No. 17-1656

In The
Supreme Court of the United States

VIOLET DOCK PORT, INC., L.L.C.,

Petitioner,

v.

ST. BERNARD PORT, HARBOR, & TERMINAL DISTRICT,

Respondent.

On Petition for a Writ of Certiorari to the Louisiana Supreme Court

BRIEF OF AMICI CURIAE OWNERS' COUNSEL OF AMERICA AND INSTITUTE FOR JUSTICE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

The St. Bernard Port, Harbor & Terminal District used its eminent domain power to seize Petitioner's fully-functioning and profitable private port facility to lease it to another private port operator to operate in a similar manner, even taking over Petitioner's customers in the process. The taking was not part of a comprehensive redevelopment plan, nor was Petitioner's property blighted or causing any public harm. The intended private recipient of the property was intimately involved in all aspects of the taking from its earliest planning stages, to the local government's applications for state funding, to taking over operations on the property post-taking.

The Louisiana Supreme Court, relying on *Kelo v. City of New London*, 545 U.S. 469 (2005), upheld the taking by holding "this expropriation satisfies the broad definition of public purpose under federal law."

The questions presented are:

1. Did the Louisiana Supreme Court err when it held that the Fifth Amendment's "public use" requirement is a question of fact to be resolved in the trial court, subject only to manifest error review on appeal?

2. Do the Fifth and Fourteenth Amendments prohibit government from taking a fully-functioning private facility with the intent to lease it to another private entity to operate, with the revenues earned from those operations to be shared by both the local government entity and its favored private actor?

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INTEREST OF AMICI CURIAE[1]

1. Owners' Counsel of America. OCA is an invitation-only national network of the most experienced eminent domain and property rights attorneys. They have joined together to advance, preserve, and defend the rights of private property owners, and thereby further the cause of liberty, because the right to own and use property is "the guardian of every other right," and the basis of a free society. *See* James W. Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (3d ed. 2008). OCA is a non-profit 501(c)(6) organization sustained solely by its members. OCA members and their firms have been counsel for a party or amicus in many of the property cases this Court has considered in the past forty years, and OCA members have also authored and edited treatises, books, and law review articles on property law, eminent domain, and property rights.

2. Institute for Justice. The Institute for Justice (IJ) is a nonprofit, public interest law center committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government, including restoring limits on the power to take property. IJ has represented many property owners in opposing eminent domain for private development in both federal and state courts. *See*, *e.g.*, *Kelo v. City of New London*, 549 U.S. 469 (2005); *City of Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006). IJ also regularly files

1. All parties have consented to the filing of this brief. Counsel of record for the parties received timely notice of the intention to file this brief. Amici affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

amicus briefs on the proper construction and application of "public use" under the U.S. Constitution, as well as the construction of similar language under state constitutions.

Amici are submitting this brief because this case offers an opportunity for the Court to clarify whether there are any realistic limitations on the power of eminent domain, and to affirm the central role of judicial review in enforcing a fundamental constitutional limitation on the power of government. We believe our viewpoint and this brief will be helpful to the Court.

SUMMARY OF ARGUMENT

In a nation seemingly besieged by a vortex of divisive issues, you only need to glance at a newspaper to understand that eminent domain is one of the most contentious. Takings for pipelines.[2] Protesters sitting in trees.[3] Blight designations supporting condemnations for a new plant for a multinational electronics manufacturer.[4] There is even an "Eminent Domaine" winery.[5] But unlike many other hot-button issues,

2. Brittany Peterson and Stuart Leavenworth, *Pennsylvanians speak out about losing their land to a Sunoco pipeline*, Miami Herald (June 1, 2017) ("Any day now, a pipeline company will arrive on Ralph Blume's land in southern Pennsylvania to remove a hay shed. The shed sits on the route of the new Mariner East 2 pipeline, which Sunoco is building to transport natural gas liquids to the East Coast and abroad. Blume, 76, doesn't plan to make it easy for Sunoco contractors. 'I'll sit in the damn building, and they can go to hell,' he said, one week after he watched Sunoco contractors cuts down trees on his farm.").

