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 A Writ Of Certiorari To The Louisiana Supreme Court

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* NFIB SMALL BUSINESS LEGAL CENTER, SOUTHEASTERN LEGAL FOUNDATION, CATO INSTITUTE, CENTER FOR CONSTITUTIONAL JURISPRUDENCE, ATLANTIC LEGAL FOUNDATION, MOUNTAIN STATES LEGAL FOUNDATION, NEW ENGLAND LEGAL FOUNDATION, AND RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONER

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MOTION OF NFIB SMALL BUSINESS LEGAL CENTER, SOUTHEASTERN LEGAL FOUNDATION, CATO INSTITUTE, CENTER FOR CONSTITUTIONAL JURISPRUDENCE, ATLANTIC LEGAL FOUNDATION, MOUNTAIN STATES LEGAL FOUNDATION, NEW ENGLAND LEGAL FOUNDATION, AND RUTHERFORD INSTITUTE FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Supreme Court Rule 37.2(b), *Amici Curiae*, the National Federation of Independent Business (NFIB) Small Business Legal Center, Southeastern Legal Foundation, Cato Institute, Center for Constitutional Jurisprudence, Atlantic Legal Foundation, Mountain States Legal Foundation, New England Legal Foundation, and Rutherford Institute respectfully request leave of this Court to file the following brief in support of the Petitioner in the above captioned matter. In support of the motion, the *amici* state:

1. On behalf of the listed *amici*, NFIB Small Business Legal Center requested the consent of Petitioner and Respondent to file an *amicus curiae* brief in this case. This request was timely, in accordance with Supreme Court Rule 37.2.

2. Petitioner consents to the proposed *amicus curiae* brief.

3. Respondent does not oppose the proposed *amicus curiae* brief.

4. Each signatory to this brief has an interest in defending private property rights, curbing the

abuse of eminent domain powers and protecting fundamental constitutional rights. Many of the signatories have prepared and filed briefs in this Court in other property rights cases, including *Kelo v. City of New London*, 545 U.S. 469 (2005). Many signatories have authored articles, books, and other academic works on eminent domain, property rights, and other constitutional issues.

5. Each signatory has submitted a statement of interest outlining their interests in this case.

Amici curiae respectfully request leave to file the attached brief.

Respectfully submitted,

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QUESTIONS PRESENTED

1. What standards must courts apply under the Public Use Clause to determine whether the stated purpose for a taking is a pretext for private benefit?

2. Whether the Public Use Clause of the Fifth Amendment is satisfied where private property is taken to advance a public corporation's pecuniary gain as a market participant, in competition with the entity targeted for condemnation?

3. Should this Court overrule *Kelo v. City of New London*'s ruling that transferring property from one private owner to another for the purpose of "economic development" is a public use justifying the use of eminent domain under the Fifth Amendment?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICI CURIAE*[1]

The **NFIB Small Business Legal Center (NFIB Legal Center)** is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate and grow their businesses.

NFIB represents member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership reflects American small business.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses. The NFIB

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[1] The parties were notified 10 days prior to the filing of *amici*'s intent to file. Blanket consent is on file with the Court for Petitioner. Respondent does not oppose the filing of this brief, but did not give consent. No counsel for a party has authored this brief in whole or in part, and no person other than *amici curiae*, their members, and their counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.

Legal Center files in this case because the small business community remains deeply concerned about this Court's decision in *Kelo v. City of New London*, 545 U.S. 469 (2005). This case is particularly alarming because of the anti-competitive nature of this taking.

Southeastern Legal Foundation (SLF) is a national nonprofit, public-interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. For 42 years, SLF has advocated, both in and out of the courtroom, for the protection of private property interests from unconstitutional governmental takings. This aspect of its advocacy is reflected in regular representation of property owners challenging overreaching governmental actions in violation of their property rights. Additionally, SLF frequently files *amicus curiae* briefs at both the state and federal level in support of property holders. *See*, *e.g.*, *United States Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016). Following the Supreme Court's decision in *Kelo*, SLF took the lead in the successful effort to roll back eminent domain private property seizures by government for so-called "economic development" purposes, assisting then-Georgia Governor Sonny Perdue in drafting Georgia's anti-*Kelo* laws. Georgia's law served as a blueprint for the American Legislative Exchange Council, and as a result, SLF worked with a number of states providing legal opinions and research on these issues.

