No. 17-1656

In the
Supreme Court of the United States

VIOLET DOCK
PORT, INC., LLC,
Petitioner,

v.

ST. BERNARD PORT,
HARBOR, & TERMINAL DISTRICT,
Respondent.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

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 a 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 AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation (PLF) submits this brief amicus curiae on behalf of Violet Dock Port, Inc., LLC.[1]

PLF was founded over 40 years ago and is widely recognized as the most experienced nonprofit legal foundation of its kind. PLF attorneys have participated as lead counsel or amicus curiae in several landmark United States Supreme Court cases in defense of the right of individuals to make reasonable use of their property and the corollary right to obtain just compensation when that right is infringed. *See*, *e.g.*, *Knick v. Township of Scott*, No. 17-647; *Horne v. Department of Agriculture*, __ U.S. __, 135 S. Ct. 2419 (2015); *Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013); *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012); *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). PLF has offices in Florida, California, Washington, and the District of Columbia,

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been received.

Pursuant to Rule 37.6, Amicus Curiae affirms 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. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

and regularly litigates matters affecting property rights in state courts across the country. PLF believes its perspective and experience with property rights litigation will aid this Court in the consideration of the issues presented in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises an important and unresolved question concerning the limitations that the Fifth Amendment places on the government's authority to condemn private property. Specifically, this case asks a question left unanswered by *Kelo v. City of New London, Conn.*, 545 U.S. 469, 508 (2005): whether the Public Use Clause prohibits government entities like the St. Bernard Port, Harbor, & Terminal District (Port District) from exercising its eminent domain powers to transfer the property of one private business to another for "economic development" purposes without limitation. App. A at 11. It does not. This Court should grant the writ and reverse the Louisiana Supreme Court's conclusion to the contrary. Pet. at 11a.

The Public Use Clause is an essential restraint on the government's power to take an individual's private property against his or her will. *See Vanhorne's Lessee v. Dorrance*, 2 U.S. 304, 307, 2 Dall. 304 (1795) (noting eminent domain's origin in the "absolute despotic power" of the monarch); *see also Calder v. Bull,* 3 U.S. (3 Dall.) 386, 388 (1798) (The government has no constitutional authority to "take[] property from A and give[ ] it to B ...."); *Mississippi & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878) (The "public use" requirement is a restriction on the exercise of eminent domain); *Kelo*, 545 U.S. at

508 (Thomas, J., dissenting) (The Founders adopted the "public use" requirement in order to limit the government's condemnation powers.). Thus, this Court has long held that the government is "forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party." *Kelo*, 545 U.S. at 477; *see also Hawaii Housing Authority 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.").

Certainly, courts have blurred the distinction between a strict "public use" and a more general "public purpose" over the years by recognizing circumstances in which economic development plans can satisfy the Public Use Clause—even though such plans may result in private redevelopment of condemned properties. *See*, *e.g.*, *Kelo*, 545 U.S. at 485-86 (comprehensive redevelopment plan condemning a neighborhood); *Midkiff,* 467 U.S. at 241-42 (1984) (condemnation of holdings that skewed the local property market); *Berman v. Parker,* 348 U.S. 26, 33-35 (1954) (condemnation of "blighted" community for redevelopment). But none of those cases involved a direct transfer of private property from one person to another, which remains forbidden. *Kelo*, 545 U.S. at 477. On this point, *Kelo* emphasized 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." *Id*. at 478; *see also id.* at 491 (A taking will be invalidated upon a showing of "impermissible favoritism" to a private party.) (Kennedy, J., concurring). But because *Kelo* did not involve a one-to-one transfer of property, the Court

preserved for a future determination the question whether the government may effect a private taking for "economic development" purposes. *Id.* 487.

This case presents the very scenario that concerned the Justices in *Kelo* (and alarmed the public and commentators): a taking and resulting transfer of property from one owner to another that bears all the hallmarks of a disguised and impermissible private taking. Pet. at 32a. Ostensibly justified as an economic development measure, the taking here transferred a profitable port facility from one private company to another company. The Louisiana Supreme Court concluded that the Port District's economic development rationale qualified as a "public use" despite evidence indicating that the economic development rationale was a pretext for a forbidden private taking. Pet. at 32a, 34a-43a. The court reached this conclusion by characterizing *Kelo* as having authorized economic development takings without limitation. Pet. at 11a (concluding that *Kelo* "expressly upheld a taking for economic development purposes"). Thus, this case squarely raises the unresolved question of what standard of review is appropriate when confronted with evidence of a pretextual private taking. Pet. at 32a. Resolution of this question is a matter of utmost national importance, as the lower courts regularly confront claims of pretextual economic development takings, and they are sharply divided on the proper approach to such claims.

