No. 23-1301

IN THE

Supreme Court of the United States

BEN BRINKMANN, *et al.*,

Petitioners,

v.

TOWN OF SOUTHOLD, NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE *AMICUS* BRIEF AND BRIEF FOR *AMICI CURIAE* NATIONAL ASSOCIATION OF REALTORS AND NEW YORK STATE ASSOCIATION OF REALTORS IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE *AMICUS* BRIEF

Amici Curiae National Association of REALTORS® and New York State Association of REALTORS® respectfully move the Court for leave to file the attached brief in support of the petition for a writ of certiorari in *Brinkmann, et al. v. Town of Southold, New York*, No. 23-1301. As detailed below, *amici* are trade associations representing over a million professionals and entities involved in the real estate industry. *Amici* seek to inform the Court of the practical, on-the-ground consequences of the Second Circuit's decision, which threatens to chill beneficial property development, raise costs for consumers, and eviscerate the fundamental property rights of Americans to buy, sell, improve, and develop real property.

Due to the circumstances of engagement and an error in communication, counsel for *amici* notified counsel of record for Respondent of *amici*'s intention to file this brief on July 8, 2024. While this notice was less than the ten days in advance of the due date required by Rule 37.2(a), neither party opposes the filing of this brief.[1] Moreover, Respondent has been granted a 30-day extension for the filing of its response to the petition, so it has received notice of *amici*'s brief far more than ten days in advance of its own due date. Accordingly, neither party will suffer any prejudice because of the untimely notice.

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1. Petitioners, who received timely notice, have consented to the filing. Counsel of record for Respondent has represented that his client "take[s] no position" on the matter.

This Court has previously granted similar motions unless one party affirmatively objects to the filing of the *amicus* brief. *See, e.g., Loper Bright Enterprises, et al. v. Raimondo, et al.*, No. 22-451 (May 1, 2023) (granting motion for leave to file *amicus* brief filed by David Goethel, et al., which noted that, in the absence of timely notice, neither party opposed the filing); *Cohen, et al. v. Apple Inc.*, No. 22-698 (May 22, 2023) (denying motion for leave to file *amicus* brief filed by City of Berkeley, which noted that Respondent objected to the filing due to the absence of timely notice). Because neither party has raised an objection here, *amici* respectfully move the Court for leave to file the accompanying brief.

Respectfully submitted.

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July 11, 2024

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INTEREST OF *AMICI CURIAE*[1]

The National Association of REALTORS® ("NAR") is a national trade association representing over 1.5 million members, including residential and commercial brokers, salespeople, property managers, appraisers, counselors, and others engaged in the real estate industry. Members belong to one or more of the approximately 1,200 local and 54 state and territory associations of REALTORS®.

The New York State Association of REALTORS®, Inc. ("NYSAR") is a state trade association representing more than 60,000 of New York State's real estate professionals. NYSAR provides a forum for professional development among its members and provides education and advocacy to the public and government for the purpose of promoting the right to sell, buy, own, and develop real property.

NAR and NYSAR support private property rights, including the right to buy and develop real property, and the right to sell real property for use in a new development. NAR and NYSAR members have an interest in this case because the Second Circuit's decision injects uncertainty into the ability to develop property which creates a risk of fewer sales and fewer developments, which would negatively impact consumers and threaten the livelihoods of NAR and NYSAR members.

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1. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties received written notice of the filing of this brief and neither party has objected to its filing.

SUMMARY OF ARGUMENT

The Second Circuit below held that a government may exercise its eminent domain power to stop a disfavored development on private property so long as it offers a pretextual public purpose for the taking and ultimately uses the condemned land for that purpose. In doing so, the court created a circuit split and set forth a dangerous precedent that will have significant ramifications for the real estate industry and property owners alike.

If permitted to stand, the Second Circuit's decision will chill beneficial property development. By opening the door to pretextual takings, the Second Circuit injected intolerable levels of uncertainty into the real estate development process. Now, even if a developer in New York does everything "by the book" and receives the requisite approvals for his project, an unavoidable uncertainty remains. If the government dislikes the project or the developer, it may simply take the property to stop the development, so long as it pays lip service to some pretextual public purpose. The possibility that a development could be scuttled for arbitrary, capricious, discriminatory, or even malicious reasons—papered over with a fake park or some other pretext—now hangs over every project in the Second Circuit. This threat will substantially chill beneficial and affordable property development.

