. Cal. Dec. 5, 2006) ("The final *Penn Central* factor—the character of the government action … depends on whether the property owner has been 'singled out' to bear a public burden, perhaps due to bad faith on the part of the government, or has been called upon to provide a public benefit rather than to avoid injury to other persons.") (citing *E. Enters. v. Apfel*, 524 U.S. 498, 537 (1998) (plurality opinion)), *rev'd in part*, 714 F.3d 1118 (9th Cir. 2013).

Appendix A

A

The court's decision today creates a split with the decisions of several state supreme courts. The Connecticut Supreme Court, for example, has said that "there is no merit" to the argument "that a violation of the public use requirement is limited to situations in which the government takes private property for a use that is not a public use." *New England Ests., LLC v. Town of Branford*, 294 Conn. 817, 854 (2010). Rather, "[i]t is well established … that a government actor's bad faith exercise of the power of eminent domain is a violation of the takings clause," and indeed "many state courts have found a violation of the takings clause on the basis of a bad faith exercise of the power of eminent domain." *Id.* (citing cases).

In *New England Estates*, the Connecticut Supreme Court considered a Takings Clause challenge involving circumstances similar to this case: the owner sought to build an affordable housing development on its property, but the town "was not receptive to an affordable housing development." *Id.* at 826. It seized the property, "claiming that its reasons for the taking were to investigate and to remediate any environmental contamination on the property, and for the possible development of playing fields, when in fact the town's real purpose was to prevent the proposed residential development of the property." *Id.* at 841. A jury agreed that "in taking the land, the town either acted in bad faith, taking the land for pretextual reasons, acted unreasonably, or

in an abuse of its power," and the Connecticut Supreme Court held that such a pretextual taking violates the public use requirement of the Takings Clause. *Id.* at 854.

The Georgia Supreme Court considered a case in which the property owner had sought to construct a hazardous waste facility and alleged that the condemnation of its property was "undertaken in bad faith and for the sole purpose of defeating the construction of the hazardous waste facility." *Earth Mgmt., Inc. v. Heard Cnty.*, 248 Ga. 442, 446 (1981). The Georgia Supreme Court acknowledged that the county's purported purpose—establishing a public park—was a public purpose and that "the court is in no position to second-guess Heard County as to the size and scope of a park for its people." *Id.* But the court went on to consider "whether the action of the county commissioner in condemning this parcel of land was taken for the purpose of building a public park or whether this was a mere subterfuge utilized in order to veil the real purpose of preventing the construction of a hazardous waste disposal facility." *Id.* at 446-47. The court concluded as follows:

> Even fully considering the evidence relied upon by Heard County, the inescapable conclusion is that although a public park is a legitimate public use for real estate, the appropriation of this land for that purpose was not the true reason for the institution of the condemnation proceeding here. We can only

> conclude that Heard County instituted the condemnation proceeding for the obvious purpose of preventing the land from being used as a hazardous waste facility. Such action is beyond the power conferred upon the county by law and amounts to bad faith.

Id. at 448. In a subsequent case, the Georgia Supreme Court similarly concluded that the evidence supported "the finding of the trial judge that the sole commissioner directed the filing of the condemnation not because of a need for a public safety training facility, but to block the City of Bremen's planned facility." *Carroll County v. City of Bremen*, 256 Ga. 281, 282 (1986). The Georgia Supreme Court invalidated the taking because "[t]he condemning authority of a county may not be used simply to block legitimate public activity." *Id.* And it explained that a government may not use eminent domain to avoid normal democratic procedures for regulating the use of property. *See id.* at 282-83 ("While there was nothing improper in the acts of the Commission in speaking out against the facility and in urging the public to express opposition to the state licensing authority, it was improper to use the condemnation authority to block the plant when other avenues failed.").

Other state courts have similarly invalidated pretextual takings in circumstances similar to this case. *See Middletown Township v. Lands of Stone*, 595 Pa. 607, 617 (2007) ("Recreational use must be the true purpose behind the taking or else the Township

simply did not have the authority to act, and the taking was void *ab initio*."); *R.I. Econ. Dev. Corp. v. Parking Co.*, 892 A.2d 87, 104 (R.I. 2006) ("[T]he condemnation … was inappropriate, motivated by a desire for increased revenue and was not undertaken for a legitimate public purpose."); *Essex Fells v. Kessler Inst. for Rehab.*, 673 A.2d 856, 860-61 (N.J. Super. 1995) (Fuentes, J.) (explaining that "the decision to condemn shall not be enforced where there has been a showing of improper motives, bad faith, or some other consideration amounting to a manifest abuse of the power of eminent domain" and specifically "where 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") (internal quotation marks omitted); *Pheasant Ridge Assocs. v. Town of Burlington*, 399 Mass. 771, 776 (1987) ("Bad faith in the use of the power of eminent domain is not limited to action taken solely to benefit private interests. It includes the use of the power of eminent domain solely for a reason that is not proper, although the stated public purpose or purposes for the taking are plainly valid ones."); *In re Hewlett Bay Park*, 265 N.Y.S.2d 1006, 1010 (N.Y. Sup. Ct. 1966) ("This court has come to the conclusion that the real purpose of this condemnation proceeding in larger part is not to use this property for something affirmative, so much as it is to prevent its use for something else which the village authorities regard as undesirable. Such is a perversion of the condemnation process.").

Still other state courts, even when allowing a taking, have reaffirmed the principle that a pretextual or bad faith taking is impermissible. *See, e.g.*, *Norwood v. Horney*, 110 Ohio St. 3d 353, 373-74 (2006) ("There can be no doubt that our role—though limited—is a critical one that requires vigilance in reviewing state actions for the necessary restraint, including review to ensure … that the state proceeds fairly and effectuates takings without bad faith, pretext, discrimination, or improper purpose."); *City of Las Vegas Downtown Redev. Agency v. Pappas*, 119 Nev. 429, 448 (2003) ("A property owner may raise, as an affirmative defense to the taking, that … the avowed public purpose is merely a pretext or used in bad faith.") (footnotes omitted).

B

The court quibbles that some of these cases applied a mixture of the federal Takings Clause and state law analogues. *See ante* at 13-19. There are three problems with this objection.

First, the longstanding body of law in the state courts undermines the argument that it is "impossible" for a court to determine whether "a government actor had bad reasons" for taking property—at least when the allegedly improper purpose is the prevention of the owner's lawful use (as opposed to the covert purpose to benefit a private party, which the court says it is perfectly capable of ferreting out). *Id.* at 11. To the extent that the court provides a rationale for its decision today, it is that courts must defer to a government's judgment because inquiring

into purpose would be unworkable. Yet the experience of the state courts shows that it is not.[5]

Second, the state courts adopted the prohibition on pretextual takings from the federal courts. In applying the principle, the Massachusetts Supreme Judicial Court observed that "the Federal courts have recognized the possibility that a condemnation may be arbitrary, capricious, or in bad faith." *Pheasant Ridge*, 399 Mass. at 776. And it was correct.

Our own court, for example, rejected a challenge to a federal condemnation because the condemnation was for "a legitimate public use" and could not be construed "as either arbitrary or capricious or an evidence of bad faith." *United States v. New York*, 160 F.2d 479, 481 (2d Cir. 1947).[6] The Supreme Court similarly said that a taking would be invalid "if the designated officials had acted in bad faith or so 'capriciously and arbitrarily' that their action was without adequate determining principle or was unreasoned." *United States v. Carmack*, 329 U.S. 230, 243 (1946).

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[5] *Cf.* Jeffrey S. Sutton, Who Decides?: States as Laboratories of Constitutional Experimentation 222 (2022) (arguing, in the context of administrative law, that "[t]he state experiences defeat some of the federal explanations for … continuing to embrace a broad deference model") (emphasis omitted).

[6] *See also Goldstein v. Pataki*, 516 F.3d 50, 63 (2d Cir. 2008) (recognizing "the possibility that a fact pattern may one day arise in which the circumstances of the approval process so greatly undermine the basic legitimacy of the outcome reached that a closer *objective* scrutiny of the justification being offered is required").

At least five other circuits have recognized the same prohibition on pretextual or bad faith takings. *See United States v. 101.88 Acres of Land*, 616 F.2d 762, 767 (5th Cir. 1980) ("The court may ask in this inquiry whether the authorized officials were acting in bad faith or arbitrarily or capriciously by condemning given land."); *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 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."); *S. Pac. Land Co. v. United States*, 367 F.2d 161, 162 (9th Cir. 1966) ("[T]he Supreme Court itself has declined to rule out the possibility of judicial review where the administrative decision to condemn a particular property or property interest is alleged to be arbitrary, capricious, or in bad faith. And various courts of appeal, including this one, have said that an exception to judicial non-reviewability exists in such circumstances.") (emphasis and citation omitted); *Wilson v. United States*, 350 F.2d 901, 907 (10th Cir. 1965) ("*In the absence of bad faith*, … if the use is a public one, the necessity for the desired property as a part thereof is not a question for judicial determination.") (emphasis added); *United States v. 64.88 Acres of Land*, 244 F.2d 534, 536 (3d Cir. 1957) ("It is well established that, *absent bad faith* which is not argued here, the government's determination and explicit assertion of the nature and extent of the estate to be taken are not judicially reviewable.") (emphasis added).

It is difficult to maintain that the "bad faith" limitation on the eminent domain power is a creature of state law when the state courts adopted the limitation from federal law.

Third, there is no reason to expect significant divergence between the federal Takings Clause and a state law analogue because both provisions codify a pre-existing common-law right. As the Georgia Supreme Court once explained, "the amended Constitution of the United States, which declares 'private property shall not be taken for public use without just compensation,' does not create or declare any *new principle of restriction*, either upon the legislation of the National or State governments, but simply recognised the existence of a great common law principle, founded in natural justice, especially applicable to all republican governments." *Young v. McKenzie*, 3 Ga. 31, 44 (1847).[7] The right was recognized in the Magna Carta,[8] and it was protected in

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[7] *See also Henry v. Dubuque & P.R. Co.*, 10 Iowa 540, 543-44 (1860) ("The plaintiff needed no constitutional declaration to protect him in the use and enjoyment of his property against any claim or demand of the company to appropriate the same to their use, or the use of the public. To be thus protected and thus secure in the possession of his property is a right inalienable, a right which a written constitution may recognize or declare, but which existed independently of and before such recognition, and which no government can destroy.").