3. Justin Nobel, *Pipeline Protesters Take to The Trees*, Rolling Stone (May 15, 2018) ("On March 28th, 'Nutty' planted herself atop a fifty-foot pole–the timber of a tulip poplar tree—in Virginia's Jefferson National Forest to block the path of a proposed natural gas pipeline.").

4. Rick Romell, *Village of Mount Pleasant declares Foxconn area as blighted, may use eminent domain to take properties*, Milwaukee J. Sentinel (June 5, 2018) ("And Monday's action likely will further sharpen the battle lines already drawn over the Foxconn project, which is lauded by proponents as an engine of economic transformation and criticized by detractors as a taxpayer-financed boondoggle and environmental threat.").

5. "Eminent Domaine" is a winery in Newberg, Oregon:

> The name, Eminent Domaine, is a reflection of our experience with the legal term, eminent domain, our dedication to the Oregon wine industry and our love of the wines produced in our region.

(*footnote continued on next page*…)

the focus on eminent domain has an easily-identifiable point source: this Court's decision in *Kelo v. City of New London*, 545 U.S. 469 (2005).

In *Kelo*, this Court's majority approved the taking of non-blighted family-owned homes, concluding that seizing property from one private owner and turning it over to another private owner for purposes of economic development was generally consistent with the Public Use Clause as long as it was accomplished within the confines of a transparent and objective overall development plan. Thus, the public purpose of the development plan of which the taking is a part (and not the public use of the specific taking being challenged) is the measure of constitutional validity. *See id*. at 480 ("The disposition of this case therefore turns on the question whether the City's development plan serves a 'public purpose.'").

The reaction was swift. *See* Ilya Somin, The Grasping Hand: "Kelo v. City of New London" and the Limits of Eminent Domain (2015). The majority ruling resulted in a "massive and unprecedented political reaction . . . [which] attracted intense and

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(…*footnote continued from previous page*)

> In 2002 the City of Portland cited eminent domain as reason for claiming an office building we owned downtown. We began negotiations, as we agreed with the intent of the law, which states that the property would be used for the public good in exchange for a price based on fair market value. However, when both qualifiers came into question, a lengthy legal process ensued. Despite having a more favorable outcome from arbitration, the compensation was low and the property was used for undisclosed purposes.

Our Story, Eminent Domaine, http://www.eminentdomaine.com/our-story/ (last visited July 8, 2018).

widespread hostility." Ilya Somin, *The political and judicial reaction to Kelo*, Washington Post, (June 4, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/04/the-political-and-judicial-reaction-to-kelo/. Forty-five states and the federal government "enacted legislation intended to curb economic development takings; this is probably the broadest legislative reaction ever generated by any Supreme Court ruling." Ilya Somin, *The Judicial Reaction to* Kelo, 4 Albany Gov't L. Rev. 1, 2 (2011) (footnotes omitted). The ripple effect of *Kelo* was felt across "partisan, ideological, racial, and gender" lines. *Id*. The public's reaction was no less intense. The decision resulted in mass-market books. *See* Jeff Benedict, Little Pink House: A True Story of Defiance and Courage (2009); Carla T. Main, Bulldozed: "Kelo," Eminent Domain and the American Lust for Land (2007). Susette Kelo's story was even dramatized in a feature film. *See* Little Pink House (Korchula Productions, 2017).