The petition should be granted.

REASONS FOR GRANTING THE WRIT

I

THIS CASE RAISES AN IMPORTANT QUESTION AS TO WHETHER THE PUBLIC USE CLAUSE PROHIBITS THE GOVERNMENT FROM USING AN "ECONOMIC DEVELOPMENT" RATIONALE AS A PRETEXT TO TRANSFER PROPERTY TO A PARTICULAR PRIVATE PARTY FOR PRIVATE PURPOSES

The Louisiana Supreme Court adopted a rule of federal constitutional law that extends *Kelo* beyond its plain terms and in a manner that undermines the Public Use Clause. Pet. At 11a. At its most basic, the "public use" requirement forbids the government from taking property from one person in order to give it to another. *Calder*, 3 U.S. (3 Dall.) at 388 (An exercise of eminent domain power for private gain is "against all reason and justice."). This fundamental protection is essential to our constitutional system. Without it, "all private property is … vulnerable to being taken and transferred to another private owner, so long as it might be upgraded[.]" *Kelo*, 545 U.S. at 494 (O'Connor, J., dissenting); *see also id.* at 503 ("The specter of condemnation hangs over all property."). *Kelo* itself reaffirmed that private taking will remain forbidden regardless of the Court's conclusion that economic plans can sometimes qualify as a public purpose. *Id*. at 477-78.

Importantly, the *Kelo* majority emphasized that the government would not "be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." *Id.* at 478. Justice Kennedy's concurrence

stated that under the Public Use Clause, a court "should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits." *Id.* at 491 (Kennedy, J., concurring). His opinion further anticipated that some private transfers could raise such a substantial risk of "undetected impermissible favoritism" that they should be presumptively invalid. *Id.* at 493 (Kennedy, J., concurring). That is, "the transfers are so suspicious, or the procedures employed so prone to abuse, or the purported benefits are so trivial or implausible, that courts should presume an impermissible private purpose." *Id.*

Despite the Justices' attempts to provide some assurance that *Kelo* would not open the door for the government to carry out private takings in the name of economic progress, the decision failed to provide any concrete guidance on how and when courts should identify takings as pretextual and improper. Daniel B. Kelly, *Pre-textual Takings: Of Private, Developers, Local Governments, and Impermissible Favoritism*, 17 S. Ct. Econ. Rev. 173, 174 (2009). The majority and concurring *Kelo* opinions did point to several criteria that suggested that pretext was not a problem in *Kelo* itself, *i.e.*, the taking was part of an "integrated development plan," the transferee was not known before hand, and the public benefits were not incidental. *Kelo,* 545 U.S. at 487, 492; *id.* at 493 (Kennedy, J., concurring). But neither the majority nor concurring *Kelo* opinion clearly outlined whether contrary factual circumstances—in isolation or in combination—would trigger a heightened form of scrutiny designed to ferret out an impermissible private taking operating under the veil of a purported public purpose. The Court instead left this critical

question for another day. *Kelo,* 545 U.S. at 487; *id.* at 493 (Kennedy, J., concurring); Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 Cornell L. Rev. 1, 65 (2006) ("[T]he majority and Justice Kennedy left unanswered the question of how courts should determine when a taking becomes too private to constitute a public use.").

The *Kelo* Court's refusal to offer a clear framework for identifying (and striking down) private takings disguised as public measures exacerbated the concern that *Kelo* invited governments to take property to give to favored, private patrons. John Dwight Ingram, *Eminent Domain After* Kelo, 36 Cap. U.L. Rev. 55, 57 (2007) ("If the *Kelo* definition of 'public use' is applied, no private property will be protected from condemnation. A small business will always provide fewer jobs and tax revenues than a big national retail chain. The same can be said if a church is replaced by a large hotel, or a community of homes by a large manufacturing plant."). Indeed, the *Kelo* dissenters objected to the majority opinion largely because they believed it put all private property at risk of being taken for the use and gain of economically powerful private parties. *Kelo,* 545 U.S. at 503-04 (O'Connor, J., dissenting). The dissenters were rightly skeptical of the majority and concurring Justices' vague assurance that their opinions would not countenance naked property transfers from A to B. *Id.* at 502-04 (O'Connor, J., dissenting).

