No. 19-607

In The
Supreme Court of the United States

WOODCREST HOMES, INC.,
Petitioner,

v.

CAROUSEL FARMS METROPOLITAN DISTRICT,
Respondent.

On Petition for Writ of Certiorari to the Colorado Supreme Court

BRIEF OF AMICI CURIAE SOUTHEASTERN LEGAL FOUNDATION, CATO INSTITUTE, OWNERS' COUNSEL OF AMERICA, AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Is the Fifth Amendment's restriction of eminent domain to "public use[s]" satisfied even if a condemnation is undertaken "for the purpose of conferring a private benefit on a particular private party"?

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INTEREST OF AMICI CURIAE[1]

Southeastern Legal Foundation. Southeastern Legal Foundation (SLF), founded in 1976, is a national nonprofit, public interest law firm and policy center that advocates for constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. SLF frequently files amicus curiae briefs in support of property owners.

Cato Institute. The Cato Institute was established in 1977 as a nonpartisan public policy research foundation 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 constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

Owners' Counsel of America. Owners' Counsel of America (OCA) is a network of the most experienced eminent domain and property rights attorneys from across the country who seek 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* (2d ed. 1998). OCA is a non-profit organization, organized under IRC § 501(c)(6) and sustained solely by its members. OCA

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1. In accordance with this Court's Rule 37.2(a), all counsel of record for the parties received timely notice of the intention to file this brief. Petitioner and Respondent have consented to this brief. No counsel for any party authored any part of this brief, and no person or entity other than amici made a monetary contribution intended to fund its preparation or submission.

member attorneys have been involved in landmark property cases in nearly every jurisdiction nationwide. OCA members and their firms have been counsel for a party or amici in many of the takings and eminent domain cases this Court has considered in the past forty years.

NFIB Small Business Legal Center. The National Federation of Independent Business 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 right of its members to own, operate and grow their businesses. 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, including takings cases.

The brief will aid the Court in its consideration of the petition by explaining how the lower courts are all over the map regarding the Fifth Amendment's "public use" standard. In the 15 years since *Kelo v. City of New London*, 545 U.S. 469 (2005), courts have not been able to agree on how to determine when to apply more exacting scrutiny to takings that have the hallmarks which this Court identified as revealing unconstitutional private benefit. Amici urge the Court to grant the petition to resolve this important issue.

SUMMARY OF ARGUMENT

In *Kelo v. City of New London*, 545 U.S. 469 (2005), this Court 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," is unconstitutional. *Id*. at 478.[2] But the Court did not address the question directly, because "[s]uch a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this 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. It offers the Court an opportunity to clarify that the Public Use Clause is not mere hortatory fluff, and affirm that the Fifth Amendment limits eminent domain. The Court should grant review.

ARGUMENT

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 to determine when,

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2. Justice Kennedy concurred, concluding that in some instances, "a more stringent standard of review than that announced in *Berman* [*v. Parker*, 348 U.S. 26 (1954)] and [*Hawaii Hous. Auth. v.*] *Midkiff*[, 467 U.S. 229 (1984)] might be appropriate for a more narrowly drawn category of takings." *Id.* at 493 (Kennedy, J., concurring). Justice Kennedy also noted that "[t]here may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted." *Id.*

if ever, an allegedly pretextual taking will be subject to more than rational basis review, or whether there are any circumstances where the presumption in favor of validity should shift. *See*, *e.g.*, Ilya Somin, *The Judicial Reaction to* Kelo, 4 Albany Gov't L. Rev. 1, 35-36 (2011) ("As should be evident . . . there is no consensus 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.").

This case has all of the factors identified as indicators of pretext: a known (indeed, an open-and-notorious) private beneficiary cloaked by Colorado law with the sovereign power who initiated, drove, and paid for the process; no integrated or independent public development plan (the only plan was Respondent's private plan); no present identified public benefit from the taking (the only public benefits identified were possible future benefits); and an exercise of eminent domain so unusual that one court concluded the true purpose of the taking was to benefit a private party. Because the taking was such an aberrant exercise of government power, the Public Use Clause required that the reviewing courts view the record with more than the usual degree of deference, and should have presumed that the taking was for a private benefit, or at the very least reviewed the proffered justifications with more than conceivable basis scrutiny.