The **Cato Institute** is a nonpartisan, public-policy research foundation established in 1977 and

dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual Cato Supreme Court Review, and files *amicus curiae* briefs in courts nationwide. Cato has consistently advocated for more stringent review under the Public Use Clause and has joined in asking this Court to reconsider or limit *Kelo*.

The **Center for Constitutional Jurisprudence** was established in 1999 as the public interest law arm of the Claremont Institute, the mission of which is to uphold and restore the principles of the American Founding to their rightful and preeminent authority in our national life. In addition to providing counsel for parties at all levels of state and federal courts, the Center and its affiliated attorneys have participated as *amicus curiae* or on behalf of parties before this Court in several cases, including *Kelo v. City of New London*, 545 U.S. 469 (2005).

The Center believes the issue before the Court in this matter is one of special importance to the scheme of individual liberty enshrined in the Constitution. The Framers considered the individual right to own and use private property to be the cornerstone of individual liberty. This case goes to the core of that individual right, addressing whether private individuals can

employ the power to take property from other private individuals.

The **Atlantic Legal Foundation (ALF)** is a nonprofit, nonpartisan public interest law firm that provides legal representation and advice, without fee, to scientists, educators, parents, other individuals, companies and trade associations. ALF's leadership includes distinguished legal scholars and practitioners from across the legal community.

ALF's mission is to advance the rule of law in courts and before administrative agencies by advocating limited and efficient government, free enterprise, individual liberty, school choice, and sound science. ALF is guided by a basic but fundamental philosophy: Justice prevails only in the presence of reason and in the absence of prejudice; accordingly, ALF promotes sound thinking in the resolution of legal disputes and the formulation of public policy. ALF has an abiding interest in the protection of property rights, as one of the essential elements of a democratic and productive society.

The **Mountain States Legal Foundation (MSLF)** is a nonprofit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. MSLF has members who reside, own property, and work in all 50 states. Since its creation in 1977, MSLF

and its attorneys have defended individual liberties and have been active in ligation opposing governmental actions that result in takings of private property. *See*, *e.g.*, *Marvin M. Brandt Revocable Tr. v. United States*, 572 U.S. 93 (2014).

The **New England Legal Foundation (NELF)** is a nonprofit, nonpartisan public interest law firm, incorporated in Massachusetts in 1977, and headquartered in Boston, Massachusetts. NELF's membership consists of corporations, law firms, individuals, and others, primarily from the New England region, who believe in NELF's mission of promoting balanced economic growth for the United States and the New England region, protecting the free enterprise system, and defending economic and property rights. NELF has regularly appeared as an *amicus curiae* in this Court in cases affecting property rights including in *Kelo v. City of New London,* 545 U.S. 469 (2005). Notably, NELF has also recently filed an *amicus* brief in *Knick v. Twp. of Scott, Pa.*, 862 F.3d 310 (3d Cir. 2017), *cert. granted*, 138 S. Ct. 1262 (U.S. Mar. 5, 2018) (No. 17-647).

NELF has long supported the reconsideration by this Court of the *Kelo* decision itself or, at the least, the articulation by this Court of the standard of review that courts must apply under the Fifth Amendment's Public Use Clause to adequately protect property owners in cases where the stated purpose for a taking may be a pretext for conferring a private benefit. NELF believes that this case affords the Court an excellent opportunity to do both: to reconsider its 2005 decision in

Kelo, or to announce a meaningful Public Use standard in *Kelo*-type takings.

The **Rutherford Institute** is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing free legal representation to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have represented parties before the Court in cases such as *Owasso Indep. School District v. Falvo*, 534 U.S. 426 (2002). The Institute has also filed briefs as an *amicus* of the Court in cases involving property rights on many occasions, including *Kelo v. City of New London*, 545 U.S. 469 (2005).

The Rutherford Institute is participating as *amicus* herein because it regards the case as an extraordinary opportunity for the Court to clarify and uphold the sacrosanct right to own and use private property without fear that it will be usurped by the government. When this nation was founded, securing the property rights of citizens was considered a principal function of government. However, expansion of the power of eminent domain in recent decades has resulted in a corresponding destruction of a fundamental aspect of liberty. This Court should reaffirm the historic commitment to property rights and make clear that the government may only take property in furtherance of a bona fide public purpose.