[8] Magna Carta art. XXVIII ("No constable or other royal official shall take corn or other movable goods from any man without immediate payment, unless the seller voluntarily offers postponement of this."); *see also Young*, 3 Ga. at 44 (tracing the right "to *Magna Charta*, the learned commentaries of *Black-*

the colonies and the early republic before the ratification of the Bill of Rights.[9] When a constitutional provision was "understood to codify a pre-existing right, rather than to fashion a new one," its scope generally corresponds to those of "state analogues." *District of Columbia v. Heller*, 554 U.S. 570, 603, 626 (2008). The state analogues inform the meaning of the public use requirement. The alternative approach would treat the federal Takings Clause as an "odd outlier, protecting a right unknown in state constitutions or at English common law." *Id.* at 603.[10]

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stone on the common law, and the opinions of the distinguished jurists and eminent judges of our own country").

[9] *See* James W. Ely Jr., *"That Due Satisfaction May Be Made:" The Fifth Amendment and the Origins of the Compensation Principle*, 36 Am. J. Legal Hist. 1, 4 (1992) ("[B]oth colonial and post-Revolutionary practice, as well as constitutional theory, supported the compensation requirement."); William B. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 583 (1972) ("[C]ompensation was the regular practice in England and America, as far as we can tell, during the whole colonial period."); J.A.C. Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 Wis. L. Rev. 67, 71 (1931) ("[U]nder the banner of a 'higher law,' the courts declared themselves to be the guardians of the sanctity of vested rights in property against their appropriation for other than a public use or without just compensation."); *see also Norwood*, 110 Ohio St. 3d at 364 ("[A]lmost every state constitution eventually included provisions related to eminent-domain powers.").

[10] The court suggests that the state provisions are not sufficiently analogous, but the state cases apply the federal Takings Clause, a similarly worded state constitutional provision that imposes a public use requirement, or both. *See New England Ests.*, 294 Conn. at 853 (applying the Fifth Amendment); *Earth*

III

Despite the large body of state and federal law suggesting otherwise, the court announces that "courts do not inquire into alleged pretexts," *ante* at 3—again with the proviso that courts *do* inquire when the alleged pretext is conferring a private benefit, *id.* at 8. The court acknowledges that the Supreme Court and the federal circuit courts have previously said that bad faith takings violate the Takings Clause. *Id.* at 20-21 (citing *S. Pac. Land Co.*,

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Mgmt., 248 Ga. at 446 (applying state constitutional principle that "no private property shall be taken except for a public purpose"); *Middletown Township*, 595 Pa. at 617 (noting that the federal Takings Clause provides that "without a public purpose, there is no authority to take property from private owners," and that the Pennsylvania Supreme Court "has looked for the 'real or fundamental purpose' behind a taking"); *R.I. Econ. Dev.*, 892 A.2d at 96 (explaining that "both the United States Constitution and the Rhode Island Constitution" provide that "private property may be taken only for public uses"); *Essex Fells*, 673 A.2d at 860 (relying on both the federal Takings Clause and the state constitutional provision providing that "[p]rivate property shall not be taken for public use without just compensation") (quoting N.J. Const. art. I, ¶ 20); *Pheasant Ridge Assocs.*, 399 Mass. at 775-76 (relying on federal and state case law proscribing bad faith takings); *Hewlett Bay Park*, 265 N.Y.S.2d at 1007 (considering petition to set aside a taking "as not having been made in good faith nor for a public purpose as required by the Constitutions of the State of New York and of the United States of America"); *Norwood*, 110 Ohio St. 3d at 364 (discussing "the limitations of public use and compensation" in the federal and state constitutions); *Pappas*, 119 Nev. at 434 ("Both the United States and Nevada Constitutions allow the taking of private property for public use provided just compensation is paid to the private property owner.").

367 F.2d at 162; *Carmack*, 329 U.S. at 243-44). But the court decides that those cases have been overruled. "That may have been so in 1966, but it is not so now," the court says, because "[t]he Supreme Court's current pronouncement on 'pretext' concerns only the pretext of non-public (that is, private) use." *Id.* at 21 (citing *Kelo*, 545 U.S. at 478). In fact, neither *Kelo* nor our court's decision in *Goldstein* discarded the longstanding prohibition on pretextual, bad faith takings.

A

In *Kelo*, the Supreme Court stated that a government is not "allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." *Kelo*, 545 U.S. at 478. Today's decision interprets this statement to mean that the *only* impermissible pretext is bestowing a private benefit. But *Kelo* addressed the issue of a private benefit because the taking at issue in that case involved the transfer of property "from one private party to another." *Id.* at 477. The petitioners argued that the actual purpose of the taking was to bestow a private benefit.

The trial court explained that "[w]here the purpose … is economic development and that development is to be carried out by private parties or private parties will be benefited, the court must decide if the stated public purpose—economic advantage to a city sorely in need of it—is only incidental to the benefits that will be conf[err]ed on private parties of a development plan." *Kelo v. City of New London*, No.

557299, 2002 WL 500238, at *36 (Conn. Super. Ct. Mar. 13, 2002). And the trial court "conducted a careful and extensive inquiry" in which:

> [t]he trial court considered testimony from government officials and corporate officers, documentary evidence of communications between these parties, respondents' awareness of New London's depressed economic condition and evidence corroborating the validity of this concern, the substantial commitment of public funds by the State to the development project before most of the private beneficiaries were known, evidence that respondents reviewed a variety of development plans and chose a private developer from a group of applicants rather than picking out a particular transferee beforehand, and the fact that the other private beneficiaries of the project are still unknown because the office space proposed to be built has not yet been rented.

Kelo, 545 U.S. at 491-92 (Kennedy, J., concurring) (citations omitted). The trial court "concluded, based on these findings, that benefiting [the private party] was not 'the primary motivation or effect of this development plan,'" *id.* at 492, and the Supreme Court agreed, *see id.* at 478 (majority opinion) ("The trial judge and all the members of the Supreme Court of

Connecticut agreed that there was no evidence of an illegitimate purpose in this case.").

If the alleged illegitimate purpose in *Kelo* had not been the bestowal of a private benefit but the obstruction of the owner's lawful use, then the trial court and the Connecticut Supreme Court would have considered whether there was evidence of *that* impermissible purpose. We know that because the Connecticut Supreme Court has specifically held that the public use requirement of the federal Takings Clause is not "limited to situations in which the government takes private property for a use that is not a public use" but is violated when a government "either acted in bad faith, taking the land for pretextual reasons, acted unreasonably, or in an abuse of its power." *New England Ests.*, 294 Conn. at 854. In particular, a municipal government "violate[s] the public use requirement by being dishonest about the reasons for which it took the land" because "[i]t is well established … that a government actor's bad faith exercise of the power of eminent domain is a violation of the takings clause." *Id.*

The Supreme Court's specific mention of private benefits reflected the record before it.[11] It cannot be read to sweep away the pre-existing body of federal or state law that other types of pretextual takings violate the public use requirement. Certainly, the Connecticut Supreme Court does not understand *Kelo* to have done that:

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[11] *See Goldstein*, 516 F.3d at 61 ("[T]he Supreme Court's guidance in *Kelo* need not be interpreted in a vacuum.").

> [R]eliance on *Kelo v. New London* 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, interprets that decision overbroadly. *Kelo* did not involve any allegations that the city of New London acted in bad faith in taking private property. Therefore, the issue of whether a bad faith taking would violate the public use requirement was not before the court.

New England Ests., 294 Conn. at 854 n.28 (citations omitted).[12] In short, that sentence from *Kelo* cannot bear the weight the court puts on it.

B

The court puts additional weight on *Goldstein*, suggesting that our court has discarded earlier case law prohibiting bad faith takings.[13] In fact,

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[12] See also *New England Ests.*, 294 Conn. at 854 ("Although the United States Supreme Court has not yet addressed this issue directly, we agree with those jurisdictions concluding that the public use clause should not be interpreted so narrowly. Indeed, many state courts have found a violation of the takings clause on the basis of a bad faith exercise of the power of eminent domain.").

[13] *But see Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of [the Supreme Court] has direct application in a case, … the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); *Jones v. Cough-*

Goldstein does not do that either.

Goldstein involved a claim similar to *Kelo*: property was condemned for an economic development project, and the owners alleged that the government's "claims of public benefit are a pretext to justify a private taking," Brief for Plaintiffs-Appellants at 14, *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008) (No. 07-2537), 2007 WL 6158382, concealing the actual purpose to "enrich[] the private individual who proposed [the project] and stands to profit most from its completion," 516 F.3d at 53.

If the allegations had been plausible, there is no question that the property owners would have stated a claim. Even today's decision acknowledges that a property owner would survive a motion to dismiss based on plausible allegations that the actual purpose of a taking was to confer a private benefit. Thus, we affirmed the dismissal of the complaint not because pretextual takings are permissible but because the allegations of pretext were "conclusory." *Id.* at 56, 63. The owners "failed to allege … any specific illustration of improper dealings between [the private developer] and the pertinent government officials," even though the claim of pretext depended on showing that the officials aimed to benefit the developer. *Id.* at 64. We declined to allow "such a claim to go forward, founded on mere suspicion." *Id.* at 62.

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lin, 45 F.3d 677, 679 (2d Cir. 1995) ("A decision of a panel of this Court is binding unless and until it is overruled by the Court *en banc* or by the Supreme Court.").

In *Goldstein*, "even if Plaintiffs could prove every allegation in the Amended Complaint, a reasonable juror would not be able to conclude that the public purposes offered in support of the Project were 'mere pretexts' within the meaning of *Kelo*." *Id.* at 55 (alteration omitted) (quoting *Goldstein v. Pataki*, 488 F. Supp. 2d 254, 288 (E.D.N.Y. 2007)). That case does not resemble this one, in which our panel unanimously agrees that "[t]he complaint alleges facts sufficient to support a finding that the decision to create the park was a pretext." *Ante* at 2.