It also stands to eviscerate the fundamental property rights of landowners to improve, develop, and sell their property. This Court has long held that a government's power to interfere with private land use is limited. For example, zoning regulations must be "reasonable" to pass

constitutional muster. But the Second Circuit's blessing of pretextual takings invites governments to end-run these basic protections, allowing arbitrary and capricious impingements on fundamental property rights to go entirely unchecked.

Finally, the erroneous decision below created a 6-1 split among federal circuits and state courts of last resort. The Seventh Circuit along with the supreme courts of Connecticut, Pennsylvania, Massachusetts, Georgia, and Rhode Island have all rejected the Second Circuit's approach, recognizing that bad-faith, pretextual takings lack a valid public purpose. This majority view faithfully applies the text of the Takings Clause, affording landowners the constitutional protections they are due.

This Court should grant the petition to resolve this split, restore stability to the real estate development process, and reinstate the fundamental property rights of millions of Americans.

ARGUMENT

I. The Second Circuit's Erroneous Decision Will Chill Beneficial Development and Allow Municipalities to Circumvent Basic Protections for Fundamental Property Rights.

This case presents an issue of great importance, because the decision below threatens to substantially disrupt the real estate industry and eviscerate fundamental property rights. Private parties already endure a long process to construct a new building development. Allowing governments to block such projects at any time with

pretextual takings would introduce intolerable levels of uncertainty that would chill lawful and beneficial developments desired by landowners and potential purchasers of land. Moreover, vesting this sort of unchecked authority in local governments threatens to eviscerate the fundamental rights of landowners to improve, develop, and sell their property by creating an end-run around even the most minimal constitutional protections.

A. The Decision Below Creates a Safe Harbor for Targeted, Pretextual Takings that Will Chill Beneficial Property Development.

Although there are already many hurdles to clear when developing a new use for real property, the path is well-worn enough that developers can often estimate costs in terms of their time and resources and thus determine whether a project is worth pursuing. Uncertainty is a fearsome specter in this process. And while some degree of uncertainty may be unavoidable, the Second Circuit's decision renders the development process intolerably unpredictable.

According to the decision below, a new project that complies with all legal and contractual requirements could be smothered at any point by the threat or use of eminent domain improperly targeting that particular development. As a result, the threat of pretextual eminent domain would hover over the entire development process. This process is made up of many cumbersome steps to ensure compliance with safety, environmental, and zoning regulations. Those steps include: finding a particular location for the development; purchasing or leasing that

location's real property; designing a building for that particular location according to applicable building codes; determining the infrastructure available for that location and what needs to be added; determining that location's existing zoning and applying to change it as necessary; complying with environmental regulations applicable to that location; addressing any concerns, investigations, or litigation from neighbors or applicable government entities about the proposed use of the location; setting a budget and seeking financing; obtaining insurance; obtaining a building permit; retaining a construction company and securing building materials and a workforce; constructing the building; and passing inspections during and after construction to obtain final approval.[2] These steps already involve navigating comprehensive statutory and regulatory schemes, common law, and industry standards.

If eminent domain could be employed at any time before, during, or after this process to shut down a law-abiding development because the government disfavors it (or the developer), a crippling uncertainty would reign supreme in the real estate industry.

This uncertainty is particularly troublesome to the rule of law and operation of our democracy because it can only be ameliorated by exercising political pull. The successful developers under this new regime would not be the best builders, but those with the best intelligence about the inner workings of government entities and the

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2. G. Valle, Commercial Building Construction Sequence: Start to Finish, BuilderSpace (Jan. 22, 2021), available at https://www.builderspace.com/commercial-building-construction-sequence-start-to-finish.

most influence over the relevant government officials. First-time participants in developing a new use of a property will be most vulnerable to this uncertainty, creating massive barriers to entry in this market, which in turn will decrease competition and increase costs for consumers. Entrepreneurship, revitalization of blighted neighborhoods, maximization of scarce land in crowded areas, and the development of affordable commercial and residential space all risk being stunted if the Second Circuit's decision is permitted to stand.

B. The Decision Below Invites, and Would Insulate from Review, Arbitrary and Capricious Impingements on Fundamental Property Rights.