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SUMMARY OF ARGUMENT

The Louisiana Supreme Court approved the forcible transfer of private commercial property to eliminate competition with a public enterprise—and for the benefit of another private entity. In doing so, it blessed the use of eminent domain for anticompetitive purposes that are antithetical to the public interest. This concretely demonstrates the perverse implications of this Court's decision in *Kelo v. City New London,* 545 U.S. 469 (2005).

In her *Kelo* dissent, Justice O'Connor warned that the majority opinion opened the door for any mom-and-pop store to be replaced by a Ritz-Carlton. *Id*. at 503 (O'Connor, J., dissenting). The constitutional basis for such a taking remains questionable, but not even the worst scenarios set forth in her dissent undermine the Fifth Amendment like the opinion below. Rather, the Louisiana Supreme Court's decision, and similar cases in other jurisdictions, effectively preclude pretextual takings claims, inviting corruption and abuse far beyond what even Justice O'Connor anticipated. Unless this Court acts to limit application of *Kelo*, or to at least reconsider the level of deference given to the condemning authority, politically powerful corporate interests will have incentives to lobby public authorities to expropriate properties owned and operated by smaller firms—even with the goal of eliminating competition. That is precisely what happened here: the government displaced an independent enterprise from the market for an overtly anticompetitive purpose.

The Louisiana Supreme Court accepted at face value the purported public purpose of enabling expansion of the St. Bernard Port Harbor & Terminal District's (Port Authority) operations, which allegedly benefits the public. But whether a taking to advance the government's interest as a competing market-participant constitutes a public use is an important and still unanswered question under this Court's jurisprudence. Further, the lower court's refusal to consider the clear anticompetitive motivations underlying this exercise of eminent domain underscores the compelling need for guidance from this Court about the proper standard for addressing pretextual takings claims—a point on which the lower courts remain irreconcilably conflicted.

ARGUMENT

THE COURT SHOULD GRANT CERTIORARI TO LIMIT OR RECONSIDER *KELO V. CITY OF NEW LONDON*.

A. In the Wake of *Kelo*, Courts Have Taken Several Approaches to Determine Whether a Taking is Pretextual, with Louisiana's Approach Being the Most Deferential.

Even while upholding a taking for "economic redevelopment" in *Kelo*, this Court said that government may not "take property under the mere pretext of a public purpose, when its actual purpose [is] to bestow

a private benefit."[2] 545 U.S. at 478. In his concurrence, Justice Kennedy emphasized that Courts should strike down any government act where there is a "clear showing" that the taking "is intended to favor a particular private party, with only incidental or pretextual public benefits." *Id*. at 491 (Kennedy, J., concurring). He stressed that courts should scrutinize the motivations prompting the exercise of eminent domain. When "confronted with a plausible accusation" of improper motives, a reviewing court must consider the "primary motivation" for the expropriating authority. *Id*. at 491-92. A reviewing court "should treat the objection as a serious one and review the record to see if it has merit. . . ." *Id*. at 491.

Here the Louisiana Supreme Court held that the Public Use Clause is satisfied so long as there is some conceivable basis in the record for finding that the taking served a public purpose. *St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc., LLC*, 239 So. 3d 243, 251 (La. 2018) ("Based on the record before us, we cannot say that the trial court's finding was manifestly erroneous. . . ."). In one sentence, the Court dismissed Petitioner's argument that the government's true motivation was to benefit another business. The court's rationale would seemingly uphold any taking. So long as the condemning authority articulates a plausible justification that would facially satisfy the

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[2] *Cf.* Bernard H. Siegan, *Property Rights: From Magna Carta to the Fourteenth Amendment*, 16-17, 39 (2001) (explaining that it has always been unlawful to abrogate an individual's property rights for the advancement of purely private interests).

Public Use Clause, a court could ignore clear and undisputed evidence of collaboration (or collusion) with a private entity that will directly benefit from the compelled transfer. Louisiana therefore stands on the extreme side of the spectrum of those jurisdictions that have addressed the parties' burden of persuasion in pretextual takings claims.