But this legislative and public reaction has resulted in only limited protections for property owners on the target end of abusive takings, because state laws are often riddled with exceptions adopted to favor special interest groups, and in application, property owners such as Petitioner continue on an uneven playing field. *See* Harvey M. Jacobs and Ellen M. Bassett, *All Sound, No Fury? The Impacts of State-Based* Kelo *Laws*, 63 Planning & Envtl. L. 3, 7 (2011) ("But among a set of supporters and advocates of these state laws there appears to be a broad consensus that there has been little substantive impact from them. Overall, the laws are characterized as more symbolic than substantive in nature and content."). Highly deferential judicial review continues to limit

the proper role of the judiciary as a check on the legitimacy of the exercise of eminent domain authority.

Kelo recognized that an exercise of eminent domain "under the mere pretext of a public purpose, when its actual purpose [is] to bestow a private benefit," would be unconstitutional. *Id.* at 478. *Kelo* left unresolved the question of when a taking—ostensibly for public use—will instead confer private benefit because it was not "executed pursuant to a 'carefully considered' development plan, there was "evidence of an illegitimate purpose," and the result is "to benefit a particular class of identifiable individuals." *Id.* The Court did not further address the question because "[s]uch a one-to-one transfer of property, executed outside the confines of an integrated development plan, [was] not presented in [that] case. While such an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot, the hypothetical cases posited by petitioners can be confronted if and when they arise." *Id.* at 487 (footnotes omitted).

This is that case. The Port's taking of a fully-functioning docking facility and turning it over to a previously identified competitor to operate was not part of a publicly beneficial plan, and this case includes all of the factors identified by *Kelo* as indicators of pretext: a known private beneficiary driving the process; no integrated or independent development plan; little public benefit from the taking; and an exercise of eminent domain so unusual that it shows the actual character of the taking was not public use or purpose. Because of these factors, the Public Use Clause required that the courts consider the case with less than the usual deference and

should have viewed the taking with heightened scrutiny.

Amici make three points in this brief. First, meaningful judicial review under the Public Use Clause is essential because the political process does not adequately protect property owners from abusive takings. The record in this case aptly illustrates how favored private players can capture the process, even while the condemnor's stated purposes for the taking remain neutral. Second, Public Use Clause objections should be considered by applying the same analysis that the courts use where other constitutional rights are claimed to be denied by facially neutral government action. Finally, we set out the analytical and evidentiary framework which should have governed this case.

This Court is uniquely positioned to calm the waters on the question of when a taking of property "for the purpose of conferring a private benefit on a particular private party" passes Public Use Clause muster. *Id.* at 477. This case presents an excellent vehicle to do so.

ARGUMENT

I. MEANINGFUL JUDICIAL REVIEW IS NEEDED BECAUSE THE POLITICAL PROCESS DOES NOT PROTECT PROPERTY OWNERS

In *Kelo*, the Court formally "*Euclid*ized" the Public Use Clause. The arc began in *Berman v. Parker*, 348 U.S. 26, 32 (1954), when the Court concluded that a legislative declaration of the public interest is "well-nigh conclusive." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) expanded the concept by expressly equating the eminent domain power and

the police power. *Id*. at 240 ("The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers."). Then, in *Kelo*, the Court completed the arc by concluding that if a particular taking could conceivably be considered part of a comprehensive plan, the public purpose of the taking was established, even if the specific transfer was to take property from "A" and give it to "B" without a particularized determination of public use or purpose.[6] Relying upon *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)—the case which upheld a municipality's power to zone provided it is exercised in the context of a "comprehensive plan"—*Kelo* upheld the New London taking because it was part of what the majority concluded was a well-considered plan of "comprehensive character." *Kelo*, 545 U.S. at 484. Eminent domain has thus become, like zoning, just another tool in the government's regulatory toolbox. Professor Haar would no doubt approve. *See* Charles M. Haar, *"In Accordance With a Comprehensive Plan"*, 68 Harv. L. Rev. 1154 (1955) (the comprehensive plan is the foundation of zoning, and the basis of judicial deference to such exercises of the police power). Courts view zoning and other police power regulations though the "rational basis" lens because they are, at least in theory, adopted by transparent and comprehensive processes. Robust