The court relies heavily on a sentence from *Goldstein* to the effect that "review of a legislature's public-use determination is limited such that where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the compensated taking of private property is not proscribed by the Constitution." *Id.* at 9 (alterations omitted) (quoting *Goldstein*, 516 F.3d at 58). Here is that sentence in context:

> The Supreme Court has therefore instructed lower courts not to "substitute [their] judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'" *To that end*, we have said that our review of a legislature's public-use determination is limited such that "'where the exercise of the eminent domain power is rationally related to a conceivable public purpose,' ...

> the compensated taking of private property for urban renewal or community redevelopment is not proscribed by the Constitution."

Goldstein, 516 F.3d at 58 (emphasis added) (citations omitted). The context shows that judicial deference to the legislature is appropriate with respect to "what constitutes a public use," not with respect to the distinct question of whether the purported public use was genuine or pretextual. In this case, no one disputes that a park would be a public use if it were the Town's actual purpose.

Moreover, it is worth emphasizing—as Justice Kennedy did in *Kelo*—that "[t]he determination that a rational-basis standard of review is appropriate" does not "alter the fact" that pretextual takings "are forbidden by the Public Use Clause." *Kelo*, 545 U.S. at 490 (Kennedy, J., concurring). Thus, "[a] court applying rational-basis review under the Public Use Clause should strike down a taking" shown to be pretextual, "just as a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications." *Id.* at 491 (citing *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446-47, 450 (1985); *Dep't of Agric. v. Moreno*, 413 U.S. 528, 533-36 (1973)). In this way, the *Kelo-Goldstein* standard still means that "[a] court confronted with a plausible accusation" of an impermissible pretextual taking "should

treat the objection as a serious one and review the record to see if it has merit" and should conduct "a careful and extensive inquiry." *Id.*

Subsequent to *Kelo* and *Goldstein*, a district court in our circuit considered allegations of a pretextual, bad faith taking that did not involve the transfer of a private benefit. In *Wellswood Columbia, LLC v. Town of Hebron*, the plaintiffs alleged that the actual "purpose of the defendant Town of Hebron's actions in taking the Plaintiffs' property was to interfere with the Plaintiffs' lawful and economically productive use and development of the Property." No. 10-CV-01467, 2013 WL 5435532, at *3 (D. Conn. Sept. 30, 2013). The district court, relying on *New England Estates*, explained that "if Plaintiff has indeed pled a distinct bad faith takings claim pursuant to the public use requirement of the Fifth Amendment, such a claim is properly before this court." *Id.* at *2. If *Kelo* or *Goldstein* overruled the longstanding prohibition on bad faith takings, that would be news to several courts.[14]

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[14] *See, e.g., Roxul USA, Inc. v. Bd. of Educ.*, No. 19-CV-54, 2019 WL 2016866, at *3 (N.D. W. Va. May 7, 2019) ("[T]he Fifth Amendment presupposes that the state acted in pursuit of a valid purpose. Although the Court agreed that the BOE's *claimed* reason for the taking would constitute a public use—as the BOE stated it intended to build a school facility to meet the community's educational needs—the Court found that the BOE's actions lacked any legitimate government interest, were motivated by animus, and were arbitrary, capricious, and in bad faith.") (emphasis added); *United States v. 5.0 Acres of Land*, No. 04-C-4325, 2008 WL 4450315, at *4 (N.D. Ill. Sept.

IV

How plausible were the allegations of pretext in this case? "We review a district court's grant of a motion to dismiss *de novo*, accepting as true all factual claims in the complaint and drawing all reasonable inferences in the plaintiff's favor." *Altimeo Asset Mgmt. v. Qihoo 360 Tech. Co.*, 19 F.4th 145, 147 (2d Cir. 2021) (quoting *Henry v. County of Nassau*, 6 F.4th 324, 328 (2d Cir. 2021)).

A

In order to build a hardware store on their property in Southold, the Brinkmanns sought to comply with the requirements of the Town. In May 2017, the Brinkmanns met with the Southold Town Planning Department to convey their plan for the vacant lot. S. App'x 2. The Brinkmanns then had two meetings, in July and September 2017, with the Mattituck-Laurel Civic Association. J. App'x 17. At the September meeting, some residents expressed concerns about traffic, and the Brinkmanns volunteered to pay for

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30, 2008) ("[T]he Supreme Court has not ruled out the possibility of judicial review where the administrative decision to condemn a particular property or property interest is alleged to be arbitrary, capricious, or in bad faith. Seventh Circuit caselaw recognizes that an exception exists to the general powerlessness of courts to review eminent domain takings in circumstances of bad faith or abuse of discretion. It has stated that when 'questions of bad faith, arbitrariness, and capriciousness [have been raised], the district court [is] required to resolve those questions.'") (citations omitted) (quoting *58.16 Acres of Land*, 478 F.2d at 1059) (citing *Carmack*, 329 U.S. at 243-44; *United States v. Meyer*, 113 F.2d 387, 392 (7th Cir. 1940)).

traffic studies. *Id.* at 17-18.[15] The Brinkmanns had additional discussions about the plan with the Town Planning Department—and made two separate rounds of revisions based on those discussions—before submitting a formal application to build the hardware store to the Town Building Department. J. App'x 18. Nonetheless, the Building Department ultimately denied their formal permit application on the ground that the Planning Department had not formally approved the site plan. *Id.* at 18-19. In 2018, the Brinkmanns' architects completed their designs, complying with the Planning Department's request that the Brinkmanns' proposed buildings abut the main road and provide space for parking in the back; the Brinkmanns and their architects then met with the Planning Department for a preliminary meeting and submitted the application for site-plan approval. *Id.* at 19.

Meanwhile, the Town imposed additional requirements. In June 2018, the Town informed the Brinkmanns that they needed to obtain a Special Exception Permit, which involved a $1,000 fee, and a Market and Municipal Impact Study ("Study") at a cost later determined to be $30,000. *Id.*; S. App'x 3. Only after the sixteen-month back-and-forth with the Brinkmanns over the proposed hardware store did the Town Board, in September 2018, first vote to purchase the Brinkmanns' property for the purpose of stopping the construction of the hardware store. J.

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[15] The traffic study was completed in 2020 and concluded that the Brinkmanns' proposal would not create a traffic problem. J. App'x 18.

App'x 22. The Town also tried intimidation. In October 2018, Scott Russell, the Town Supervisor, called the president of the Bridgehampton National Bank to pressure him not to sell the property to the Brinkmanns—despite the Bank's contractual obligation to complete the sale—and instead to sell it to the Town. *Id.* at 24. After this pressure failed, Assistant Town Attorney Donna Hagen called the Bank's attorney to pressure the Bank not to sell to the Brinkmanns. *Id.*

After its efforts to intimidate the Bank failed, the Town contrived additional regulatory hurdles, even after the Brinkmanns complied with the Town's demand for $30,000 for the Study in January 2019. *Id.* at 25. Just six weeks later, in February 2019, the Town enacted a six-month building permit moratorium on a one-mile stretch of road that covered the Brinkmanns' property. *Id.* During this six-week period, the Town did not begin work on the Study, which it was required to conduct within 90 days of receiving the application. *Id.* at 25-26; *see* Town of Southold City Code § 280-45(B)(10)(b). The Town twice extended the six-month building moratorium in August 2019 and July 2020 even though, at both times, Suffolk County recommended that the Town disapprove the extensions because no evidentiary support justified the moratorium. *Id.* at 26-27. The moratorium was not strictly enforced—at least for other properties. *Id.* at 27-28. Despite the small size of the area subject to the moratorium, the Town granted at least three waivers for other properties

while it was in effect—suggesting that the moratorium targeted one particular property. *Id.* at 27-28.

The Brinkmanns plausibly allege that the Town sought to stop construction of their hardware store.

B

The Brinkmanns also plausibly allege that the Town's stated purpose of a public park was pretextual. The Town expressed no interest in acquiring the property for a park in 2011 when the property was up for sale or during the five years that the property sat vacant under the Bank's ownership. *Id.* at 15-16. Throughout the Brinkmanns' discussions with the Town, no one communicated to the Brinkmanns any interest in placing a park on the property. No one mentioned such an interest during the meeting with the Civic Association, *id.* at 18; in communications with the Town Building Department, *id.* at 19; or when the Town required the Brinkmanns to pay $30,000 for the Market and Municipal Impact Study, *id.* at 20. At the time the Town Board voted to purchase the property from the Brinkmanns, it was clear that the Town was not proposing the purchase for the purpose of constructing a park because at that time the Town had not:

> engaged in any planning for a public park on the property; had not tasked any Town committee with evaluating the possibility of a new public park on the property; had not tasked any Town planning staff with evaluating the pos-

> sibility of a new public 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 public 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 public park; had not held any public hearings about creating a new public park on the property; had not retained any outside consultants to evaluate the property as a location for a new public 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.

Id. at 22-23. When he attempted to pressure the Bank in 2018 to sell the property to the Town rather than to the Brinkmanns, the town supervisor never mentioned a goal of building a park on the property, instead saying, "I will never allow anything to be built on that property." *Id.* at 24.[16] Moreover, at the

[16] The court cites this statement as evidence that the Town had no impermissible purpose in seizing the property, *see ante* at 8,

time the Brinkmanns filed their complaint, there was an undeveloped plot next to the Brinkmanns' property that the Town could have turned into a park but never expressed any interest in acquiring. J. App'x 23-24.

Sarah E. Nappa, a member of the Southold Town Board, published an op-ed in the local newspaper entitled "Eminent domain decision sets dangerous precedent," describing why she voted against seizing the property.[17] In the op-ed, she never even suggests anyone wanted a park at the location.[18] Instead, she acknowledges that the decision was based on the Town's opposition to the hardware store. Because "[a] comprehensive [Town] plan has been languishing for over 10 years, and although it is finally completed and adopted, it is still not implemented," she writes, "I completely understand and see the desperation that the members of this community have and feel that this drastic action is the only thing they have left." However, she objects to using eminent domain "simply because this administration couldn't get its act together" to amend the town code through lawful procedures. "[T]his is privately

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but the statement evidences (1) the Town's purpose to obstruct the Brinkmanns' lawful use of the property and (2) the lack of a plan to build a park, the ostensible public use.