Fears that eminent domain can and will be abused for private gain in the post-*Kelo* "economic development" context have proved well-founded.

Governments (as well as quasi-public entities imbued with the eminent domain power) regularly take private land to give it to particular private parties for alleged economic reasons. Marc Mihaly & Turner Smith, Kelo's *Trail: A Survey of State and Federal Legislative and Judicial Activity Five Years Later*, 38 Ecology L.Q. 703, 729 (2011) ("Cities throughout the developed and developing world are undergoing intense redevelopment, most of it the result of extensive use of the tool of public-private partnerships, including the necessary ancillary use of eminent domain.").

Without a firm constitutional barrier against pretextual takings, there is little to stop governments from using "economics" as a method to redistribute property from less-favored owners to more politically influential ones. 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) ("If the government can use the eminent domain power as a tool for revenue enhancement or job growth, the temptation and the opportunity to overuse the power [to transfer property to private interests] may be too great."). That is, as it stands now, governments have a strong incentive to use eminent domain to reward favored developers, donors, and other private parties by giving them land owned by others for the transferee's private benefit. *Kelo,* 545 U.S. at 502-04 (O'Connor, J., dissenting); *see also, Kaur v. New York State Urban Dev. Corp.,* 72 A.D.3d 1, 21 (N.Y. App. Div. 2009), *rev'd* 933 N.E.2d 721 (N.Y. 2010) (finding that a condemnor took land for the express and pre-determined purpose of giving it to Columbia University—which proposed the taking —after

conducting a blight study "biased in Columbia's favor"). The Public Use Clause is a constitutional bulwark against that abuse.

This case exemplifies what the *Kelo* dissenters correctly foresaw would arise from the majority opinion: one where the government takes one person's property to give it to another private citizen for its own use and purposes, under the guise of a public economic purpose, and to which a court feels bound to turn a blind eye. The Port District "picked out" a company before the taking and then transferred Violet Dock's port facility to it. Pet. at 99a-104a. Worse, the record showed that the transferee company had participated extensively in the plans leading up to the Port District's condemnation action, specifically targeting Violet Dock's land. Pet. at 34a-43a, 99a-104a. The private benefits are obvious and paramount—the transferee company acquired a profitable port facility for its own economic gain. *Id.* This case provides an ideal vehicle for addressing whether heightened scrutiny applies to, and forbids, an economically premised property transfer that appears intended to serve a private purpose. The Court should grant the petition to confirm that neither *Kelo* nor the Public Use Clause allows the government to shift property from one person to another when all objective evidence shows the taking is really being accomplished to assist a particular, known private company.

II

STATE SUPREME COURTS AND THE LOWER FEDERAL COURTS ARE IRREPARABLY DIVIDED ABOUT HOW TO IDENTIFY A PRETEXTUAL TAKING

Review is also necessary to settle a widening split of authority among the state and lower federal courts regarding the test used to identify a private taking. *Kelo* suggested that heightened public use scrutiny would apply to a taking that transfers property to a private person under a pretextual economic purpose but declined to develop a test. Deprived of any clear guidance on this issue, lower courts have struggled to identify and address alleged pretextual economic development takings. Ilya Somin, *The Judicial Reaction to* Kelo, 4 Alb. Gov't L. Rev. 1, 3 (2011) ("[F]ederal and state courts have been all over the map in their efforts to apply *Kelo*'s restrictions on 'pretextual' takings. There is no consensus in sight on this crucial issue. It may be that none will develop unless and until the Supreme Court decides another case in this field."); Kelly, *Pretextual Takings*, 17 S. Ct. Econ. Rev. at 176 ("[T]he [*Kelo*] Court's lack of clarity, has created significant uncertainty for both litigants and lower courts.").