6. *Kelo*, 545 U.S. at 484 ("Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in *Berman*, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.").

judicial scrutiny is not necessary under this theory because the remedy for an owner whose property's value may be impacted by regulations lies in the arena of politics, not with the courts. A conclusion that pronouncements of public use are coterminous with the police power is similarly dependent upon the expectation that a property owner targeted by eminent domain has sufficient political capital to participate meaningfully in the legislative process, and the courts should not interfere in such areas where representative bodies have more institutional competence to balance questions of public policy. *See*, *e.g.*, *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

That assumption is severely undermined, however, because there are critical differences between an exercise of the government's power to regulate property (even if it may devalue it severely as a result), and its power to seize it outright, even upon payment of compensation. *See* Gideon Kanner, *We Don't Have to Follow Any Stinkin' Planning—Sorry about That, Justice Stevens*, 39 Urb. Law. 529, 536 (2007) ("The Municipal Precondemnation Plans Are Not Worth the Paper They Are Written on"). The dissent in *Kelo* identified the precise issue: "when deciding if a taking's purpose is constitutional, the police power and 'public use' cannot always be equated." *Kelo*, 545 U.S. at 501 (O'Connor, J., dissenting). The conflation of police power with eminent domain is even less apt in situations like the case here, where the targeted property owner is often in a class of one and unable to organize with others with similar interests to object, because there are no others being targeted:

> For reasons that have not been judicially explained, in administering eminent domain

> laws, courts abandoned their cherished role of impartial guardians of constitutional rights who get to pass on the constitutionality of government activities and to invoke provisions of the Bill of Rights to protect the citizen from government abuses. Instead, the U.S. Supreme Court justices and lower court judges took the position that eminent domain takings are almost entirely a legislative matter, even though decisions to take specific properties are actually made by unelected local government functionaries (who are often influenced by the lobbying of the ultimate, usually private, beneficiaries of the redevelopment process.

Gideon Kanner, *Detroit and the Decline of Urban America*, 2013 Mich. St. L. Rev. 1547, 1552 (citing Dean Starkman, *Condemnation Is Used to Hand One Business Property of Another*, Wall. St. J., Dec. 2, 1998, at A1). And these decisions often are not made by elected legislative bodies, as the courts have assumed. Redevelopment agencies, highway departments, and regional transportation authorities, for example, often make the call about whether and what to take. *See*, *e.g.*, *Kelo*, 545 U.S. at 474-75 (New London Development Corporation). Even other private landowners are delegated the power to decide what to take. *See*, *e.g.*, *County of Hawaii v. C & J Coupe Family Ltd. P'ship*, 208 P.3d 713 (2009) (upholding condemnation undertaken at the behest of a private developer in a development agreement), *cert. denied*, 565 U.S. 881 (2011).

The reality is also that the owners of property generally targeted by these types of takings lack the wherewithal to compete in a survival-of-the-wealthiest contest with a well-financed special

interest bent on acquisition. *See* Stephen J. Jones, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 Syracuse L. Rev. 285, 302 (2000) (citing Laura Mansnerus, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. Rev. 409, 436 (1983)). Eminent domain also is subject to the risk that it may be more efficient for private parties who desire to acquire another's property to "invest" in eminent domain action through the condemning agency than it is to attempt to purchase the property on the open market. Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 Tex. Rev. L. & Pol. 49, 52 (1998). In cases like these, no judicial deference is due a condemning authority's determination since "the results of a manipulated political process are no more legitimate than those of the unelected judiciary." Jones, *Trumping Eminent Domain*, 50 Syracuse L. Rev. at 302 (citing Richard E. Levy, *Escaping* Lochner*'s Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. Rev. 329, 362-63 (1995)).