[17] Sarah Nappa, *Guest Column: Eminent Domain Decision Sets a Dangerous Precedent*, Suffolk Times (Sept. 19, 2020), *available at* https://perma.cc/7YD2XQ4X. The column is quoted in the complaint. *See* J. App'x 29-30; *see also id.* at 1097 (noting Nappa's vote against the seizure).

[18] *See* Nappa, *supra* note 17.

owned land that the owners purchased with certain legal rights intact. They are not asking for anything beyond what the town code allows," Nappa writes. "If this town wants to prevent a certain size of business or not allow certain types of businesses in a certain zone, it needs to be written in the code." But instead of passing such a law, the Town seized the Brinkmanns' property to prevent their lawful use of it:

> 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 a dangerous precedent to set.[19]

There is no real dispute that the park was a pretext.

C

Taken together, the allegations establish a violation of the public use requirement of the Takings Clause. The Brinkmanns plausibly allege "a fact pattern … in which the circumstances of the approval process so greatly undermine the basic legitimacy of the outcome that a closer *objective* scrutiny of the justifications being offered is required." *Goldstein*,

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[19] *Id.*

516 F.3d at 63. In particular, the Brinkmanns plausibly allege that the Town's stated "purpose of building a public park … was a mere subterfuge utilized in order to veil the real purpose" of preventing the owner's lawful use of the property. *Earth Mgmt.*, 248 Ga. at 447. Under the Takings Clause, towns are not "allowed to take property under the mere pretext of a public purpose," *Kelo*, 545 U.S. at 478, and the avowed public purpose "must be the true purpose behind the taking," *Middletown Township*, 595 Pa. at 617. This is because "where 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," *Essex Fells*, 673 A.2d at 861. The complaint plausibly alleges that the actual purpose of the Town in seizing the property was to prevent the owners from building a hardware store on the property, which the local laws and regulations allowed them to do. When "the real purpose of [a] condemnation proceeding" is "to prevent [the property's] use for something else which the village authorities regard as undesirable," it "is a perversion of the condemnation process." *Hewlett Bay Park*, 265 N.Y.S.2d at 1010. "The condemning authority of a county may not be used simply to block legitimate public activity." *Carroll County*, 256 Ga. at 282.

Under these circumstances, "the designated officials … acted in bad faith." *Carmack*, 329 U.S. at 243. "Bad faith … includes the use of the power of eminent domain solely for a reason that is not proper, although the stated public purpose or purposes

for the taking are plainly valid ones." *Pheasant Ridge Assocs.*, 399 Mass. at 776. We have said that a taking is invalid when there is "evidence of bad faith." *New York*, 160 F.2d at 481. The "well established" rule is "that a government actor's bad faith exercise of the power of eminent domain is a violation of the takings clause," *New England Ests.*, 294 Conn. at 854, which requires the government to "effectuate[] takings without bad faith, pretext, discrimination, or improper purpose," *Norwood*, 110 Ohio St. 3d at 374. Because the complaint plausibly alleges that the Town of Southold seized property in bad faith for an improper purpose, it should survive a motion to dismiss.

* * *

"If ever there were justification for intrusive judicial review of constitutional provisions that protect 'discrete and insular minorities,' surely that principle would apply with great force to the powerless groups and individuals the Public Use Clause protects." *Kelo*, 545 U.S. at 521-22 (Thomas, J., dissenting) (citation omitted) (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 152, n.4 (1938)). During oral argument in this appeal, the Town frankly acknowledged that, under its view of the public use requirement, the Town could seize the homes of disfavored minorities—out of animus toward those minorities and a desire to drive them out of Southold—as long as the Town said it would build parks where the minorities' homes once stood.[20] Political majorities ex-

[20] Oral Argument Audio Recording at 15:50 to 17:10.

press animus toward all sorts of disfavored minorities, so I do not share the court's confidence that such an abuse of the eminent domain power would be redressable through "some *other* constitutional or statutory provision." *Ante* at 21. I would instead enforce the public use requirement of the Takings Clause.

The court's decision today demonstrates that even if one might think that prior cases have "constru[ed] the Public Use Clause to be a virtual nullity," *Kelo*, 545 U.S. at 506 (Thomas, J., dissenting), it is possible to erode it further still. I would adhere to precedent providing that a pretextual, bad faith taking violates the public use requirement. Because the Brinkmanns plausibly allege that the Town effected the taking in bad faith for the impermissible purpose of thwarting the owners' lawful use of their property, I would reverse the judgment of the district court and allow their claim to proceed. Accordingly, I dissent.

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BEN BRINKMANN, HANK BRINKMANN, and MATTITUCK 12500 LLC., Plaintiffs, v. TOWN OF SOUTHOLD, NEW YORK, Defendant.	**MEMORANDUM AND ORDER** 21-CV-2468 (LDH)

LASHANN DEARCY HALL, United States District Judge:

Ben Brinkmann, Hank Brinkmann, and Mattituck 12500 LLC ("Plaintiffs") bring this action against the Town of Southold, New York ("Defendant") pursuant to 42 U.S.C. § 1983 alleging a "pretextual taking" in violation of the Takings Clause of the Fifth Amendment of the United States Constitution. Defendant moves pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the complaint in its entirety.

Appendix B

BACKGROUND[1]

Ben and Hank Brinkmann are brothers who, along with their sister, Mary Brinkmann, run a chain of four midsize hardware stores in Long Island. (Compl. ¶¶ 15–19, ECF No. 1.) In 2011, Plaintiffs set their sights on a vacant lot in Southold, New York, for expansion of their business, but Bridgehampton National Bank purchased the lot before Plaintiffs could purchase it. (*Id.* ¶¶ 23–25.) On December 2, 2016, after declining to develop the property, the bank contracted with Plaintiffs to sell the lot for $700,000. (*Id.* ¶ 28.) The purchase contract included a due diligence provision to allow Plaintiffs to ensure that they could develop the lot prior to finalizing the purchase, so Plaintiffs immediately began planning. (*Id.* ¶ 30–31.) Plaintiffs allege, however, that Defendant thwarted their efforts at every turn.

After agreeing to buy out a local Southold hardware store and engaging an architect to draw up site plans that would match the surrounding neighborhood design aesthetic, Plaintiffs met with the Southold Town Planning Department in May 2017 to discuss their plans. (*Id.* ¶ 32–35.) In September 2017, Plaintiffs held a public meeting with the Mattituck-Laurel Civic Association attended by Southold Town Supervisor Scott Russell and "at least two councilmembers." (*Id.* ¶¶ 37–39.) At the

[1] The following facts are taken from the complaint and are assumed to be true for the purpose of this memorandum and order.

public meeting, residents expressed concern about traffic near the proposed store. (*Id.* ¶ 40.) Supervisor Russell summarized the concerns after the meeting, noting that increased traffic was a problem for all applicants in the property area. (*Id.* ¶ 41.) Plaintiffs promised to pay for any intersection improvements deemed necessary by traffic studies. (*Id.* ¶ 40.) A traffic study conducted in September 2020 revealed that the proposed store would cause no traffic problems. (*Id.* ¶ 42.)

In January 2018, after twice revising their site plans based on meetings with the Town Planning Department, Plaintiffs filed their first permit application with the Town Building Department. (*Id.* ¶¶ 45–46.) The application was denied in March 2018 because the Town Planning Department did not approve the site plan. (*Id.* ¶ 47.) In May 2018, after revising the site plan for the third time, Plaintiffs again applied for site-plan approval. (*Id.* ¶¶ 50–51.) The following month, Defendant notified Plaintiffs that their plan required a special exception permit because the planned store was more than 6,000 square feet. (*Id.* ¶ 52.) Plaintiffs paid a $1,000 fee to submit the application. (*Id.*) Defendant also informed Plaintiffs that the Planning Board would have to conduct a "Market and Municipal Impact Study," at Plaintiffs' expense, to determine adverse impacts on the local economy. (*Id.* ¶ 55.)

In July 2018, the owner of the local hardware store who had agreed to sell it to Plaintiffs, doubled the purchase price. (*Id.* ¶ 59.) The store owner had

retained Martin Finnegman, who was the former Town attorney. (*Id.*) Also, in July 2018, Defendant informed Plaintiffs that the fee for the Market and Municipal Impact Study would be $30,000. (*Id.* ¶¶ 60.) Three days later, Finnegan wrote to Plaintiffs and lowered the purchase price for the local hardware store. (*Id.* ¶ 64.) He "indicat[ed] that [Plaintiffs] needed to pay up to 'eliminate . . . insurmountable hurdles' that [Plaintiffs] were facing with permitting because 'upgrading [their] status to the existing local hardware store should shed a favorable light on [their] application.'" (*Id.*) "Upon information and belief," Plaintiffs allege that Finnegan had personal knowledge of Defendant's evaluation of their permit application while he was renegotiating the hardware store sale. (*Id.* ¶ 65.) Plaintiffs rejected both offers. (*Id.* ¶ 66.)

In September 2018, Defendant voted to purchase the property, and in October 2018, the Town Supervisor called the president of Bridgehampton National Bank to ask that they sell the property to Defendant and not Plaintiffs. (*Id.* ¶¶ 67–68, 75.) After the bank president refused, the Town Supervisor responded that he would "never allow anything to be built on that property." (*Id.* ¶ 75.) Later, the Assistant Town Attorney called the bank's attorney to pressure it to back out of the contract with Plaintiffs. (*Id.* ¶ 78.) Undeterred, Plaintiffs closed on the property on November 20, 2018. (*Id.* ¶ 79.)

In January 2019, Plaintiffs paid the impact study fee, but, a few weeks later, Defendant enacted a six-

month moratorium on building permits in a one-mile geographic area where their property was located. (*Id.* ¶¶ 81, 83.) Defendant offered Plaintiffs a refund for the fee, but Plaintiffs declined. (*Id.* ¶ 84.) Defendant extended the moratorium in August 2019 and again in July 2020, despite each moratorium application "lack[ing] evidentiary support." (*Id.* ¶¶ 89–92.) During the moratorium, Defendant granted at least three waivers to those who applied for them. (*Id.* ¶ 94.) Plaintiffs, however, did not apply because they believed doing so would be futile. (*Id.*¶ 95.)