While *Kelo* emphasized that the Public Use Clause prohibits pretextual takings, it provided only limited guidance on the issue. *See*, *e.g.*, *Goldstein v. Pataki*, 488 F. Supp. 2d 254, 288 (E.D.N.Y. 2007) (observing that *Kelo* "did not define the term 'mere pretext' "). The resulting confusion is evident in the widely different standards that courts apply when assessing pretextual takings claims. *See* Daniel B. Kelly, *Pretextual Takings: Of Private Developers, Local Governments, and Impermissible Favoritism*, 17 Sup. Ct. Econ. Rev. 173 (2009); Ilya Somin, The Grasping Hand: *Kelo v. City of New London* and the Limits of Eminent Domain, ch. 7 (rev. ed. 2016). At least five divergent approaches exist.

Some jurisdictions look to the condemning authority's intentions. *See Middletown Twp. v. Lands of Stone*, 939 A.2d 331, 337 (Pa. 2007) (interpreting *Kelo* as requiring Courts to examine "the real or fundamental purpose behind a taking. . . ."); *Cty. of Hawaii v. C&J Coupe Family Ltd. P'ship*, 198 P.3d 615, 648-49 (Haw. 2008) (*Kelo* requires courts to consider "the actual purpose" to determine whether the official rationale was "mere pretext."). In conflict with Louisiana's approach, these courts seriously consider evidence of the underlying motives. *See 99 Cents Only Stores v. Lancaster*

Redevelopment Agency, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001) ("No judicial deference is required, [] where the ostensible public use is demonstrably pretextual."). For example, in *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996), the Ninth Circuit invalidated a taking because the official rationale of blight alleviation was a mere pretext for "a scheme . . . to deprive the plaintiffs of their property . . . so a shopping-center developer could buy [it] at a lower price." *Id*. at 1321; *see also Aaron v. Target Corp.*, 269 F. Supp. 2d 1162, 1174-76 (E.D. Mo. 2003), *rev'd on other grounds*, 357 F.3d 768 (8th Cir. 2004) (holding that a property owner was likely to prevail on a claim that the government's real reason for the taking was to serve the interest of the Target Corporation and not to alleviate blight).

Other courts require a searching inquiry into whether the public or a private entity stands as the primary beneficiary of a taking. *See Franco v. Nat'l Capitol Revitalization Corp.*, 930 A.2d 160, 173-74 (D.C. 2007); *MHC Fin. Ltd. P'ship v. City of San Rafael*, 2006 WL 3507937, at *14 (N.D. Cal. Dec. 5, 2006); *Daniels v. Area Plan Comm'n*, 306 F.3d 445, 456-66 (7th Cir. 2002). Still other jurisdictions hold that the pretextual takings inquiry must focus on the extent of the pre-condemnation planning process—with the assumption that a lack of planning reveals an improper purpose. *See, e.g.*, *Mayor & City Council of Baltimore v. Valsamaki*, 916 A.2d 324, 352-53 (Md. 2007); *R.I. Econ. Dev. Corp. v. Parking Co.*, 892 A.2d 87, 104 (R.I. 2006). And another line of cases recognizes a pretextual taking where evidence exists to show a specific private

beneficiary was known at the outset. *See Carole Media v. N.J. Transit Corp.*, 550 F.3d 302, 311 (3d Cir. 2008) (upholding a taking because "there [was] no allegation that [the Authority] . . . knew the identity" of the private party that ultimately benefited from the transfer).

By contrast, Louisiana follows a fifth line of cases that virtually defines pretextual takings out of existence—with grave consequences for small business, the poor, minorities and other politically weak property owners who are most vulnerable to eminent domain abuse.[3] *See Kelo*, 545 U.S. at 521 (Thomas, J., dissenting) (noting that "losses will fall disproportionately on poor communities"); *Id*. at 505 (O'Connor, J., dissenting) ("The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms.").

As in this case, the Second Circuit applied a rational basis-like standard in dismissing a pretextual takings claim where a private developer was both the originator of the project and arguably the primary beneficiary.[4] *Goldstein v. Pataki*, 516 F.3d 50, 62 (2d Cir.

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[3] *See* Br. of the NAACP et al. as *Amici Curiae* Supporting Petitioners, *Kelo*, 545 U.S. 469; Br. of Becket Fund for Religious Liberty as *Amici Curiae* Supporting Petitioners, *Kelo*, 545 U.S. 469 (describing vulnerability of religious nonprofits).