I. Lower Courts Are "All Over The Map" About When A Taking Requires More Than Conceivable Basis Review

In grappling with the issues left open by *Kelo*, the lower courts have been unable to settle on clear or

consistent guidelines for how to evaluate takings cases, what constitutes pretext, or what situations present such unusual exercises of eminent domain that a court should apply a more stringent standard of review. In *Kelo*, this Court held that takings supported only by claims of "economic development" are not so unusual that a *per se* rule of invalidity is warranted. When an economic development plan is facially neutral, well-considered, and adopted via a transparent public process, a reviewing court should defer, even if the plan includes an eminent domain component. The Court concluded that New London's economic development plan met those criteria: it was "carefully considered," *Kelo*, 545 U.S. at 478, "comprehensive," was adopted after "thorough deliberation," and thus "unquestionably served a public purpose." *Id.* at 484. Consequently, "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." *Id.* The Court compared the New London development plan with comprehensive Euclidean zoning and "other exercises in urban planning and development . . . [in which] the City is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts." *Kelo*, 545 U.S. at 483 & n.12 (citing *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)).

The Court also concluded, however, that a taking would not survive scrutiny if the asserted public purpose is a pretext to hide private benefit. *Kelo*, 545 U.S. at 478. That issue was not presented in *Kelo*, but the majority and Justice Kennedy's concurring opinion set out a number of factors to evaluate when an asserted public purpose is, in fact, a pretext hiding private

benefit, and a trigger to more intense judicial review. Perhaps recognizing that it would be difficult for property owners to ferret out hidden private motivations, these factors focus on the lack of objective indicia of trustworthiness, by asking whether the taking was the result of a procedure that was facially neutral, well-considered, and afforded affected parties opportunities for input.

The first indicator of private purpose is the lack of a carefully considered and comprehensive development plan. *Kelo*, 545 U.S. at 487 (a taking "executed outside the confines of an integrated development plan" is suspect). Another element to examine is the condemnor's actual motivation to determine whether a purpose was to confer a private benefit. *Id.* at 478 ("Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit."). The third is the use of eminent domain to accomplish a "one-to-one transfer of property" to an identified private party. *Id.* at 477 ("the City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party") (citing *Midkiff*, 467 U.S. at 245; *Kelo*, 545 U.S. at 478 n.6. The fourth is whether the taking results in primary benefit to a private party "with only incidental or pretextual public benefits." *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring).

The Court concluded that such proof would indicate a taking was an "unusual exercise of government power" and that consequently, "a private purpose was afoot." *Kelo*, 545 U.S. at 487 (footnotes omitted). Justice Kennedy added that exercises of eminent domain such as these may be so suspect that a reviewing court should examine it with more than rational basis

scrutiny, or even by reversing the presumption of validity. *Kelo*, 545 U.S. at 493 (Kennedy, J., concurring). But since none of these factors were present in *Kelo*, they could be "confronted if and when they arise." *Id.* Lacking definitive guidance from this Court, however, the lower courts have been unable to settle on which of these criteria are applicable and controlling in any given case, or whether any of them is more or less critical than the rest, and the decisions are a patchwork of results and rationales.

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 *R.I. 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 that 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 *Mayor & City Council of Baltimore v. Valsamaki*, 916 A.2d 324 (Md. 2007), 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 development." *Id.* at 352-53 (citing *Kelo*, 545 U.S. at 473-74).

In *County of Hawaii v. C & J Coupe Family Ltd. P'ship*, 198 P.3d 615 (Haw. 2008), the Hawaii Supreme Court joined Pennsylvania and a New York intermediate appellate court in holding that *Kelo* requires a reviewing court to look for the actual motivation of the condemnor. *See id.* at 638 (courts must "thoroughly consider" evidence of pretext and private benefit by examining the "actual purposes," and the government's "veracity," by "look[ing] behind the government's stated public purpose" with a "closer objective scrutiny of the justification being offered").