In July 2020, Defendant held a public hearing pursuant to New York Eminent Domain Procedural Law to determine whether a park on Plaintiffs' property constituted a public use, and in September 2020, Defendant issued formal findings and determinations concluding that it did. (*Id.* ¶¶ 100–01.) The same month, Defendant authorized the acquisition of Plaintiffs' property for a "passive use park." (*Id.* ¶ 102.)

STANDARD OF REVIEW

To withstand a Rule 12(b)(6) 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.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible when the alleged facts allow the court to draw a "reasonable inference" of a defendant's liability for the alleged misconduct. *Id.* While this standard requires more than a "sheer possibility" of a defend-

ant's liability, *id.*, "[i]t is not the Court's function to weigh the evidence that might be presented at trial" on a motion to dismiss, *Morris v. Northrop Grumman Corp.*, 37 F. Supp. 2d 556, 565 (E.D.N.Y. 1999). Instead, "the Court must merely determine whether the complaint itself is legally sufficient, and, in doing so, it is well settled that the Court must accept the factual allegations of the complaint as true." *Id.* (citations omitted).

DISCUSSION

Eminent domain is "'a fundamental and necessary attribute of sovereignty, superior to all private property rights' . . . . [b]ut the Fifth Amendment ensures[] this power is not without limits[.]" *Goldstein v. Pataki*, 516 F.3d 50, 57 (2d Cir. 2008) (quoting *Rosenthal & Rosenthal, Inc. v. N.Y. State Urban Dev. Corp.*, 771 F.2d 44, 45 (2d Cir. 1985)). The Fifth Amendment provides, in relevant part, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V ("Takings Clause").[2] The Takings Clause guarantees that "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." *Goldstein*, 516 F.3d at 57 (quoting *Thompson v. Consol. Gas Utils. Corp.*, 300 U.S. 55, 80 (1937)). That is, any government taking must be for public use. And,

[2] The Supreme Court extended the Takings Clause to the states vis-à-vis the due process clause of the Fourteenth Amendment. *See Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 241 (1897).

to be sure, the Government may not "take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." *Kelo v. City of New London, Conn.*, 545 U.S. 469, 479 (2005).

Of course, "[t]he primary mechanism for enforcing the public-use requirement has been the accountability of political officials to the electorate, not the scrutiny of federal courts." *Goldstein*, 516 F.3d at 57. Thus, while there is "a role for courts to play in reviewing a legislature's judgment of what constitutes a public use[,]" that role is "'an extremely narrow one.'" *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984) (quoting *Berman v. Parker*, 348 U.S. 26, 32 (1954)). District courts are "not to 'substitute [their] judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'" *Goldstein*, 516 F.3d at 58 (quoting *Midkiff*, 467 U.S. at 244). Instead, they are to "patrol[] the borders" of the decision to condemn private property. *Goldstein*, 516 F.3d at 63. "If a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use." *Midkiff*, 467 U.S. at 244.

Against this backdrop, it is clear that Plaintiffs have failed to state a claim under the Takings Clause. Plaintiffs do not allege that their property was taken to bestow a private benefit. Nor do Plaintiffs allege that the Town Board failed to follow the

procedure provided by New York's eminent domain laws or that the Town Board's findings and determinations concerning whether a park is a "public use" are unsupported. And, Plaintiffs do not, and could not, dispute that building a public park is a public use. *See Rindge Co. v. Los Angeles Cnty.*, 262 U.S. 700, 707–08 (1923) ("[T]he condemnation of lands for public parks is now universally recognized as a taking for public use.").

Nevertheless, Plaintiffs maintain 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. (Pl.'s Opp'n at 4–12, ECF No. 36.) Plaintiffs rely upon the Supreme Court's statement in *Kelo* that the government may not "take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." But that reliance is misplaced. The Second Circuit made clear in *Goldstein* that this single sentence should not be interpreted out of the context in which it was written. The Second Circuit explained that, in fact, *Kelo* affirmed the "longstanding policy of deference to legislative judgments in this field." *Goldstein*, 516 F.3d at 61 (citation omitted). *Kelo* posed a "novel" issue because the legislature took property and gave it to a private party purely for economic development, and not, as had been blessed in the past, to remove blight. *Id.* In other words, the Supreme Court approved a taking that appeared to directly violate the Public Use Clause's prohibi-

tion on taking from person A to benefit person B. Indeed, Justice O'Connor stated in her dissent, "private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded . . . in the process[,]" which "wash[ed] out any distinction between private and public use of property." *Kelo*, 545 U.S. at 494 (O'Connor, J. dissenting). This apparent expansion of eminent domain necessitated the "pretext" limitation, one that Justice Kennedy took even further in his concurrence: "[T]ransfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause." *Id.* at 490 (Kennedy, J. concurring). Plaintiffs' implicit argument that the Supreme Court "sought *sub silentio* to overrule *Berman*, *Midkiff*, and over a century of precedent" to make the so-called "pretext doctrine" applicable in situations other than those involving a taking for purely economic development, is simply incorrect. *Goldstein*, 516 F.3d at 62. Courts are still prohibited from "giv[ing] close scrutiny to the mechanics of a taking rationally related to a classic public use as a means to gauge the purity of the motives of the various government officials who approved it."[3] *Id.* In fact, the majority in *Kelo* noted

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[3] Plaintiffs' reliance on *99 Cents Only Stores v. Lancaster Redevelopment Agency* is misplaced because, unlike here, the plaintiff made a showing that the taking was to bestow a private benefit. *See* 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001) ("[T]he evidence is clear beyond dispute that Lancaster's condemnation efforts rest on nothing more than the desire to achieve the naked transfer of property from one private property to another.").

that though the city was "not confronted with the need to remove blight . . . their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled" to judicial deference. *Kelo*, 546 U.S. at 483.

As in their motion for a preliminary injunction, Plaintiffs resist this conclusion by relying primarily upon state court opinions that purport to rely on *Kelo*. But both cases involve interpretations of state constitutions, not the Fifth Amendment. For example, in *Rhode Island Economic Development Corp. v. The Parking Co., L.P.*, the Rhode Island supreme court determined that, because a municipal corporation gained a significant financial benefit for itself and its public use rationale was completely unsupported, the municipal corporation had engaged in an "arbitrary and bad-faith taking of private property that [the Rhode Island Supreme Court previously] condemned." 892 A.2d 87, 106 (R.I. 2006). But the "arbitrary and bad faith" test is a creature of Rhode Island eminent domain statutes and the Rhode Island constitution's definition of public use, not the Fifth Amendment. *See Romeo v. Cranston Redevelopment Agency*, 254 A.2d 426, 429, 432 & 434 (R.I. 1969) (analyzing whether "Article XXXIIII intended that the phrase 'blighted and substandard area' be

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In addition, the plaintiff challenged the public use determination itself because the determination that blight needed to be removed was unsupported. *Id.* Here, by contrast, there is no private benefit alleged, and there is no allegation that Defendant's public use determination is unsupported.

given the same restrictive interpretation as our predecessors in 1949 gave to the term 'blighted area'[,]" answering no, but holding that redevelopment agencies cannot engage in the "arbitrary, capricious or bad faith taking of private property"). *City of Lafayette v. Town of Erie Urban Renewal Authority* likewise involved the interpretation of a state constitution, not the Fifth Amendment. *See* 434 P.3d 746, 750–52 (2018) (applying article XX of the Colorado constitution and determining whether Lafayette engaged in a bad faith taking).

Plaintiffs also attempt to relitigate the import of three state court cases that they assert interpret the Fifth Amendment and argue that "the Supreme Court assumes that states are interpreting their constitutions in lockstep with the federal constitution unless they explicitly say otherwise." (Pl's Opp'n at 7–9 & n.4.) Setting aside that this Court determined that those cases are nonbinding, Plaintiffs ignore that "[s]tates [] impose 'public use' requirements that are stricter than the federal baseline." *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."). It would be error to assume then that a state court's public use determination is based only on the federal constitution. Indeed, each of Plaintiffs' cases contain indications that the state court was interpreting its own constitution, not the Fifth Amendment. For example, in *Earth Management, Inc. v. Heard County*, the Georgia supreme court clearly applied its own constitutional provisions because it

did not cite the Fifth Amendment nor any federal court case interpreting it. *See* 248 Ga. 442, 446–47 (1981) (explaining that the case presented a "point of impact between two vital competing public interests. . . . [T]hat the state shall deprive no person of his property without due process of law and the principle that no private property shall be taken except for a public purpose." (citing only Constitution of Georgia, Art. I, Sec. III, Para I (Code Ann. § 2–301)). In *Pheasant Ridge Associates Ltd. Partnership v. Town of Burlington*, the Massachusetts supreme court stated: "Recognition in our cases that a bad faith land taking would be unlawful . . ." 399 Mass. 771, 777 (1987) (emphasis added).[4] This statement sug-

[4] The Massachusetts court primarily relied upon Massachusetts cases to support the proposition, and then cited two federal cases that predate *Midkiff* and *Kelo*. *See Id.* at 776 (citing *Southern Pac. Land Co. v. United States*, 367 F.2d 161, 162 (9th Cir. 1966) and *United States v. Carmack*, 329 U.S. 230 (1946)). Both of these cases recognized only the possibility that the Fifth Amendment permitted a bad faith, arbitrary or capricious review when an official exercises taking power pursuant to delegated authority, such as an agency. Of course, since that time, the Supreme Court has never held that a public use claim permits such an inquiry, and as described above, has strongly suggested that it does not. Plaintiffs' reliance on *Heirs of Guerra v. United States*, 207 F.3d 763 (5th Cir. 2000) and *United States v. 58.16 Acres of Land*, 478 F.2d 1055 (1973) is similarly unhelpful because neither case considers *Midkiff*, both cases predate *Kelo*, and neither case came from the Second Circuit. Finally, *City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 76 P.3d 1 (Nev. 2003), which predates *Kelo*, relied upon only Colorado and Oregon case law when it explained that "[c]ourts may not question the wisdom of how to accomplish the public purpose absent a showing of fraud or bad faith." 76 P.3d at 15 & n.69 (citing *Port of Umatilla v. Richmond*, 321 P.2d 338,

gests reliance on state, not federal law. Finally, in *In re Opening Private Road for Benefit of O'Reilly*—a case that Plaintiffs argue establishes that the Pennsylvania supreme court interpreted the Fifth Amendment in *Middletown Township v. Lands of Stone*—the Pennsylvania Supreme Court does not clarify whether it relies upon the Fifth Amendment or its own constitution *See* 607 Pa. 280, 299 (2010) ("The constitutions of the United States and Pennsylvania mandate that private property can only be taken to service a public purpose [and] [t]his Court has maintained that, to satisfy this obligation, the public must be the primary and paramount beneficiary of the taking" (citations omitted)). The states' additional restrictions on the public use definition based upon their own constitutions and precedent are of no moment here because "[t]his Court's authority . . . extends only to determining whether [a] proposed condemnation [is] for a 'public use' within the meaning of the Fifth Amendment to the Federal Constitution." *Kelo*, 545 U.S. at 489.