In general, courts faced with pretextual takings claims have focused on factual criteria highlighted in the *Kelo* opinions. But they draw sharply divergent conclusions as to which criteria are most relevant to determining whether a private taking is at hand. For example, a number of high courts have read *Kelo* as allowing (or even requiring) them to closely examine a purported economic development taking, as a potential pretext for a private taking, if the private

benefit predominates over the public benefit. In *County of Hawaii v. C & J Coupe Family Ltd. P'ship,* the Hawaii Supreme Court concluded that "the *Kelo* majority opinion … allows courts to look behind an eminent domain plaintiff's asserted public purpose under certain circumstances." 198 P.3d 615, 638 (Haw. 2008). In particular, the court held that "*Kelo* make[s] it apparent 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 644. The Court directed the lower court to engage in a "pretext" analysis primarily by considering whether the taking "provided a predominantly private benefit." *Id.* at 647; *see also Franco v. National Capital Revitalization Corp.,* 930 A.2d 160, 173-74 (D.C. 2007) ("[A] reviewing court must focus primarily on benefits the public hopes to realize from the proposed taking. If the property is being transferred to another private party, and the benefits to the public are only 'incidental' or 'pretextual,' a 'pretext' defense may well succeed.").

Other courts focus on the actual motives of the condemnor. For instance, in *Middletown Township v. Lands of Stone,* the Pennsylvania Supreme Court held that it had to consider "the real or fundamental purpose behind the taking … [and] the true purpose must primarily benefit the public." 939 A.2d 331, 337 (Pa. 2007); *see also Kaur v. New York State Urban Development Corp.*, 72 A.D.3d at 12-16 (finding that evidence that the condemnor had deliberately favored the transferee demonstrated the redevelopment taking was pretextual); *99 Cents Only Stores v. Lancaster Redevelopment Agency,* 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001) (holding that "no judicial

deference is required . . . where the ostensible public use is demonstrably pretextual" and that the condemnation was invalid because "Lancaster's condemnation efforts rest on nothing more than the desire to achieve the naked transfer of property from one private party to another"); *Cottonwood Christian Ctr. v. Cypress Redev. Agency,* 218 F. Supp. 2d 1203, 1229 (C.D. Cal. 2002) ("Courts must look beyond the government's purported public use to determine whether that is the genuine reason or if it is merely pretext.").

The Third Circuit focuses on whether the private beneficiary of a taking was identified beforehand to determine if a taking really serves a private, rather than public, purpose. *Carole Media LLC v. New Jersey Transit Corp.,* 550 F.3d 302, 311 (3d Cir. 2008). In *Carole Media*, the Third Circuit considered the constitutionality of a policy that sought to take a business's licenses to post advertisements on billboards owned by the New Jersey Transit Corporation so as to bid them out to other advertising companies. The court upheld the taking in substantial part because "there is no allegation that NJ Transit, at the time it terminated Carole Media's existing licenses, knew the identity of the successful bidder for the long-term licenses at those locations." *Id.* Given the absence of foreknowledge about the private beneficiary of the taking, the court ruled that "this case cannot be the textbook private taking involving a naked transfer of property from private party A to *B* solely for *B's* private use." *Id.*

Several state supreme courts consider the nature and extent of public planning to be the prime indicator of whether a transfer of property to a private

party is for a private purpose. In *Mayor and City Council of Baltimore City v. Valsamaki,* the Maryland Supreme Court rejected the alleged public need to take a "three story building which houses a bar and package goods store" for ultimate transfer to a private developer, largely due to the lack of careful, *Kelo*-like comprehensive public planning. 916 A.2d 324, 326 (Md. 2007); *see also Middletown Township v. Lands of Stone,* 939 A.2d at 338 (stating that "evidence of a well-developed plan of proper scope is significant proof that an authorized purpose truly motivates a taking"); *Rhode Island Economic Development Corp. v. The Parking Co.,* 892 A.2d 87,104 (R.I. 2006) (emphasizing that "the City of New London's exhaustive preparatory efforts that preceded the takings in *Kelo*, stand in stark contrast to [the condemning authority's] approach in the case before us").