Similarly, in *Lands of Stone*, 939 A.2d at 337, the court held that a reviewing court must look for "the real or fundamental purpose behind a taking," (and, as noted above, the purpose must "primarily benefit the public"). A New York intermediate appellate court concluded that under *Kelo*, a taking was pretextual because the actual motivation of the condemnation was to benefit a private party, and the condemnor's blight finding was "mere sophistry." *Kaur v. N.Y. State Urban Dev. Corp.*, 892 N.Y.S. 2d 8, 10 (App. Div. 2009), *rev'd*, 933 N.E.2d 721 (N.Y. 2010), *cert. denied*, 562 U.S. 1108 (2010).

"Only one post-*Kelo* pretext decision seems to have turned on the fact that the identity of the new private owner was not known in advance by condemning authorities." Somin, *The Judicial Reaction to* Kelo, 4 Albany Gov't L. Rev. at 28 (citing *Carole Media LLC v. New Jersey Transit Corp.*, 550 F.3d 302 (3d Cir. 2008)). In that case, the court rejected the claim that a taking was pretextual 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." *Carole Media LLC*, 550 F.3d at 311.

Other courts require a comparison of the private benefits with the expected public benefits. *See*, *e.g.*, *Franco v. Nat'l Capital Revitalization Corp*., 930 A.2d 160, 169 (D.C. 2007). In that case, the court concluded a pretext defense may succeed "[i]f the property is being transferred to another private party, and the benefits to the public are only 'incidental' or 'pretextual[.]'" *Accord In re O'Reilly*, 5 A.3d 246, 258 (Pa. 2010) ("[T]he public must be the primary and paramount beneficiary of the taking"). Other courts apply this same analysis but rely on Justice Kennedy's concurring opinion. *See, e.g., MHC Financing Ltd. P'ship v. City of San Rafael*, No. C00-3785VRW, 2006 WL 3507937 (N.D. Cal. Dec. 5, 2006) (*Kelo* requires a "careful and extensive inquiry" into "whether, in fact, the development plan is of primary benefit to the developer" with only incidental public benefits) (quoting *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring)).

Finally, some courts seem to ignore all of the *Kelo* factors, and take "an extremely deferential approach to pretext issues, falling just short of defining the pretext cause of action out of existence." Somin, *The Judicial Reaction to* Kelo, 4 Albany Gov't L. Rev. at 30. Professor Somin is referring to the Second Circuit, which concluded in *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir.), *cert. denied*, 554 U.S. 930 (2008), that it need not "give close scrutiny to the mechanics of a taking," and to the New York Court of Appeals, which held in *Goldstein v. N.Y. State Urban Dev. Corp*., 921 N.E.2d 164 (N.Y. 2009) that a finding of "blight," no matter how ludicrous, is virtually unassailable.

The Colorado Supreme Court's decision below falls into this latter category, because it virtually abdicates any meaningful role for a court, despite the taking being accomplished by the alter-ego of the private

beneficiary (formed for the sole purpose of exercising eminent domain and taking property it could not acquire by negotiation), the lack of any public plan (the only plan was the developer's plan, and the only benefits that could be identified were promised "eventual" public benefits that Respondent asserted it would provide, but is under no obligation to actually do so.

The court below candidly acknowledged that "review of potentially improper takings can often be *problematic* because courts don't know ex ante whether the land will be used as claimed[.]" App. 16 (emphasis added). That's a gross understatement. The court purported to get over the ex ante problem by asserting "here we *know* from the start how the District will utilize Parcel C." *Id* (emphasis added). The reality, however, is that the court doesn't "know" how Respondent will use the property, and that the future use is merely a present assertion by Respondent, not some kind of hard-and-fast or enforceable promise.