Ignoring this Court's footnote in the preliminary injunction order, Plaintiffs argue that requiring a plaintiff to plead a private benefit here would allow the government to use eminent domain to punish political opponents or unpopular minorities. (Pl's Opp'n at 9–10.) They write at length regarding the story of Willa Bruce, a Black woman, whose success-

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350–51 (Ore. 1958) (applying Oregon law); *Denver West Metro. Dist.*, 786 P.2d 434, 436 (Colo. Ct. App. Div. 3 1989) (applying Colorado law); *Thornton Dev. Auth. v. Upah*, 640 F. Supp. 1071, 1076 (D. Colo. 1986) (applying Colorado law)).

ful business in Manhattan Beach was taken through eminent domain for a public park during the era of Jim Crow. (*Id.* at 10–12.) While Plaintiffs' concern for Black women is admirable, they can take solace in the fact that the Fourteenth Amendment provides sufficient protection of their right against a discriminatory state action, including a taking. *See 49 WB, LLC v. Village of Haverstraw*, 511 F. App'x 33 (2d Cir. 2013) (recognizing that a substantive due process challenge to a condemnation could be had if a plaintiff proves it "occurred under circumstances warranting the labels 'arbitrary and outrageous'" which are labels "associated with 'racial animus' or 'fundamental procedural irregularity'" (quoting *Natale v. Town of Ridgefield*, 170 F.3d 258, 262 (2d Cir. 1999)).

Finally, Plaintiffs' complaint does not present a "fact pattern . . . in which the circumstances of the approval process so greatly undermine the basic legitimacy of the outcome reached that a closer objective scrutiny of the justification offered is required." *Goldstein*, 516 F.3d at 63 (emphasis in original). As in *Goldstein*, Plaintiffs "acknowledge[] the . . . rational relationship to . . . public use[.]" *Id.* at 62. And, Plaintiffs' claim of an impermissible purpose is primarily based on "one or more of the government officials [being] actually—and improperly—motivated[.]" *Id.* While Plaintiffs allege difficulties in obtaining a permit, their lack of knowledge about Defendant's plan to build a park, other available land for the park, and a statement from the Town Supervisor that nothing would be built on Plaintiffs'

property, those allegations do not amount to anything more than the Town's desire to leave the plot of land undeveloped. That is, Plaintiffs' allegations do not support an inference of a nefarious, improper motive necessitating "closer objective scrutiny." *Id.*

CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss is GRANTED.

SO ORDERED.

Dated: Brooklyn,
New York
September 30, 2022

/s/ LDH
LaSHANN DeARCY HALL
United States District
Judge

Appendix C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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BEN BRINKMANN, HANK BRINKMANN, and MATTITUCK 12500 LLC.,

Plaintiffs,

-against-

TOWN OF SOUTHOLD, NEW YORK,

Defendant.
----------X

Civil Action No. 2:21-cv-02468

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Jury Trial Demanded.

Plaintiffs BEN BRINKMANN, HANK BRINKMANN, and MATTITUCK 12500 LLC., by their attorneys, the Institute for Justice, complaining of the defendant, respectfully allege as follows.

Introduction

1. This is a Fifth Amendment lawsuit challenging the Town of Southold's attempt to seize private property from Plaintiffs ("the Brinkmanns"), via eminent domain, for the specific purpose of preventing the Brinkmanns from building and operating a lawful business that satisfies all zoning and other regulatory requirements.

2. The Town's *stated* purpose for the taking is the creation of a small public park, but this is a pretext concealing the actual purpose. The Town did not contemplate a park, much less engage in any planning for a park on the Brinkmanns' property, until after they applied for a building permit, and after the Town had exhausted every other regulatory avenue in its attempt to stop the Brinkmanns from obtaining a building permit. The Town has made no effort to purchase a larger parcel next door that is for sale and equally suitable for a small park.

3. Eminent domain must be used for a public use. And the government's asserted public use must be the actual reason for using eminent domain. When, as here, the government uses eminent domain for an illegitimate reason—just to halt a lawful business—and uses a park as a pretext to justify that taking, the exercise of eminent domain is unconstitutional.

4. Brinkmann's Hardware is a Long Island-based, family-owned business. The Brinkmanns want to open a new hardware store on an approximately 1.75-acre parcel (the "Property") they own along the main thoroughfare through the Hamlet of Mattituck in Southold (12500 NYS Route 25 (SCTM# 1000-114.-11-17)).

5. The Town's government, however, does not want Brinkmann's Hardware in their Town. So, the Town has used every tool at its disposal to try and stop the Brinkmanns. The Town has insisted that the Brinkmanns pay exorbitant fees for impact studies, but they paid up. The Town has imposed a (selectively

enforced) moratorium on all new building permits along the main thoroughfare where the Property is located, but the Brinkmanns sued to end the moratorium. The Town even tried to induce Bridgehampton National Bank to breach its contract for the sale of the Property to the Brinkmanns, with the Town Supervisor vowing that Brinkmann's Hardware would never open there.

6. Lacking any legitimate reason to stop the Brinkmanns from building its new location, which Plaintiffs are entitled to do as a matter of right on the commercially zoned Property, the Town has now authorized seizing the Brinkmanns' land through eminent domain, ostensibly for a park.

7. This is a sham. The Town had never previously considered putting a park on this land; the only reason it is doing so now is to stop the Brinkmanns from opening a store on the land it owns.

8. State and federal courts around the country have recognized that takings are unlawful when the government's stated purpose is a mere pretext for some other, illegitimate purpose. And one such illegitimate purpose is to prevent property owners from making entirely lawful uses of their property.

9. The Brinkmanns filed this lawsuit seeking: (1) a declaration that the sham public-use determination for the Town's pretextual park violates the Fifth Amendment's public-use requirement; and (2) an injunction preventing the Town from acquiring the Property using eminent domain based on the invalid

public-use determination at issue here or any similarly invalid declaration in the future.

Parties

10. Plaintiffs Ben and Hank Brinkmann are residents of the State of New York.

11. Ben and Hank are the sole owners of Plaintiff Mattituck 12500 LLC, which is organized and in good standing under the laws of the State of New York. Mattituck 12500 LLC owns the Property in the Hamlet of Mattituck, which is a neighborhood within Southold, New York. The Property's address is 12500 NYS Route 25, and it is located at the northeast corner of New Suffolk Avenue and Route 25 in the Hamlet of Mattituck (SCTM# 1000-114.-11-17). The Property is the subject of this litigation.

12. Defendant Town of Southold is a municipal corporation organized under the laws of the State of New York.

Venue and Jurisdiction

13. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343, 2201, 2202, and 42 U.S.C. § 1983.

14. Venue lies in this Court pursuant to 28 U.S.C. § 1391.

Appendix C

Factual Allegations

15. Brinkmann's Hardware is a small, family-owned and -operated business that has operated on Long Island since 1976.

16. In 1976, Tony and Pat Brinkmann opened the first Brinkmann's Hardware store in Sayville, New York. At the time, the store was only 1,200 square feet.

17. Since then, the business has expanded to four locations on Long Island: Blue Point, Holbrook, Miller Place, and the original (now flagship) location in Sayville.

18. Tony and Pat have since retired, and their children, Mary, Ben, and Hank now run the stores. (Mary is not directly involved with the planned Southold store.)

19. Brinkmann's Hardware stores are mid-sized neighborhood hardware stores, the type of which has been a staple of American main streets for generations.

20. The Brinkmanns have proven that small hardware stores can still compete with big box stores like Home Depot. They do this by prioritizing customer service and convenience. They strive to always build stores in the downtown area, and on well-exposed corners (like the Property in Mattituck) whenever possible. Customers value Brinkmann's convenient locations, knowledgeable staff, and competitive prices.

21. Ben and Hank Brinkmann understand that the success of their stores is highly dependent on the stores' locations. A Home Depot can open anywhere, and people will drive long distances to get to it, but a neighborhood hardware store has to be convenient.

22. Ben and Hank know Long Island well, and they are always on the lookout for possible locations for new stores, but ideal locations are scarce.

23. In 2011, Ben and Hank discovered a vacant lot for sale that they thought would be perfect for a new store. It is 1.7 acres, commercially zoned, undeveloped, and located on a main street corner in the Town of Southold.

24. In 2011, however, the Brinkmanns were not in a financial position to acquire the Property and build a new store.

25. In 2011, Bridgehampton National Bank, which intended to build a new branch on the location, bought the Property.

26. In 2011, when the Property was for sale, the Town never made any effort to acquire the Property and did not have any plans for a park on the Property.

27. The bank never built a new branch on the Property because it moved into an existing building in town that unexpectedly became available.

28. The bank held the Property until 2016, when Brinkmann's was able to expand. Ben and Hank

approached the bank about buying the Property, and the bank agreed. They contracted to purchase the lot for $700,000 on December 2, 2016.

29. In 2016, when the bank sold the Property to the Brinkmanns, the Town made no effort to acquire the Property and had no plans for a park on the Property.

30. The Brinkmanns' purchase agreement with Bridgehampton contained a due-diligence period to ensure that the Brinkmanns would, in fact, be able build a store on the location.

31. Upon signing the contract, Ben and Hank immediately started meeting with Town officials and other stakeholders to move the project forward through permitting and zoning review, and then to construction.