[4] For detailed discussions of the Atlantic Yards cases, which describe the many abuses, *see* Ilya Somin, *Let There Be Blight: Blight Condemnations in New York after* Goldstein *and* Kaur, 38 Fordham Urban L.J. 1193, 1197-99, 1200-16 (2011) (Symposium on Eminent Domain in New York); Amy Lavine & Norman Oder, *Urban Redevelopment Policy, Judicial Deference to Unaccountable*

2008) (rejecting the suggestion that any significant scrutiny was required: "[It is impermissible to] give close scrutiny to the mechanics of a taking . . . to gauge the purity of the motives of the various government officials who approved it."). And the New York Court of Appeals upheld the same taking without seriously considering evidence that the planning process was deliberately skewed to benefit a preordained private developer.[5] *In re Goldstein*, 921 N.E.2d 164 (N.Y. 2009); *see also Kaur v. N.Y. State Urban Dev. Corp.*, 13 N.Y.3d 511 (N.Y. 2010) (ignoring extensive evidence that a private university would reap most of the condemnation's benefits, evidence of inadequate planning, and the undisputed fact that the university was identified as the main beneficiary from the beginning). Other jurisdictions have followed suit. Louisiana is simply the latest in more and more jurisdictions that refuse to consider allegations of improper motives and pretext. *See*, *e.g.*, *Gov't of Guam v. 162.40 Square Meters of Land More or Less, Situated in Municipality of Agana*, 2011 WL

Agencies, and Realty in Brooklyn's Atlantic Yards Project, 42 Urb. L. 287 (2010).

[5] "[N]othing was said about 'blight' by the sponsors of the project until 2005," when the ESDC realized that a blight determination might be legally necessary. *Goldstein*, 921 N.E. at 189 (Smith, J., dissenting). By "that point [the developer] had already acquired many of the properties he wanted (thanks to eminent domain) and left them empty, thus *creating* much of the unsightly neglect he [later] cite[d] in support of his project." Damon Root, *When Public Power Is Used for Private Gain*, Reason.com (Oct. 8, 2009), *available* online at http://reason.com/archives/2009/10/08/when-public-power-is-used-for (last visited Jul. 6, 2018).

4915004 (Guam, 2011) (upholding a taking transferring title for a single parcel to then-Mayor Felix Ungacta); *Cf. 62-64 Main St., L.L.C. v. Mayor & Council of City of Hackensack*, 221 N.J. 129, 157 (2015) (upholding a blight designation for redevelopment on a substantial evidence basis).

These inconsistent applications show that both courts and litigants need clarity on what showing is necessary to prevail in a pretextual takings claim. While the first four approaches at least claim to comport, in one way or another, with passages in the *Kelo* opinion, the Louisiana Supreme Court's approach cannot be squared with this Court's precedent. This case presents the ideal vehicle for this Court to provide clarity because there is evidence in the record to support a taking under all four of these tests: (1) improper motivation; (2) the primary beneficiary; (3) limited planning; and (4) a previously identified private beneficiary.

B. The Court Should Grant Certiorari to Clarify that Elimination of Competition is not a Legitimate Public Use.

The Louisiana Supreme Court accepted the Port Authority's pretextual argument that expropriation of private dock facilities will advance the public interest by facilitating trade, creating jobs and bringing in revenue. *St. Bernard Port, Harbor & Terminal Dist.*, 239 So. 3d at 250-51 (holding that expansion of "public ports" serves a "public purpose") (citing *Kelo*, 545 U.S. at 479). But by that logic private enterprise serves the

public good as well.[6] As a result, there is no reason in principle to believe that a "public port" authority, providing the same services, advances the public good any more than a private business. For that matter, neither the Louisiana Supreme Court nor the Louisiana Court of Appeal began to explain how operation of a private docking facility injures the public in any way that might be ameliorated through public appropriation. This violates the unifying principle of this Court's takings jurisprudence, which holds that for a condemnation to serve a public purpose it must either allow actual use by the public or be intended to ameliorate a social problem. *See Kelo*, 545 U.S. at 481-82 (observing that in previous cases the Court had recognized a public purpose in the removal of blight or the elimination of "social and economic evils . . . ") (internal citations omitted); *id*. at 500 (O'Connor, J., dissenting) (emphasizing that this should be understood as a limiting principle under the Public Use Clause).