Nollan v. Cal. Coastal Comm'n, 482 U.S. 825 (1987) is one example in which this Court applied heightened judicial scrutiny to certain categories of land-use regulations to ensure that a regulatory action requiring the surrender of property for a purported public purpose was indeed for a public use and not "an out-and-out plan of extortion." *Id.* at 837. The Port's affirmative appropriation of property from Petitioner presents the same threat: that the condemning authority, rather than representing the consent of the governed, has been captured by special

interests or has an ulterior motive. *See* Mansnerus, *Public Use, Private Use*, 58 N.Y.U. L. Rev. at 432. Thus, *Berman*, *Midkiff*, and *Kelo*'s wholly uncritical and deferential approach—is there any other area of constitutional jurisprudence where the legislature's pronouncement is treated as "well-nigh conclusive?"—is not readily adaptable to takings such as Petitioner's, and "[t]here is nothing in the Constitution that requires such a subservient attitude on the part of the court in the context of eminent domain any more than in other fields of constitutional law. As the California Supreme Court made clear, it is simply a judicial policy choice." Kanner, *Detroit and the Decline*, 2013 Mich. St. L. Rev. at 1553 (citing *Bacich v. Bd. of Control*, 144 P.2d 818, 823, 826 (Cal. 1943)).

II. PUBLIC USE OBJECTIONS SHOULD BE CONSIDERED BY APPLYING THE SAME ANALYSIS THAT COURTS EMPLOY WHERE OTHER CONSTITUTIONAL RIGHTS ARE INFRINGED BY FACIALLY NEUTRAL ACTION

Kelo left open a role for the courts to play in "ferreting out takings whose sole purpose is to bestow a benefit on the private transferee," but as Justice O'Connor pointed out in dissent, the majority did not "detail[] how courts are to conduct that complicated inquiry." *Kelo*, 545 U.S. at 466 (O'Connor, J., dissenting). *Kelo* did not define "mere pretext," and following the decision, there was a "virtual blizzard of articles, treatises, law review articles, and the like" seeking clarification. *Mayor and City Council of Baltimore City v. Valsamaki*, 916 A.2d 324, 267 n.25 (Md. 2007). The judiciary has fared no better than legal scholars, and in the intervening years, the

lower courts have vainly searched for a consistent approach for determining when, if ever, an allegedly pretextual taking will be subject to heightened scrutiny, or whether there are any circumstances in which the presumption in favor of validity should shift. *See* Somin, *The Judicial Reaction to* Kelo, 4 Albany Gov't L. Rev. at 35-36 ("As should be evident . . . there is noconsensus among either state or federal judges on the criteria for determining what counts as a pretextual takings claim after *Kelo*. . . . It seems unlikely that any consensus will emerge in this area any time soon, unless the Supreme Court decides to review a case that settles the dispute.").

Some courts read *Kelo* to say that the lack of a comprehensive plan means the asserted public use is pretextual. In *Middleship Township v. Lands of Stone*, 939 A.2d 331 (Pa. 2007), the court concluded that "evidence of a well-developed plan of proper scope is significant proof that an authorized purpose truly motivates a taking." *Id.* at 338. Similarly, in *Rhode Island Econ. Dev. Corp. v. The Parking Co.*, 892 A.2d 87 (R.I. 2006), the court contrasted the "exhaustive preparatory efforts that preceded the takings in *Kelo*" to conclude that the government has a higher burden in quick-take condemnations than it has in "regular" takings. *Id.* at 104. The court concluded that the lack of a *Kelo* plan showed that the condemnor's "principal purpose" for the taking was to achieve by way of condemnation that which it could not achieve by agreement. *Id.* at 106. In *Valsamaki*, the court shifted the burden to the condemnor to show "concrete, immediate necessity" with "specific and compelling evidence" when it uses quick-take procedures, and to show what plans it had for the property beyond future "mixed-use devel-