32. One of the first things that Ben and Hank did in 2017 was discuss their plans with the owner of the one existing hardware store in Mattituck, Rich Orlowski. Ben and Hank proposed buying out Orlowski's existing business. Orlowski and the Brinkmanns agreed that, when the new Brinkmann's location opened, Orlowski would close his store for a lump sum payment of the value of his inventory as of the date he closed his business (believed to be approximately $350,000), and that he would be hired as the manager of the new Brinkmann's location.

33. In April 2017, the Brinkmanns engaged a local architect, Nemschick Silverman Architects P.C., to conduct a feasibility study and draw up site plans.

34. The contract provided that the new hardware store should "match the surrounding neighborhood design aesthetic."

35. The Brinkmanns met with the Southold Town Planning Department in May 2017, to inform them of their plans for a new location.

36. During the May 2017 meeting with the Planning Department, Southold planning officials did not state that the Town had plans for a public park on the Property.

37. Planning officials did not state during the May 2017 meeting that the Town had plans for a public park on the Property because the Town did not have any such plans.

38. The Brinkmanns also held two meetings with the Mattituck-Laurel Civic Association. First, they met with just the leadership of the Association in July 2017, and Orlowski attended that meeting to help introduce the plan and to demonstrate that he was working with the Brinkmanns. Then they held an open meeting in September 2017.

39. The open meeting was attended by Southold Town Supervisor Scott Russell and at least two councilmembers. At the meeting, some residents expressed concern about the impact that the proposed store would have on traffic at the intersection.

40. At the meeting, Ben and Hank Brinkmann promised that they would pay for whatever

intersection improvements might be deemed necessary by traffic studies.

41. After the meeting, Supervisor Scott Russell wrote: "I give credit to the applicant for his willingness to walk into the lion's den. From my perspective, a great deal of concern is the impact on traffic and the overall impact on safety. That is an over-riding concern on all applications in that area. That is very understandable."

42. A traffic study was ultimately completed in September 2020, and nothing in the study indicated that the proposed hardware store would cause traffic problems.

43. At no point during the July or September 2017 meetings with the Mattituck-Laurel Civic Association did either Town Supervisor Russell or anyone else state that the proposed Brinkmann's location on the Property conflicted with existing Town plans to build a public park on the Property.

44. No one stated during the July or September 2017 meetings that the proposed Brinkmann's location conflicted with existing Town plans to build a public park on the Property because no such plans existed.

45. The Brinkmanns shared the site plans with the Town Planning Department prior to submitting a formal application. The Plans went through two rounds of revisions based on those discussions.

46. In January 2018, the Brinkmanns filed their first permit application with the Town Building Department. This application contained the third version of the site plan, which had been revised based on prior discussions with Town officials. *See* Southold Code § 144-8.

47. That application was denied by the Town Building Department in March 2018, because no site plan had been approved by the Planning Department.

48. In denying the January 2018 permit application, planning officials did not state that the proposed Brinkmann's location conflicted with existing Town plans to build a public park on the Property.

49. In denying the January 2018 permit application, planning officials did not state that the proposed Brinkmann's location conflicted with existing Town plans for a public park on the Property because no such plans existed.

50. In April 2018, the architects completed their designs for the Property depicting a 12,000 square-foot hardware store, a 3,000 square-foot paint store, 5,000 square feet of storage, and 80 parking spaces. As requested by the Planning Department, this version of the plan depicted the buildings abutting the main road, with parking behind.

51. In May 2018, the Brinkmanns and the architects attended a preliminary planning meeting with the town Planning Department and applied for site-plan approval.

52. In June 2018, the Town notified the Brinkmanns that the project required a "Special Exception Permit," with a $1,000 application fee, because the planned store would be over 6,000 square feet.

53. The Town's ordinances contain a lengthy list of objective requirements for stores over 6,000 square feet. These requirements address issues including setbacks, architectural style, building materials, parking, and signage. *See* § 280-45(B)(10).

54. The Brinkmanns' plans addressed all of these requirements, and they were prepared to modify their plans further based on feedback from the Planning Board.

55. Another requirement to build a store over 6,000 square feet is that the Planning Board is required to conduct a "Market and Municipal Impact Study," to determine that the proposed store will not have an adverse impact on various aspects of the local economy. § 280-45(B)(10)(b). In June 2018, the Town notified the Brinkmanns that the project required such a study, with a fee to be determined.

56. In notifying the Brinkmanns in June 2018 that they needed to complete a "Market and Municipal Impact Study," planning officials did not notify the Brinkmanns that their proposed hardware store conflicted with existing Town plans for a public park on the Property.

57. In notifying the Brinkmanns in June 2018 about the "Market and Municipal Impact Study,"

planning officials did not state that the proposed Brinkmann's location conflicted with existing Town plans for a public park on the Property because no such plans existed.

58. In the summer of 2018, Orlowski changed his attorney, hiring the former Town attorney, Martin Finnegan.

59. Mr. Finnegan contacted the Brinkmanns on July 10, 2018, to inform them that he represented Mr. Orlowski. And on July 24, 2018, Finnegan again contacted the Brinkmanns to inform them that Orlowski was "renegotiating the agreement" and demanding double the price, $700,000, to buy out Orlowski's hardware store.

60. On July 31, 2018, the Town notified the Brinkmanns that the fee for the Impact Study would be $30,000.

61. In notifying the Brinkmanns in July 2018 that the study fee would be $30,000, planning officials did not inform the Brinkmanns that their proposed hardware store conflicted with existing Town plans for a public park on the Property.

62. In notifying the Brinkmanns in July 2018 that the study fee would be $30,000, planning officials did not inform the Brinkmanns that their proposed hardware store conflicted with existing Town plans for a public park on the Property, because no such plans existed.

63. By this time, it was becoming increasingly clear to Ben and Hank that the Town was deeply opposed to them opening the new store.

64. Three days after the Town informed the Brinkmanns they would have to pay the Impact Study fee, Mr. Finnegan again wrote to the Brinkmanns on August 2, 2018, and told them Orlowski had reduced the demand for his hardware store business to $450,000, indicating 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."

65. Upon information and belief, Mr. Finnegan, the former Town Attorney, had personal knowledge of the Town's evaluation of the Brinkmanns' permit application at the time he was representing Mr. Orlowski and renegotiating the sale of Orlowski's hardware store in Southold.

66. The Brinkmanns rejected both offers that Mr. Finnegan presented: the $700,000 offer for Orlowski's hardware store business that Finnegan made on July 24, 2018, and the offer Finnegan made on August 2, 2018, for the reduced amount of $450,000, which Finnegan communicated alongside a reference to how acceptance may affect the Brinkmanns' then-pending permit application with the Town.

67. In September 2018, the Town Board voted to try to buy the Property from the Brinkmanns.

68. The Town voted to try to purchase the Property in September 2018 for the sole and specific purpose of stopping the Brinkmanns from building and operating their proposed location at the Property.

69. Prior to the September 2018 vote to try to purchase the Property, the Town had not engaged in any planning for a public park on the Property; had not tasked any Town committee with evaluating the possibility of a new public park on the Property; had not tasked any Town planning staff with evaluating the possibility of a new public 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 public 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 public park; had not held any public hearings about creating a new public park on the Property; had not retained any outside consultants to evaluate the Property as a location for a new public 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.

70. No public records indicate that the Town was previously considering that land for a park until the Brinkmanns decided to open a hardware store there.

71. The Town never attempted to purchase the Property when it was for sale in 2011.

72. The Town never attempted to purchase the Property from its 2011 buyer, Bridgehampton National Bank, until after the Brinkmanns had already contracted to purchase the property and had applied for a permit to build their store.

73. The Town did not approach Bridgehampton National Bank to purchase the Property after the bank decided not to develop it.

74. There is also an undeveloped plot of land next door to the Property that, at the time of this filing, is for sale and which would be equally suitable for a park, but which the Town has never considered acquiring.

75. In October 2018, the Town took more drastic measures, attempting to interfere with the Brinkmanns' purchase contract for the vacant lot. Scott Russell, the Southold Town Supervisor, called the president of Bridgehampton National Bank, Kevin O'Connor. Russell pressured O'Connor not to sell the property to the Brinkmanns. He suggested that O'Connor instead sell to the Town. O'Connor responded that he would proceed with the sale as contracted, to which Russell responded, "I will never allow anything to be built on that property."

76. When Town Supervisor Russell called the president of Bridgehampton National Bank to demand that the bank breach its real-estate contract with the

Brinkmanns and not close on the Property, he did not state that the Town had plans to build a park on the property because there were no Town plans for a park and the Town had no actual desire for a Park. The Town's only objective was to stop the Brinkmanns.

77. O'Connor called Ben and Hank to tell them about this conversation with the Town Supervisor.

78. Later, the Assistant Town Attorney, Damon Hagan, called Bridgehampton Bank's attorney, Vincent Candurra, and similarly pressured Bridgehampton to back out of the sale contract with the Brinkmanns.

79. Ben and Hank were undeterred, and they closed on the Property on November 20, 2018.

80. At the closing, Candurra told the Brinkmanns about the call he received from Hagan. Candurra told the Brinkmanns he was "put off" by the threatening and inappropriate nature of the call.

81. In January 2019, the Brinkmanns paid the Town $30,000 for the impact study that the Town's Planning Board required.

82. The pending permit application required no zoning changes, no waivers, and no discretionary variances. The plans for the store complied with all of the other requirements for a square footage exemption, and Ben and Hank believed that by paying the fee for the impact study, they could finally force the Town to act on their application.

83. A few weeks after the Brinkmanns paid the $30,000 impact-study fee, the Town enacted a six-month moratorium on any new building permits along the main thoroughfare where the Property is located. The moratorium was limited in geographic scope: It covered only a one-mile stretch of road, and it was centered on the Brinkmanns' property.

84. The Town also offered to refund the $30,000, but the Brinkmanns refused, knowing that accepting the refund would make their application incomplete.

85. During the six weeks between the time the Brinkmanns paid the Town $30,000 for the market impact study on January 9, 2019, and when the Town enacted the permit moratorium on February 26, 2019, the Town failed to perform any work on the market study despite it being legally required to complete that study within 90 days, Town of Southold City Code § 280-45(B)(10)(b). Nor did the Town retain the outside consultant it had previously identified in July 2018 "to conduct this study" (Nelson, Pope, and Voorhis), when demanding that the Brinkmanns pay a fee of $30,000 "to cover the cost of this study."