If a court cannot hold Respondent to its assertions, why should the public use or purpose or benefit from the taking be measured in the present, when the public and a court can actually test the assertion? After all, in the future *anything* is possible. Colorado's approach means is that any competent private condemnor should be able to overcome a claim of overwhelming present private benefit by including a future promise of public benefit or use (unless the condemnor employs a "stupid staff").[3]

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3. As Justice Scalia correctly observed, legislatures should not be presumed to employ "stupid staffs" who do not understand how to sidestep judicial scrutiny by manipulating the record. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1025 n.12 (1992).

In sum, this Court's guidance is desperately needed. As Professor Somin wrote:

> federal 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.

Somin, *The Judicial Reaction to* Kelo, 4 Albany Gov't L. Rev. at 3.

II. A Private Party Exercising Sovereign Powers Should "Raise Well Founded Concerns That A Private Purpose Is Afoot"

Although Respondent could not point to a present public use or benefit from the taking, it asserted that in the *future* the public would benefit from the condemnation because if Carousel Farms were allowed to develop its property in accordance with its agreement with the town, the public would receive new infrastructure such as roads and sewers. The court of appeals held that the actual purpose of the taking was to facilitate Carousel Farm's compliance with its agreement with the town, and speculative future benefits are not enough to overcome the true purpose of the taking. The Colorado Supreme Court rejected that approach, concluding that Petitioner was a "holdout" (a holdout against what, exactly? Carousel Farm's private plans, that's what). App. 20 ("Moreover, eminent domain was partly designed to overcome the 'holdout' problem that occurred here. . . . The District exercised the power of eminent domain to prevent a holdout owner from thwarting the assembly of adjacent properties that would benefit the public."). The logic being

that massive and exclusive private benefit today is irrelevant if the condemnor says it might provide a public benefit in the indeterminate future.

That approach is not merely judicial deference to a legislature, but judicial abdication of the courts' role in evaluating claims of public use, particularly when the sovereign power is being exercised by an entity with such an obvious private interest. Thus, as the Hawaii Supreme Court recognized, "a contract that delegates a county's eminent domain powers, raises well founded concerns that a private purpose is afoot." *County of Hawaii v. C & J Coupe Family Ltd. P'ship*,, 242 P.3d 1136, 1148 (2010). Here, by contrast, the state supreme court was unconcerned that a private entity exercised the state's sovereign powers, even though Respondent was formed specifically and solely to exercise the power, and had no "comprehensive plan" under which Petitioner's property was to be taken except for Respondent's own private development plans. The court, however, considered the taking under the same standards applied to real government condemnors.

This approach also conflicts with the Pennsylvania Supreme Court's contrary holding in *Robinson Township v. Pennsylvania*, 147 A.3d 536 (Pa. 2016). There, a statute authorized the taking of private property for storage of gas, and authorized a "corporation empowered to transport, sell or store natural gas or manufactured gas in this Commonwealth" to do the taking. Defending this delegation of its power to a private entity, the state argued the statute only applied to utilities regulated by the public utilities commission, and therefore the public nature of the takings is guaranteed. The Pennsylvania Supreme Court rejected the argument because the statute did not limit the

exercise of the power to regulated entities, but on its face allowed any corporation that otherwise qualified to take private property. *Id*. at 587. This was not only a problem under Pennsylvania's Constitution, but also under the Fifth Amendment:

> The Commonwealth does not claim, nor can it do so reasonably, that the public is the "primary and paramount" beneficiary when private property is taken in this manner. Instead, it advances the proposition that allowing such takings would somehow advance the development of infrastructure in the Commonwealth. Such a projected benefit is speculative, and, in any event, would be merely an incidental one and not the primary purpose for allowing these type of takings. We therefore conclude that Section 3241(a) is repugnant to both the Fifth Amendment to the United States Constitution and Article I, Section 10 of the Pennsylvania Constitution, and we enjoin it from further application and enforcement.

Id. at 588.