opment." *Valsamaki*, 916 A.2d at 352-53 (citing *Kelo*, 545 U.S. at 473-74). In *Fideicomiso De La Tierra Del Caño Martin Peña v. Fortuño*, 604 F.3d 7, 23 n.13 (1st Cir. 2010), the First Circuit held the *Kelo* majority opinion "should not be interpreted as barring as-applied challenges" if it is shown that lands are "taken for purely private purposes or under the mere pretext of a public purpose." And in *County of Hawaii v. C & J Coupe Family Ltd. P'ship*, 198 P.3d 615 (Haw. 2010), the Hawaii Supreme Court adopted a broader rule that any taking—even a taking of a road eventually to be owned by the public—is subject to pretext analysis if the record merits it. The court held that "although the government's stated public purpose is subject to prima facie acceptance, it need not be taken at face value where there is evidence that the stated purpose might be pretextual[.]" *Id*. at 647.

That such "ferreting out" is necessary should not be surprising. This Court has noted that a property owner's evidence of the government's motivation will almost always be based on context because the government is rarely careless, or self-destructively candid. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1025 n.12 (1992) (legislative bodies should not be presumed to employ "stupid staffs"). Similarly, in a taking instituted solely for a private benefit, "[t]he government will rarely acknowledge that it is acting for a forbidden reason." *Franco v. Nat'l Capital Revitalization Corp*., 930 A.2d 160, 169 (D.C. 2007). Evidence of private influence and impropriety are most often exercised in ways other than "quid pro quo." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000). "The difficulties of inquiring into actual bias, and the fact that the inquiry is often

a private one, simply underscore the need for objective rules. That same dynamic has resulted in this Court recognizing in similar situations that a reviewing court must look to context to determine the motivations of government officials, with the application of deeper scrutiny, or even a shifting of the presumption of valid purpose. *See e.g.*, *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) ("Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face."); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) ("[W]e may determine the city council's object from both direct and circumstantial evidence," which includes "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body."). Even when faced with the mere *possibility* of impropriety or the appearance of potential bias, this Court imposed a bright line prohibition. *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 877 (2009) ("There are objective standards that require recusal when 'the probability of actual bias on the part of a judge or decisionmaker is too high to be constitutionally tolerable."). Although these cases involved equal protection, the free exercise of religion, and judicial recusal standards, the inquiry is no different when property is involved, since private property is also a fundamental constitutional right that must be respected. *Dolan v. City of Tigard*, 512 U.S. 374, 393 (1992) ("We see no reason why the Takings Clause of

the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.").

This Court explained in *Nollan v. Cal. Coastal Comm'n*, 482 U.S. 825 (1987), the reasons why, even though an action may advance a legitimate state interest, it still may be subject to heightened review. The coastal commission had conditioned permission to build a beach-front home on the owner's assent to provide public access across his property. The Court held that before the public could be invited to use private property, the government must demonstrate a legitimate interest in doing so, and that an "essential nexus" exists between the interest and the means used to achieve it. *Id.* at 837. The Court accepted the determination that public views of the beach was a legitimate goal of government, and acknowledged that the agency could have prohibited the building of the house if it blocked such views, or could have allowed the building of the house with conditions designed to protect public views. Thus, the agency could have required the property owner "provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere." *Id.* at 836-37. The coastal commission had not done so, however, but conditioned its development approval on the exaction of public access that in no way furthered its stated goal of protecting views. The "constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition." *Id.* at 837 (emphasis added). Lacking a substantial nexus to the legitimate goal, the condition was invalid. In

Dolan, the Court further explained the tailored determination which the Takings Clause requires:

> We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.

Dolan, 512 U.S. at 390.