By allowing pretextual takings, the Second Circuit has blessed the circumvention of longstanding constitutional limitations on governmental interference with private land use. Without such restraints, arbitrary and capricious takings will face little to no deterrence and threaten to eviscerate fundamental property rights.

As this Court recognized nearly a century ago, "[t]he governmental power to interfere by zoning regulations with the general rights of the landowner by restricting the character of his use, is not unlimited." *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928). For example, "arbitrary and unreasonable" zoning ordinances are unconstitutional. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (zoning ordinances "can be declared unconstitutional" where they "are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare"); see also

Nectow, 277 U.S. at 188 (1928) ("zoning regulations" may not impose a restriction that "does not bear a substantial relation to the public health, safety, morals, or general welfare"); *Viscio v. Guilderland Planning Bd.*, 138 A.D.2d 795, 798 (N.Y. App. Div. 3rd Dept. 1988) ("denial of petitioner's application was arbitrary and capricious and was properly set aside"). And, in New York, "[a]ny ambiguities in a zoning ordinance must be resolved in favor of the property owner." *Matter of Mejias v. Town of Shelter Island Zoning Bd. of Appeals*, 298 A.D.2d 458, 459 (N.Y. App. Div. 2nd Dept. 2002). Most notably for our purposes, New York law also precludes "a zoning board [from] bas[ing] the denial of a special exception solely on community objection." *Retail Prop. Tr. v. Bd. of Zoning Appeals*, 774 N.E.2d 727, 731 (N.Y. 2002); see also *Matter of W.K.J. Young Grp. v. Zoning Bd. of Appeals of Vill. of Lancaster*, 16 A.D.3d 1021, 1022 (N.Y. App. Div. 4th Dept. 2005) (holding that a "determination to deny [an] application was the result of general community opposition" and thus "arbitrary and capricious").

To be sure, this Court has prescribed a highly deferential standard of review for local authorities' zoning decisions, as have New York courts. See *Schad v. Mount Ephraim*, 452 U.S. 61, 68 (1981) ("Where property interests are adversely affected by zoning, the courts generally have emphasized the breadth of municipal power to control land use."); *Pecoraro v. Bd. of Appeals*, 814 N.E.2d 404, 407 (N.Y. 2004). But even the minimal standard of reasonableness gives landowners a baseline assurance that they will be free from pure caprice. There remains an inviolable core at the heart of the ancient right of quiet enjoyment that even a century of prolific zoning has not permeated. See *Wash. ex rel. Seattle Title Tr. Co.*

v. Roberge, 278 U.S. 116, 121 (1928) ("Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities.").

But the decision below would permit cities to use pretextual takings to evade even this minimal constitutional standard, sweeping away property owners' last bulwark against unfettered interference with their property and due process rights. According to the Second Circuit, the government's power to interfere with property rights, especially the right to improve and develop property, is truly "unlimited," contrary to this Court's assurances otherwise. See, *e.g.*, *Nectow*, 277 U.S. at 188. The decision below effectively gives local governments free rein to "reverse spot zone" through pretextual uses of eminent domain—or, more likely, the *threat* of pretextual uses of eminent domain. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 132 (1978) ("discriminatory, or 'reverse spot,' zoning" is "a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones"). While reverse spot zoning is unconstitutional in New York,[3] the Town of Southold and other New York municipalities may now accomplish the same constitutionally infirm ends simply by uttering magic words like "open space," App. 11a, "passive use park," App. 92a, or "playing fields," cf. *New England Estates, LLC v. Town of Branford*, 988 A.2d 229, 237 (Conn. 2010).

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3. See *Greenport Grp., LLC v. Town Bd. of the Town of Southold*, 167 A.D.3d 575, 580 (N.Y. App. Div. 2nd Dept. 2018); *Nicholson v. Inc. Vill. of Garden City*, 112 A.D.3d 893, 895 (N.Y. App. Div. 2nd Dept. 2013); *Matter of C/S 12th Ave. LLC v. City of New York*, 32 A.D.3d 1, 9 (N.Y. App. Div. 1st Dept. 2006).

The only constitutional protection that remains is the requirement to pay just compensation to landowners, which is not a sufficient check on pretextual takings. Indeed, as the Petition and the record in this case demonstrate, many municipalities view "just compensation" as a small price to pay for an end-run around the Takings Clause. Pet. 9–11 & n.2 (collecting cases involving successful challenges to pretextual takings); see also *infra*, § II (same).