Finally, a few courts have concluded that this Court's jurisprudence requires such deference to an economic development takings rationale that a pretextual or private taking will not be found even when the facts indicate that a condemnation is primarily designed to give property to a private party for its own gain. The leading decision in this regard comes from the Second Circuit in *Goldstein v. Pataki,* 516 F.3d 50 (2d Cir. 2008). *Goldstein* concerned the taking of private property to make way for a new basketball stadium, and related amenities, for a private team. The property owners asserted "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." 516 F.3d at 52-53. The Second Circuit, however, upheld the taking concluding that *Kelo* did not allow courts to consider whether the

proffered economic development justification was a pretext for giving land to a private party for private purposes even when the facts showed a real risk of this occurrence. *Id.* at 52-53, 62-64.

The Court should take this case to resolve the disagreements among the courts on these issues.

III

THE "ECONOMIC DEVELOPMENT" RATIONALE ENCOURGAES EMINENT DOMAIN ABUSE

The heightened scrutiny suggested by *Kelo* is also warranted because condemnation for economic development purposes often encourages eminent domain abuse and is contrary to public policy.[2]

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[2] The prospect that *Kelo* could expand the number and type of "economic development" condemnation actions outraged a vast majority of Americans spanning the geographic, political, and social spectrum. Ilya Somin, *The Grasping Hand: Kelo v. City of New London & the Limits of Eminent Domain*, 139 (The University of Chicago Press, 2015). In response to the decision, 43 states enacted laws or amended their state constitutions attempting to strengthen protections against that particular type of eminent domain abuse. *See* Dana Berliner, *Looking Back Ten Years After Kelo*, 125 Yale L.J. Forum 82, 84 (2015) (citing La. Const. art. I, § 4 (2006)). And seven state high courts interpreted their state constitutions to prohibit the use of eminent domain for private development. *Id.* at 88. These measures, however, have largely failed to provide property owners with more protection against economic development takings after *Kelo*. Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 Minn. L. Rev. 2100, 2114 (2009). As a result, "[t]he federal constitutional standard enunciated in *Kelo* appears dominant throughout the states." Mihaly & Smith, Kelo's *Trail*, 38 Ecology L.Q. at 729.

A. Redevelopment Plans Frequently Fail

The argument that economic development is a public use rests on the belief that property, once transferred to a new owner, might lead to some economic benefit, like increased employment or tax revenue. Ilya Somin, *The Case Against Economic Development Takings*, 1 N.Y.U. J. L. & Liberty 949, 950 (2005). But under this rationale, almost *any* compelled transfer of property from one party to another could be justified as economic development—particularly where property is transferred from a poor owner to a wealthier person or entity. *See* Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of Public Use*, 32 Sw. U. L. Rev. 569, 598-99 (2003); Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain*, 170 (Harvard University Press, 1985). Thus, economic development, alone, extinguishes a critical limiting principle written into the Fifth Amendment.

A stark example of this arose in 1981, when Detroit condemned the Poletown neighborhood for the benefit of the General Motors Corporation, promising that a new automobile factory would create approximately 6,000 jobs and alleviate a crushing economic recession. *See generally* Jeanie Wylie, *Poletown: Community Betrayed* (1989). After heated protests and a hurried decision by the Michigan Supreme Court upholding the condemnation for economic development purposes, the city razed the Poletown neighborhood to make way for an auto plant that never created the promised jobs. *Id.* at 230. Recognizing its mistake, the Michigan Supreme Court overruled the much disgraced *Poletown* decision:

> To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain. Poletown's [economic development] rationale would validate practically any exercise of the power of eminent domain on behalf of a private entity. After all, if one's ownership of private property is forever subject to the government's determination that another private party would put one's land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, "megastore," or the like.

County of Wayne v. Hathcock, 684 N.W.2d 765, 786 (Mich. 2004).

Kentucky and Illinois's Supreme Courts have also pointed out that the economic development rationale removes all logical limits on the exercise of eminent domain. The Kentucky Supreme Court noted that every new legal business provides some sort of benefit that could be described as economic development. *City of Owensboro v. McCormick*, 581 S.W.2d 3, 7 (Ky. 1979) (quoting 26 Am. Jur. 2d Eminent Domain § 34, at 684-85 (1966)). Thus, if mere economic development is a public purpose, "there is no limit that can be drawn." *Id*. The Illinois Supreme Court dismissed the economic development rationale

by explaining: "If property ownership is to remain what our forefathers intended it to be, if it is to remain a part of the liberty we cherish, the economic by-products of [an interest group's] ability to develop land cannot justify a surrender of ownership to eminent domain." *Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C.*, 768 N.E.2d 1, 10 (Ill. 2002).