Similar scrutiny should apply here, where the taking was not in furtherance of a larger, comprehensive plan. The beneficiary was also identified well before the taking. Heightened scrutiny or a shifting of the usual presumption of validity protects the public against the danger of unrevealed private purchase and control of public processes, strengthens public confidence that the condemnation power is being exercised impartially and free of insider influence, and protects individual property owners by preserving meaningful judicial review if government appears to have been tempted to use private dealing as a substitute for true public consideration and condemnation procedures. *Cf.* Charles E. Cohen, *Eminent Domain After* Kelo v. City of New London*: An Argument for Banning Economic Development Takings*, 29 Harv. J.L. & Pub. Pol'y 491, 549 (2006) (arguing for a *per se* rule by state courts or legislatures prohibiting all economic development takings to preserve "respect for the legal system and political process, as most citizens would intuitively (and correctly) conclude that the beneficiaries of [an economic development taking] would be rich and powerful interests profiting at the expense of ordi-

nary property owners"). Heightened scrutiny will help preserve the public's confidence that the government is acting independently and free from private influence.

III. JUDICIAL REVIEW MEANS MORE THAN DEFERENCE

The Louisiana Supreme Court (over a three-justice dissent) concluded the trial court's finding of fact that the purpose of the taking was to "build and operate a terminal" was not "manifestly wrong." Pet. 13a. But that should have been only the beginning of the analysis, not the end. That the stated purpose of the taking was public is the necessary first step, and with a record loaded with evidence that "a private purpose was afoot," *Kelo*, 545 U.S. at 456, the court should have looked beyond the Port's stated purpose for the taking and determined whether that was a pretext for otherwise impermissible conduct. Facial neutrality alone should not have been determinative.

The Colorado Court of Appeals recently provided an example of how the Louisiana courts should have treated this case. In *City of Lafayette v. Town of Erie*, No. 17CA0595, 2018 Colo. App. LEXIS 899 (Colo. App. June 14, 2018), the question was whether one municipality—a home rule city—could take land from a neighboring statutory city. The case arose from what was essentially a border dispute where the towns were merging together in the exurbs along the corridor of Highway 287. The Lafayette side of the corridor had plenty of development: a big Walmart, fast food restaurants, an auto repair shop, and a King Soopers supermarket, along with a residential development. Erie wanted to get in on the development of the corridor, so it formed an urban renewal authority and purchased two vacant parcels

(together, now called Nine Mile Corner). A few years later, Erie annexed Nine Mile from the renewal agency, and declared the parcel "blighted," a prerequisite to redevelopment. And the key new tenant of the saved-from-blight property was going to be King Soopers, the very same supermarket with an outlet just south on Highway 287, but over the border in Lafayette. King Soopers wanted "a larger store prototype," and Erie's Nine Mile property looked mighty good. Lafayette, it seems, wanted to keep King Soopers ("and its corresponding tax revenue," as the court put it, *id*. at *4), and it courted the store with offers of other parcels in Lafayette. But no deal.

Things moved fast. Just a couple of months after Lafayette found out about King Soopers maybe moving next door to the Nine Mile parcel in Erie, the Lafayette city council approved the taking of the Erie's land:

> for the public purpose of open space and benefits associated with open space, as well as preservation of Lafayette's local and unique character, and buffering of Lafayette from development activities in neighboring communities.

Id. at *7. When Lafayette's offer to buy the land was refused, it filed an eminent domain lawsuit. Erie objected, arguing the condemnation lacked a public purpose. After a two-day hearing, the trial court agreed: the purpose of this taking was to stop Erie from developing the parcel:

> The articulated need of acquiring open space for the purpose of creating a community buffer between Lafayette and Erie is inconsistent with Lafayette's actions in development the Hwy. 287 corridor. Instead, Lafayette's actions are more

> closely aligned with a previously articulated goal to ensure that Erie does engage in commercial development on Nine Mile Corner.