Moreover, municipalities can use the *threat* of a pretextual taking to cow property owners into submission, without ever having to go through with the taking and payment of just compensation. This Court's exactions jurisprudence in part addresses just this type of danger. Cf. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 841 (1987) ("[W]here the actual conveyance of property is made a condition to the lifting of a land-use restriction, . . . there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective.");[4] *Dolan v. City of Tigard*, 512

4. The decision below conflicts with this precedent because it suggests that courts may not undertake the sort of means-ends analysis that the Court employed in *Nollan*. In *Nollan v. California Coastal Commission*, the government argued that the exaction of a public easement across Nollan's property was necessary to "protect[ ] the public's ability to see the beach," "assist[ ] the public in . . . using the beach," and "prevent[ ] congestion on the public beaches." 483 U.S. at 835. But the Court found it "quite impossible to understand" how the public easement served these purported purposes. *Id.* at 838–39. It therefore held that the government's imposition of the public easement exaction as a condition of issuing a permit to build a new house on Nollan's property "cannot be treated as an exercise of its land-use power for any of these purposes." *Id.* at 839. Here, the lower court's decision forecloses similar scrutiny of governments' purported "public use" justifications for exercises of their eminent domain power.

U.S. 374, 396 (1994) ("A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." (quoting *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922))). Pretextual takings present a similarly "heightened risk" of abuse: forcing property owners like Petitioners to acquiesce to reverse spot zoning under threat of condemnation for a bogus and unrelated public use. See Debra Pogrund Stark, How Do You Solve a Problem Like in Kelo?, 40 J. Marshall L. Rev. 609, 630–36 (2007).

And this threat is significant because, as commentators have long noted, "just compensation" payments often fail to capture the subjective value of the property to the would-be developer. See, *e.g.*, Thomas W. Merrill, Incomplete Compensation for Takings, 11 N.Y.U. Envtl. L.J. 110, 111 (2002) ("The most striking feature of American compensation law—even in the context of formal condemnations or expropriations—is that just compensation means incomplete compensation."); Richard A. Posner, Economic Analysis of Law 57 (6th ed. 2003) ("Just compensation is not full compensation in the economic sense."); Richard Epstein, Takings: Private Property and the Power of Eminent Domain 183 (1985) ("The central difficulty of the market value formula for explicit compensation, therefore, is that it denies any compensation for real but subjective values."); Michael R. Klein, Eminent Domain: Judicial Response to the Human Disruption, 46 U. Det. J. Urb. L. 1, 21 (1968) ("only a bare minimum of the effects of a taking become the subject matter of financial awards"); see also *United States v. Gen. Motors Corp.*, 323 U.S. 373, 383 (1945) ("proof of value peculiar to the respondent, or the value of good-will

or of injury to the business of the respondent . . . must be excluded from the reckoning”).

Accordingly, there is no basis to assume that the just-compensation requirement will deter local governments from threatening a pretextual taking to discourage lawful development or cajole landowners into giving up their rights. Although the government must compensate property owners for pretextual takings, municipalities may yet be tempted by the prospect of taking more than they paid for. And most property owners will acquiesce to the government’s whims rather than permanently forfeit the subjective values of their property, which “just compensation” does not compensate. Thus, without the restraints of the public-use requirement, pretextual takings will be significantly under-deterred.

II. This Court’s Intervention Is Necessary to Resolve a 6-1 Split Among Federal Courts of Appeals and State Courts of Last Resort.

Among appellate courts, the Second Circuit stands alone in blessing these pretextual takings. With its decision below, the court created a split with the Seventh Circuit and the supreme courts of Connecticut, Pennsylvania, Massachusetts, Georgia, and Rhode Island. Each of these courts have concluded that bad-faith, pretextual takings lack a valid public use, even if the land is indeed repurposed for a public, rather than private, benefit.