There is no public benefit in destroying a private-sector business to advance a public enterprise (much less another competing private business).[7] This

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[6] In fact, the record shows that the Port Authority plans to have another private company operate the facilities just as the Petitioner. The only difference is that the Port Authority will take a share of the profits.

[7] *Amici* maintain that the Court should foreclose this taking as a pretextual taking because it is intended to benefit another private entity. But, even if this Court concludes that this was not a pretextual taking for the benefit a private company, it should rule that a taking for the purpose of eliminating competition with a public enterprise violates the Public Use Clause.

conduct is predatory. *See Calder v. Bull*, 3 U.S. (Dall.) 386, 388 (1798) ("[A] law that takes property from A and gives it to B: [] is against all reason and justice. . . ."). This case presents the opportunity to clarify that government cannot take private property to advance its own pecuniary interests ***as a market participant***—in direct competition with a business targeted for condemnation. Such an appropriation should be found a *per se* violation of the Public Use Clause.

This Court has already recognized a distinction between a public authority acting (a) in the capacity of a sovereign or (b) in the capacity of a market-participant. *See, e.g., Reeves, Inc. v. Stake*, 447 U.S. 429, 440 (1980) (concluding that South Dakota was acting in the capacity as a market-participant on the same footing as other private parties, and not in a sovereign capacity, when selling cement); *White v. Mass. Council of Const. Emp'rs, Inc.*, 460 U.S. 204, 214-15 (1983) ("In so far as the city expended [] its own funds in entering into construction contracts for public projects, it was a market participant and [not acting in its sovereign capacity]. . . ."). This distinction is important—as a constitutional matter—where the propriety of government conduct hinges on whether a public entity is acting in a truly sovereign capacity. And since the power of eminent domain is such an extraordinary exercise of sovereignty this distinction should be even more critical under the Public Use Clause.

When seeking to appropriate private property the government necessarily relies on an assertion of

sovereign authority, which should mean that an exercise of eminent domain is permissible only where the authority is acting as a uninterested party.[8] When an authority pursues condemnation to advance its own commercial venture it is acting as a "market-participant" on equal footing with other economic actors. As a result, it should not be allowed to wield eminent domain powers anti-competitively.

For example, we have seen cases where an airport authority invoked the power of eminent domain to convert a private parking facility into a public facility. *See Commonwealth v. Susquehanna Area Reg'l Airport Auth.*, 423 F. Supp. 2d 472 (M.D. Pa. 2006). As in this case, such condemnations serve no public purpose because the converted property is used for the same purpose as it would have under private ownership. To allow such a condemnation would be to allow predatory conduct—which would violate the fundamental precept that government exists to serve the public, not to further its own corporeal interests.[9] Timothy

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[8] *Cf.* Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 668, 696 (1991) (arguing that state and local authorities should be subject to the same rules as private economic actors unless it may be said that "a financially disinterested and politically accountable actor controls and makes [the] substantive decision in favor of [the anti-competitive act in question] . . . ").

[9] "[T]o the extent the State acts to advance its own pecuniary interests to the detriment of its citizens, it may exceed its natural charter to govern in the public interest." Jarod Bona & Luke Wake, *The Market-Participant Exception to State Action Immunity From Antitrust Liability*, 23 Competition: J. Anti. & Unfair Comp. L. Sec. St. B. Cal. 156, 171 (2014).

Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 Harv. J.L. & Pub. Pol'y 283, 299 (2012) ("In politics, Aristotle distinguished between governments aimed for the benefit of the ruled and those that aim at the ruler's benefit."); *see also* Joseph Sax, *Taking and the Police Power*, 74 Yale L.J. 36, 62 (1964) (distinguishing between an appropriate exercise of police powers and self-interested abuse of power under the Takings Clause). When acting in such a self-interested manner—*i.e.*, to advance a public corporation's institutional interests—a taking functionally serves a private purpose. *See Case of the King's Prerogative in Saltpetre*, 77 Eng. Rep. 1294 (1607) (holding that King James I could take saltpeter [essential for gunpowder] from private lands to defend the realm, but emphasizing limits on the King's power to take private property: "[T]he King cannot [take property] for the [improvement] . . . of his own house . . . for that doth not extend to public benefit.").[10]

The mere fact that there may be some speculative and incidental public benefit in a public corporation growing is beside the point. If ABC Corporation convinced its friends on the City Council to use eminent domain to compel transfer of title to its competitor's facility, that would be a paradigmatic violation of the Public Use Clause. It is true enough that ABC

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[10] "The King could not take property for his own benefit . . . because 'the King . . . cannot do any wrong.'" 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, 572-73 (2003).