The suggestion that the economic development will impart broad public benefits is also readily refuted. In truth, redevelopment plans frequently fail and visit many negative consequences on the community. Gideon Kanner, *We Don't Have to Follow Any Stinkin' Planning—Sorry About That, Justice Stevens*, 39 Urb. Law. 529, 536 (2007). Government officials regularly overestimate the benefits of public works projects because they do not—and often cannot—understand precisely how certain plans will affect the economy, leading them to use optimistic projections simply to sell the public on the project. *Cf.* Garrett Johnson, *The Economic Impact of New Stadiums and Arenas on Cities*, 10 U. Denv. Sports & Ent. L.J. 1, 14-15 (2011). Moreover, redevelopment plans do not necessarily lead to the benefits they promise because there is no legal mechanism to require the new owner of the condemned property to follow the promised redevelopment plans. Kanner, *supra*, at 539. After the redeveloper acquires condemned land, it will own it in fee simple and is "free to resell it or put it to any lawful use [it] choose[s]." *Id.* at 540.

The redevelopment at issue in *Kelo* is the quintessential example of such a misleading and harmful project plan. Hoping to capitalize on Pfizer's plan to build a nearby facility, New London

Development Corporation (NLDC) condemned numerous homes in the Fort Trumbull neighborhood to build new facilities, including a marina, park, hotel, office space, and upscale housing, in hopes of revitalizing an economically depressed area. Shortly after the property owners lost their case to this Court and surrendered their homes, Pfizer abandoned the project. *Grasping Hand, supra*, at 235. Accordingly, NLDC did not carry out their redevelopment plans. *Id*. Nor had other redevelopment plans materialized by 2015. *Id*. Instead, for over a decade after *Kelo*, the site of the former Fort Trumbull homes sat as an empty lot.[3] *Id*. *Kelo* has become an embarrassment for those involved. Connecticut Supreme Court Justice Richard Palmer—a member of the four-judge majority that permitted the condemnation at state court—subsequently apologized to one of the former homeowners, Susette Kelo, for voting to allow the taking. *Id*. at 234. Justice Palmer told Ms. Kelo that he "would have voted differently" had he known what would happen to her home and community. *Id*.

B. "Economic Development" Takings Often Benefit the Wealthy at the Expense of Poor and Minority Communities

The use of eminent domain for economic development is often most harmful to poor and minority communities. Indeed, in jurisdictions where the government is authorized to condemn property for

[3] In 2011, the lots were briefly designated as a storm debris dump site in 2011 after Hurricane Irene *See* Gideon Kanner, *Kelo Aftermath—The Final Indignity* (Aug. 31, 2011) (http://gideonstrumpet.info/2011/08/kelo-aftermath-the-final-indignity/).

economic development, wealthy and well-connected interests are incentivized to engage in a practice that economists call "rent seeking," whereby private interests try to gain control of the eminent domain power and use it for their own benefit at the expense of the public. Thomas W. Merrill, *Rent Seeking & the Compensation Principl*e, 80 Nw. U. L. Rev. 1561, 1577 (1986) ("If the prior distribution of wealth can be changed by the state, . . . then the resources of society will be consumed in a factional struggle to capture the state apparatus in order to obtain benefits for one faction at the expense of everyone else."); *see also* Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspectiv*e, 3 Tex. Rev. L. & Pol. 49, 85 (1998).

A rule that allows private takings to occur without scrutinizing the government's economic rationale will encourage interest groups to lobby the government to condemn private property because it is cheaper to do so than negotiating with property owners for their land. *See* Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 Yale L.J. 149, 173-74 (1971). Unfortunately for property owners, rent seeking is difficult to stop because government bodies are willing to capitulate to interest groups in exchange for money and political support. *See* Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 Colum. L. Rev. 223, 230 (1986). Moreover, a condemned landowner often lacks the finances to mount a counter-lobbying effort against eminent domain abuse because costs of redevelopment projects are typically dispersed between many landowners while the benefits are

concentrated to favor of the rent seeker. *See* Kochan, *supra*, at 81.