In *United States v. 58.16 Acres of Land*, a landowner challenged the constitutionality of the Army Corps of Engineers’ attempted taking of his farmland. 478 F.2d 1055, 1057 (7th Cir. 1973). The Corps claimed that his

land, which was adjacent to its reservoir, was necessary for downstream flood control, but the owner contended that this asserted public use was mere pretext. For years the owner had been complaining to the Corps about its failure to maintain proper water levels in the reservoir, an error that caused significant erosion of his property. The Corps refused to fix the issue, informing the owner that condemnation would be cheaper than an erosion remedy. *Id.*

The district court, similarly to the Second Circuit, rejected the takings claim because the asserted purpose for the condemnation was indeed a valid public use, despite evidence suggesting that the public use was mere pretext. The Seventh Circuit disagreed, explaining that "questions of bad faith . . . bear[ ] upon the determination of public use." *Id.* at 1058–60. Because the district court did not adequately consider the farmer's arguments regarding pretext, the Seventh Circuit remanded for further proceedings.

As recognized in the Petition, five state courts of last resort have also rejected the approach embraced by the Second Circuit below. Most notably, the supreme courts of Connecticut, Pennsylvania, Massachusetts, and Georgia have all done so in cases involving materially similar facts: a municipality seeks to prevent an undesired development on private property by exercising its eminent domain authority to create a sham park instead. See *New England Estates*, 988 A.2d at 252–53 (invalidating a sham-park taking aimed at stopping undesired residential development); *Middletown Twp. v. Lands of Stone*, 939 A.2d 331, 337–38 (Penn. 2007) (same); *Pheasant Ridge Assocs. Ltd. P'ship v. Town of Burlington*, 506 N.E.2d

1152, 1156–57 (Mass. 1987) (same); *Earth Mgmt., Inc. v. Heard County*, 283 S.E.2d 455, 459–60 (Ga. 1981) (invalidating a sham-park taking aimed at stopping the development of a waste-disposal facility); *Carroll County v. City of Breman*, 347 S.E.2d 598, 599–600 (Ga. 1986) (same); see also *Borough of Essex Fells v. Kessler Inst. for Rehabilitation, Inc.*, 673 A.2d 856, 858 (N.J. Super. Ct. Law Div. 1995) (invalidating a sham-park taking aimed at stopping the development of a nursing facility). And the Rhode Island Supreme Court, applying the same reasoning, invalidated the taking of a private garage because the stated public purpose—airport parking—was mere pretext for the self-interested motive of increased revenue. *R.I. Econ. Dev. Corp. v. The Parking Co., L.P.*, 892 A.2d 87, 103–04 (R.I. 2006).

The Supreme Court of South Dakota has likewise adopted this majority approach, albeit in dictum. In *City of Freeman v. Salis*, the court expressly followed the decision of the Massachusetts Supreme Court in *Pheasant Ridge*, concluding that "[a] municipality acts in bad faith when it condemns land for . . . an improper reason, though the superficially stated purpose purports to be valid." 630 N.W.2d 699, 702–03 (S.D. 2001). The court ultimately rejected the takings claim, however, because the record demonstrated that the city's stated purpose for the taking—flood control—was not pretextual and was a valid, good-faith public use. *Id.*

Likewise, appellate courts in several states, including Colorado and Florida, have held that pretextual takings fail to satisfy public-use requirements of state condemnation laws that are materially identical to that of the federal Takings Clause. See, *e.g.*, *City of Lafayette v. Town of Erie*

Urb. Renewal Auth., 434 P.3d 746, 750–53 (Colo. App. 2018) (affirming the dismissal of a condemnation action because "the taking to establish an open space community buffer was pretextual and was not a lawful public purpose."); *City of Miami v. Wolfe*, 150 So.2d 489, 490 (Fla. Dist. Ct. App. 1963) (affirming dismissal of condemnation action because the record showed the City was not actually going to use the acquired land for the proposed purpose).

Although the Second Circuit is an outlier among the federal courts of appeals and state courts of last resort, lower courts are already following suit. See, *e.g.*, *Garvey Farm LP v. City of Elsmere*, No. 2:23-cv-015-DCR, 2023 U.S. Dist. LEXIS 92557, at *13–15 (E.D. Ky. May 26, 2023) (allowing eminent domain for a sham park aimed at stopping the expansion of a mobile home park). Meanwhile, property owners and other participants in the real estate industry suffer the detrimental effects of this erroneous, minority approach. See *infra* at § I. This Court should grant the petition and hold that the majority approach is the correct one, restoring stability to the real estate development process and reinstating the fundamental property rights of landowners.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted.

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