Corporation might grow as a result of this sort of backroom deal-making—perhaps even replacing the jobs eliminated from the competitor's facilities on a one-to-one basis; however, this would amount to a naked transfer of private market-power to the detriment of consumers (*i.e.*, the public). This forced transfer might even enable ABC Corporation to become prosperous and create even more jobs with time, but those theoretical benefits are not only speculative but incidental to ABC Corporation's primary (self-serving) motivation. *See Kelo*, 545 U.S. at 490 (Kennedy, J., concurring) (observing that even *Kelo*'s deferential standard does not "alter the fact that transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause").

Since the Port Authority stands in the very same position as ABC Corporation, it should not be allowed to take Petitioner's property here. Indeed, the only difference is that the Authority did not have to engage in backroom deal-making. All too conveniently, Louisiana has conferred the power of eminent domain upon the Authority. But the Louisiana courts have refused to check use of that power. On the contrary, they have expressly blessed this taking for the self-enriching purpose of growing the Authority's enterprise.

C. Beyond Merely Clarifying *Kelo*, this Case also Presents an Opportunity to Consider Overruling that Precedent.

While this Court is generally hesitant to reevaluate statutory cases and other matters where Congress can act to ameliorate the ill effects of a decision, this Court has emphasized that the doctrine of stare decisis is at its weakest when considering questions of constitutional law. *Janus v. Am. Fed'n of State, Cty., & Mun. Emp, Council 31*, No. 16-1466, 2018 WL 3129785, at *23 (U.S. June 27, 2018); *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) ("Stare decisis is not an inexorable command"); *see also* Amy Coney Barrett, *Constitutional Foundation: Precedent and Jurisprudential Disagreement*, 91 Tex. L. Rev. 1711, 1737 (2013) (arguing that a relatively weak form of stare decisis is essential not only to allow for correction of errors, but also for encouraging "a reasoned conversation over time between justices—and others—who subscribe to competing methodologies of constitutional interpretation"). And there are compelling reasons to reconsider *Kelo*'s conclusion that government may compel transfer of private property from one party to the next, and or the level of deference appropriate in these cases. *See* Ilya Somin, Grasping Hand, *supra* at 238-41 (explaining how this Court's standards for overruling precedent justify reversing *Kelo*); Dick Carpenter & John Ross, *Testing O'Connor and Thomas: Does The Use of Eminent Domain Target Poor and Minority Communities?*, 46 Urban Stud. 2447 (2009).

This Court has stated that it will "overrule an erroneously decided precedent . . . if: (1) its foundations have been 'eroded' by subsequent decisions; (2) it has been subject to 'substantial and continuing' criticism; and (3) it has not induced 'individual or societal reliance' that counsels against overturning" it. *Lawrence v. Texas*, 539 U.S. 558, 587-89 (2003). Another factor is whether the original decision was well reasoned. *Montejo v. La.*, 556 U.S. 778, 793 (2009). Several of these considerations weigh (heavily) in favor of revisiting, and overturning, *Kelo*.

First, *Kelo* has been subject to widespread criticism.[11] Far from garnering general acceptance, the public largely reviles the suggestion that the government may take an individual's home or business to give to a wealthier and more politically powerful corporation. Surveys show that 80 percent of the public oppose *Kelo*, and the decision has prompted massive criticism across the political spectrum—from groups as varied as the American Association of Retired Persons, the NAACP, and the Becket Fund for Religious Liberty. *See* Somin, Grasping Hand at 135-64; *see also* Abdon Pallasch, *Scalia Offers Ruling: Deep Dish v. Thin Crust?* Chicago Sun-Times (Feb. 13, 2012) (quoting Justice Antonin Scalia as saying [of *Kelo*] that the Court erred in "estimating how far . . . it could stretch the text of the Constitution without provoking overwhelming public criticism and resistance"). Acting on their antipathy, legislators (and voters) in many states