Meaningful scrutiny guards the process against the risks inherent in instituting a condemnation action for supposedly neutral reasons when governmental powers are exercised by an entity with obvious private interests at stake. This case presents exactly the type of transfer "in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause." *See Kelo*, 545 U.S. at 493 (Kennedy, J., concurring) (retroactive legislation triggers a presumption of invalidity). *See also* Thomas Merrill, *The Economics of Public Use*, 72

Cornell L. Rev. 61, 87-90 (1986) (higher judicial scrutiny when government delegates power of eminent domain to private party).

III. Heightened Scrutiny Protects The Appearance Of Government Independence

Private involvement in the condemnation process increases the risk of corruption and "rent seeking" (capture of the process by private interests). *See* Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. at 86 (1986) ("rent seeking" is competitive lobbying for government favors). When sovereign power is exercised by a transparently self-interested entity, the risk of improper purpose is at its zenith. But under the Colorado court's rationale, there is no way to examine whether the process has been privately captured.

Heightened scrutiny or a shifting of the usual presumption of validity in these circumstances protects the public against the danger of unrevealed private influence 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 a private party is tempted to use insider processes as a substitute for a true public consideration and condemnation procedure. *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 ordinary property owners").

When the probability of private influence is too risky in such circumstances, courts impose bright line prohibitions. For example, this Court determined that an elected state judge must recuse himself when the circumstances would lead to the "objective or reasonable perception" that he might be influenced by campaign contributions. There was no indication the judge had actually demonstrated any bias in favor of the contributor, yet the Court adopted a blanket rule designed to avoid the probability and appearance of bias:

> [T]here are objective standards that require recusal when "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable."

Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868, 877 (2009) (citation omitted). As in the case of eminent domain pretext, exposing undue influence in campaign contributions in judicial elections is nearly impossible because the evidence necessary to prove influence cannot be accessed by third parties.

As the Court recognized in *Nixon v. Shrink Missouri Gov't Pac*, 528 U.S. 377 (2000), private influence is most often exercised in ways other than "quid pro quo." *Id.* at 389 (quoting *Buckley v. Valeo*, 421 U.S. 1, 28 (1976)). Consequently, it adopted a prophylactic rule based on objective criteria. "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. Otherwise there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case." *Caperton*, 556 U.S. at 883. Similarly, in a

taking instituted clouded by a delegation contract, "[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).

Consequently, takings accomplished by an exercise of power delegated to a private party have been held to be invalid without inquiry into motivation, or any public benefits that may result. *See*, *e.g.*, *In re Condemnation of 110 Washington Street*, 767 A.2d 1154, 1160 (Pa. Commw. Ct. 2001) (invalidating a taking without asking whether the stated purpose of blight abatement was genuine because it was instituted pursuant to agreements which delegated condemnation power) (citation omitted); *Evans v. Smyth-Wythe Airport Comm'n*, 495 S.E.2d 825 (Va. 1998) (judgment entered pursuant to settlement agreement void because it limited commission's ability to take property).

IV. Heightened Scrutiny Protects The Courts' Role In Public Use Questions

The Colorado court's approach renders judicial review meaningless:

> Futility refers to a court's inability to prevent governmental actions that are based on impermissible motivations because of the government's ability to circumvent judicial scrutiny. For example, government officials can hide their actual motivations, including pretextual ones. Moreover, even if a court detects an impermissible motivation and invalidates a governmental action on that basis, officials may decide to take the same action without disclosing their actual motivation, thereby circumventing the judicial test.

Daniel B. Kelly, *Pretextual Takings: Of Private*

Developers, Local Government, and Impermissible Favoritism, 17 S. Ct. Econ. Rev. 173, 182-83 (2009). Conceivable basis review does nothing to mitigate the overwhelming likelihood that Respondent was furthering its own interests and not the public's, as the court of appeals concluded. Meaningful scrutiny or a presumption of invalidity would have required the courts below to closely consider the circumstances, and not simply defer to Respondent's assertions. The "clear pattern" that emerged was that Respondent was self-dealing. *See Vill. of Arlington Heights v. Metro. 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."). Although these cases involved equal protection and the free exercise of religion, the inquiry is no different when property is involved, since private property is also a fundamental constitutional right. *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.").

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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