86. Notwithstanding that the Town was required by law to complete the impact study within 90 days, the Town has, to date, taken no action to even begin the study.

87. The Town's permit moratorium concerned only the approval and issuance of permits; it did not excuse the Town from processing the Brinkmanns' application, nor did the Town's moratorium waive any of the

Town's legal obligations related to the deadlines by which it had to complete the market study it required from the Brinkmanns.

88. Exasperated, the Brinkmanns sued the Town in state court in May of 2019, challenging the moratorium. That litigation is ongoing.

89. The Town has twice extended the moratorium, first in August 2019, then in July 2020.

90. Each time it sought to extend the permit moratorium, the Town submitted a "local law" referral to the Suffolk County Planning Commission. In response, Suffolk County requested evidentiary support for extending the moratorium and the Town failed to provide it.

91. When the Town made a "local law" referral to Suffolk County concerning the first extension of its permit moratorium, the County's staff recommended "disapproval" because the Town's bare assertions for needing the moratorium lacked evidentiary support. Rather than reject the referral, Suffolk County's Planning Commission deemed it "incomplete" and requested that the Town provide traffic studies and relevant sections of the Town's comprehensive plan. The Town ignored this request.

92. When the Town sought a second extension of its moratorium and sent a "local law" referral to the Suffolk County Planning Commission, the County produced a report noting that the Town of Southold never provided the County with the supporting

evidence it requested for the Town's first extension. Thus, for this second extension, Suffolk County staff again recommended that the moratorium be "disapproved" because there were no findings that (1) "indicate how serious or urgent these circumstances are"; (2) "there are no other alternatives, less burdensome on property rights than the moratorium"; and (3) "there are no findings that indicate why the existing land use ordinances are not adequate."

93. During this time, the Town has selectively enforced the moratorium, granting building permits to parties other than the Brinkmanns.

94. Upon information and belief, the Town has granted at least three waivers to the moratorium: (1) Wickham Road LLC, owner of 12800 Main Road, Matittuck, received a waiver to obtain a variance to turn a vacant building into offices; (2) Abigail A. Wickham as agent for 11155 Main Road LLC, property location at 11155 Route 25, Mattituck, received a waiver for internal renovations and a handicap ramp; and (3) Patricia C. Moore as agent for Love Lane Village LLC, property location at 13650 Main Road, Mattituck, received a waiver for interior and exterior work including the addition of solar panels.

95. The Brinkmanns did not apply for a waiver to the moratorium because they believed it would have been futile, as the moratorium was clearly targeted at their proposed hardware store.

96. The building moratorium was specifically intended to stop the Brinkmanns, as it was imposed

shortly after their application became complete, and it has been selectively waived for parties other than the Brinkmanns despite those properties being located on the same main thoroughfare where the Brinkmanns' Property is located.

97. The fact that applications were being processed during the moratorium further emphasizes that the moratorium was designed to stop the Brinkmanns. Applications were being processed during the moratorium, but not the Brinkmanns' application. This is despite the fact that the Brinkmanns submitted a complete application, paid $30,000 for an impact-study fee, and the Town was required to complete its evaluation of "undue adverse impact" within 90 days from the submission of that fee, and also vote on that determination 30 days after conducting that evaluation. Town of Southold City Code § 280-45(B)(10)(b). In sum, the Town was required to act on the Brinkmanns' application and it did not, even though it acted on other applications.

98. The vacant property next door remains for sale, and the Town did not consider that land's suitability for a park.

99. On June 22, 2020, the trial court in the Brinkmanns' state court lawsuit denied the Town's motion to dismiss, allowing their challenge to the moratorium to proceed.

100. Soon thereafter, in July 2020, the Town held a public legislative hearing, as required by New York law, to determine whether a park on the Property

would constitute a public use for purposes of eminent domain. N.Y. Em. Dom. Proc. Law § 203.

101. In September 2020, the Town issued its formal "findings and determinations," in which the Town concluded that acquiring the Brinkmanns' land for a park would indeed be a public use. *Id.* at § 204; *see also* Resolutions 2020-571 & 2020-572, https://perma.cc/698V-JA3B.

102. In September 2020, the Town authorized the acquisition of the Brinkmanns' Property via eminent domain, for the ostensible purpose of building a "passive use park," *i.e.*, a park with no significant facilities or improvements.

103. On September 19, 2020, in a guest column in the Suffolk Times, Southold Town Board member Sarah Nappa confirmed that the Town's true objective in using eminent domain was not to establish a park, but rather to stop the Brinkmanns from building a hardware store on their land.

104. Ms. Nappa wrote: "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 a dangerous precedent to set."

Appendix C

Injury to Plaintiffs

105. The Town's declaration of public use has injured Plaintiffs Ben and Hank Brinkmann, and 12500 Mattituck LLC (through which they own the property) because, under the Takings Clause of the Fifth Amendment, the public-use determination is a sham, the asserted public park justification for the taking of Plaintiffs' property is a pretext, and this unconstitutional public-use determination is the basis of the Town's intended condemnation of the Property.

106. Unless Plaintiffs invalidate the pretextual public-use determination in federal court, they will lose the Property to the Town in a state-court condemnation proceeding.

107. Plaintiffs are further injured in that, under New York law, they would not be permitted to raise a public-use defense in that state-court condemnation proceeding. N.Y. Em. Dom. Proc. Law § 204.

108. Plaintiffs are further injured in that their only opportunity to challenge public use in the New York courts was by filing an affirmative lawsuit challenging the sufficiency of the administrative record from the public hearing in supporting the Town's legislative Determination and Findings of public use. The deadline to file such an action is thirty days after the determination, which has long since expired. N.Y. Em. Dom. Proc. Law § 207(A).

109. Plaintiffs are further injured in that, even if the 30-day statute of limitations had not already expired,

New York's Eminent Domain Procedure Law authorizes state courts to review only the sufficiency of the administrative record. N.Y. Em. Dom. Proc. Law § 207. Discovery is not allowed. Yet, because Plaintiffs allege that the asserted justifications on the face of the administrative record are a sham, the only way for them to establish that the public-use determination was pretextual and unconstitutional is by engaging in discovery to prove the actual illegitimate purpose. In short, the specific Fifth Amendment claim that Plaintiffs have brought in federal court is a claim that they could never have brought in state court.

110. For the purposes of New York state law and the state courts of New York, the taking of the Property for a public park has been conclusively deemed a public use. Under the Eminent Domain Procedure Law, Plaintiffs have no ability to file an affirmative lawsuit in state court asserting their rights under the Fifth Amendment and they are not permitted to raise the Fifth Amendment as a defense in any state-court lawsuit that the Town files against them to obtain legal title to the Property and determine just compensation for Plaintiffs. N.Y. Em. Dom. Proc. Law §§ 204, 207(A), 208.

111. A property owner whose land is the subject of a legislative public use determination in New York has a ripe claim in federal court under the Fifth Amendment and 28 U.S.C. § 1983. *See Goldstein v. Pataki*, 516 F.3d 50, 54 n.2 (2d Cir. 2008).

112. Now that the Brinkmanns have paid all of the required fees and have demonstrated that they will

not be deterred by the building moratorium, eminent domain is the Town's best prospect of stopping the Brinkmanns, which Town Supervisor Scott Russell has promised he will do.

113. Although the Town has not yet granted—or even acted on—the Brinkmanns' application for a square footage exemption, the Brinkmanns' plans meet all of the requirements for an exemption, and they are willing to modify the plans to the extent necessary, should the Planning Board determine that any of the specified requirements are not satisfied by the current plans.

114. The Town has taken concrete steps towards taking the Brinkmanns' property, and this lawsuit is the Brinkmanns' only opportunity to litigate this federal constitutional issue: whether the Fifth Amendment allows a taking whose stated purpose is a mere pretext for preventing people from making a lawful use of their property.

115. The Brinkmanns are also injured by the public use determination because, as long as eminent domain appears to be a viable option for the Town, the Brinkmanns will never be granted a permit or be allowed to start building its store. And the longer this saga drags on, the more money they will have to spend and the more capital they will have tied up, not earning any return.

116. The Brinkmanns are also injured by the determination that the taking of their land is for a public use and the cloud of pending condemnation that it

places over their property, which also puts any investments into the Property in jeopardy.

Count One: Fifth Amendment Pretextual Taking

117. All previous allegations are reincorporated here as if set out in full.

118. The Fifth Amendment's Takings Clause provides that "private property [shall not] be taken for public use, without just compensation."

119. A taking is not for a legitimate public use when the government's stated purpose is a mere pretext for some other, illegitimate purpose.

120. One such illegitimate purpose is to stop property owners from putting their property to uses that are entirely lawful and consistent with existing regulations.

121. When the circumstances surrounding a condemnation raise a strong inference that the government is acting for an improper purpose, searching judicial scrutiny is required.

122. The Town of Southold had never previously considered the Brinkmanns' land for a park. It made no effort to acquire the land when it was for sale in 2011, nor did it approach the bank about buying it until after the Brinkmanns were under contract and had applied to build their hardware store.

123. None of the Town's long-term planning documents discussed turning the Brinkmanns' property into a park.

124. The Town's proposed park is nothing but a pretext to stop the Brinkmanns from opening a lawful business on their own land. As such, this taking does not satisfy the public use requirement of the Fifth Amendment.

Relief Requested

A. A declaratory judgment by the Court that the Town of Southold's stated purpose of acquiring the Plaintiffs' property to open a public park is a mere pretext for the illegitimate objective of halting an entirely lawful use of property by its owners, and that such a taking violates the Fifth Amendment to the United States Constitution;

B. Permanent injunctive relief prohibiting Defendant Town of Southold from acquiring the Property using eminent domain based on the invalid public-use determination at issue here or any similarly invalid declaration in the future;

C. An award of attorneys' fees, costs, and expenses in this action;

D. An award of nominal damages in the amount of $1 to each Plaintiff; and

E. Any other legal or equitable relief to which Plaintiffs may show themselves to be justly entitled.

Appendix C

Dated this 4th day of May, 2021.

Respectfully Submitted,

/s/ William Aronin
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