The Constitution's Framers were hostile towards this type of naked preference because they feared "that government power would be usurped solely to distribute wealth or opportunities to one group or person at the expense of another." Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61 (1986). Indeed, it has been suggested that, properly read, the Public Use Clause limits the taking of property to cases where "the government owns, or the public has a legal right to use, the property." *Kelo*, 545 U.S. at 508 (Thomas, J., dissenting).

Economic development takings are also harmful to the public interest because they disproportionately impact poor and minority communities. *Kelo*, 545 U.S. at 505 (O'Connor, J., dissenting). Justice Thomas similarly observed that the poor are the least likely to "put their lands to the highest and best social use [and] are also the least politically powerful." *Id.* at 521 (Thomas, J., dissenting). Accordingly, the poor would be most susceptible to condemnation if economic development was considered a per se valid public use. Justice Thomas also added that minority communities would be disproportionately harmed by a broad definition of public use, observing that after the Court had first upheld the use of eminent domain to redevelop blighted areas in *Berman v. Parker*, 348 U.S. 26, cities rushed to draw plans for downtown development. *Kelo*, 545 U.S. at 522. Of the families displaced by the urban renewal rush caused by *Berman* between 1949 and 1963, 63% were racial minorities. *Id.*; *see also* Wendell E. Pritchett, *The "Public Menace" of Blight:*

Urban Renewal and the Private Uses of Eminent Domain, 21 Yale L. & Pol'y Rev. 1, 6 (2003) ("Blight was a facially neutral term infused with racial and ethnic prejudice.").

Considering the demonstrably unfair history of redevelopment takings, Justices O'Connor and Thomas's skepticism toward promised economic development was warranted. Indeed, since *Kelo*, empirical evidence demonstrates how economic condemnation devastates poor and minority communities. Dick M. Carpenter & John Ross, *Testing O'Connor and Thomas: Does the Use of Eminent Domain Target Poor and Minority Communities?*, Urb. Studies, Vol. 46 (11), p. 2447, Oct. 2009. Communities targeted by eminent domain tend to have more ethnic or racial minorities, have less education, and earn significantly less income than surrounding communities unaffected by condemnations. *Id*. at 2455. Those who are displaced by eminent domain use are also more likely to be renters and live at or below the federal poverty line. *Id*. at 2456.

It is not surprising that poor and minority communities are more vulnerable to eminent domain abuses. To begin, it is cheaper to condemn poor people's property. Local governments also have a bad incentive to condemn poor and minority communities because if they "are concerned with improving their tax bases, it simply is not economical to pay attention to the needs or desires of the poor." Paul Boudreaux, *Eminent Domain, Property Rights, & the Solution of Representation Reinforcement*, 83 Denv. U. L. Rev. 1, 47 (2005). Planning boards also typically will not target the middle and upper classes because they are

more likely to have the resources to challenge condemnation actions which poor and minority groups often lack. *See Grasping Hand, supra*, at 101. For all these reasons, if governments are given unfettered power to condemn land for economic development purposes, they will continue to overwhelmingly target poor and minority groups. *Id*.

This Court should grant this petition to ensure that the public use requirement safeguards against the use of pretextual economic rationale to take private property for the benefit of favored persons.

IV

THE PRESENT CASE IS AN IDEAL VEHICLE FOR THIS COURT TO DEFINE THE MEANING OF PRETEXTUAL TAKINGS

The present case is an excellent vehicle for this Court to set out a test for invalidating pretextual takings. The Louisiana Supreme Court adopted a rule of federal constitutional law authorizing the government to transfer private property from one person to another based for the purpose of economic development. Although the trial court found that all four elements that *Kelo* identified as possible indicators of a pretextual taking were present (*Kelo,* 545 U.S. at 487, 493), the Louisiana Supreme Court did not consider any of those factors when upholding the condemnation. Pet. at 11a. This Court can therefore use this case to consider the weight to be accorded to each of the four criteria, whether their existence will create a rebuttable presumption of a private taking, and the appropriate standard of review—providing much-needed guidance to state courts and lower federal courts.

CONCLUSION

For the foregoing reasons, PLF respectfully requests that this Court grant Violet Dock's petition for a writ of certiorari in order to reverse the Louisiana Supreme Court's ruling and to uphold the essential limitation on the government's eminent power enshrined by the Public Use Clause.

DATED: July, 2018.

Respectfully submitted,

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