[11] We do not suggest that such widespread criticism by itself justifies overruling *Kelo*.

have sought to limit the impact of the *Kelo* decision—but with only mixed results.[12] Likewise, several state supreme courts have repudiated *Kelo* as a guide to interpreting its state constitution's public use clause. *See*, *e.g.*, *City of Norwood v. Horney*, 853 N.E.2d 1115, 1136-38 (Ohio, 2006); *Bd. of Cty. Comm'rs of Muskogee Cnty. v. Lowery*, 136 P.3d 639, 646-52 (Okla. 2006). And, of course, *Kelo* has been subjected to excoriating scholarly criticism, though with some defenders. *See*, *e.g.*, Richard Epstein, Supreme Neglect: How to Revive Constitutional Protection for Private Property 83-86 (2008); James W. Ely, Jr., *"Poor Relation" Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2005 Cato Sup. Ct. Rev. 39 (2005); and Somin, Grasping Hand, at 112-34.

Second, reconsideration is appropriate at this juncture because the grave deficiencies of the majority opinion are more apparent today than in 2005.[13] Even Justice Stevens, author of the *Kelo* opinion, has

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[12] Voters in Louisiana passed a constitutional amendment intended to protect property owners from *Kelo*-style abuses. La. Const. Art. I, Sec. 4(B)(1). But, this case demonstrates that there are major exceptions. Ilya Somin provides an extensive discussion of the legislative responses in other jurisdictions, and examines persisting problems. Grasping Hand, *supra* 145-53.

[13] *Kelo* stands as anomaly in this Court's jurisprudence on the Bill of Rights. In sharp contrast to its treatment of every other individual right enumerated in that document, the Court's decision in *Kelo* allows the very same governments whose abuses the Public Use Clause is intended to constrain to define the scope of the rights that are protected. *See* Ely, 2005 Cato Sup. Ct. Rev. at 62 ("[A]mong all the guarantees of the Bill of Rights, only the public use limitation is singled out for heavy [judicial] deference.").

admitted that its reasoning was based in part on an "embarrassing" error: the assumption that a series of late nineteenth and early twentieth century "substantive due process" Supreme Court decisions, applying a highly deferential approach to state government takings, were actually decided under the Fifth Amendment. John Paul Stevens, *Address at University of Alabama School of Law*, Albritton Lecture (Nov. 16, 2011), 14-18, http//www.supremecourt.gov/publicinfo/speeches/1.pdf.[14] The *Kelo* Court wrongly relied on that line of cases, and the mistake had a significant impact on the outcome of the case.[15] 545 U.S. at 483; *see also* Somin, Grasping Hand at 123-26.

Finally, it is better to correct this grievous error now—rather than waiting for decades. This Court has recognized that recent precedent is less likely to generate reliance interests than longer-established ones, and is, therefore more easily overruled if found to be incorrect. *See Montejo*, 556 U.S. at 793. And *Kelo* has not yet generated substantial reliance interests. If anything, the political backlash over the past thirteen

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[14] Justice Stevens continues to believe that *Kelo* was correctly decided, but he justifies that conclusion by embracing the extreme proposition that "neither the text of the Fifth Amendment Takings Clause, nor the common law rule that it codified, placed any limit on the states' power to take private property, other than the obligation to pay just compensation to the former owner." Stevens, Albritton Lecture, at 18.

[15] Today we also know that the anticipated public benefits never materialized. Alec Torres, *Nine Years after* Kelo, *the Seized Land is Empty*, National Review (Feb. 5, 2014), https://www.nationalreview.com/2014/02/nine-years-after-kelo-seized-land-empty-alec-torres/ (last visited Jul. 10, 2018).

years demonstrates that the dominant trend has gone against *Kelo*. What is more, this Court's recent decision in *Janus* demonstrates that there can be no legitimate reliance interest in perpetuating violations of individual rights under the Constitution. 2018 WL 3129785, at *5 ("[N]o reliance interests on the part of [private parties collaborating with public authorities] are sufficient to justify the perpetuation of the [constitutional] violations. . . .").

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

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