Order Granting Respondents' Motion to Dismiss, *City of Lafayette v. Town of Erie Urb. Renewal Auth.*, No. 2016CV307901, at 15 (Colo. Dist. Ct. Boulder Cty., Feb. 16, 2017). The court of appeals affirmed. The court avoided the question of whether property owned by a statutory city can be taken by a home rule city. Apparently both cities assumed Lafayette could reach outside its borders and take, as long as it had the right reasons. The court noted that a Colorado home rule municipality can, generally speaking, take land outside of its borders, even property already devoted to public use, as long as the taking is for a public purpose. Instead, the court focused on Lafayette's actual motive for the taking, concluding that the taking was motivated by the city's desire to keep King Sooper from opening a larger store prototype just over the border in Erie. The court concluded Lafayette had an improper motive "to interfere with Erie's proposed commercial development." *Lafayette*, 2018 Colo. App. LEXIS at *11. The court upheld the stated purpose of the taking—a buffer zone—as facially valid. But it did not stop there:

> The stated public purpose of an open space buffer is valid, but blocking Erie's planned development— planning that predated Lafayette's condemnation petition — is not lawful.

Id. (citing *Rhode Island Econ. Dev. Corp. v. The Parking Co., L.P.*, 892 A.2d 87 (R.I. 2006)).

The court reviewed the entire factual record (not just the stated reasons for the taking) and tested whether Lafayette's claim that it needed a buffer

zone would not be satisfied by means other than taking Nine Mile Corner. For example, "Lafayette presented no evidence showing why the setback incorporated in Erie's development plans would be insufficient to serve as a community buffer."). Slip op. at 17-18. Thus, the taking was pretextual. The court concluded:

> Because Erie, as the property owner, met its burden of showing bad faith, the district court properly examined Lafayette's finding of necessity to determine, with record support, that the taking to establish an open space community buffer was pretextual and was not a lawful public purpose. The court also indicated that Lafayette's public officials were highly motivated to keep King Soopers—and the corresponding tax revenue—within Lafayette. Accordingly, the record amply supports the district court's findings.

Id. at *14. (citing *Silver Dollar Metro. Dist. v. Goltra*, 66 P.3d 170, 174 (Colo. App. 2002); *Glenelk Ass'n, Inc. v. Lewis*, 260 P.3d 1117, 1120 (Colo. 2011)).

The lessons which *Lafayette* teaches:

- Courts need not accept whatever the condemnor says its reasons are for the taking. *Id*. at *10 ("Lafayette's argument hinges on its belief that because the Lafayette city council determine this condemnation was necessary, the district court cannot look behind that determination to see if it was motivated by bad faith. This is incorrect.").
- If there's an allegation of bad faith (improper motive), the court should take a hard look. *Id*. at *9 ("Without judicial review of condemnation actions, there would be no end to one enti-

ty subverting another entity's condemnation action by initiating one of its own.").

- Some public benefit resulting from the taking won't necessarily save it. *Id*. at *6-7. Motive, not the percent of public benefit, also counts.
- In order to test whether the stated public purpose is indeed public, a court looks to the record. *Id*. at *10 (citing *City & Cty. of Denver v. Block 173 Assocs*., 814 P.2d 824, 828-29 (Colo. 1991)).
- Similarly, a condemnor's statement of the necessity of the taking is subject to review for bad faith or improper motive. *Lafayette*, 2018 Colo. App. LEXIS at *19 ("Thus, if bad faith is at issue, courts may look behind an entity's stated condemnation purpose and finding of necessity.").
- Courts may test a claim of bad faith by conducting considering all the evidence, and not limiting itself the condemnor's statements. *Id*. at *19.
- When the condemnation isn't *sui generis*, but there's a factual record of what happened before the condemnor decided to take, the reviewing court should dive into that record. Drafting a neutral resolution of taking isn't going to insulate the condemnor from this sort of review. *Id*. at *22.

In short, motive, not stated reason, is critical. The fact that a taking motivated by private reasons might also have some public benefit, or that there were good motives mixed in with the bad, isn't enough. It doesn't matter, for example, that a taking

may be for a public road, if the taking was motivated by other, nonpublic reasons.

CONCLUSION

This Court should grant the petition and review the decision of the Louisiana Supreme Court.

Respectfully submitted.

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