No. 23-1301

In the Supreme Court of the United States

BEN BRINKMANN, HANK BRINKMANN,
MATTITUCK 12500 LLC,

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

BRIEF OF SUSETTE KELO AS *AMICA CURIAE* IN SUPPORT OF PETITIONERS

MATTHEW A. SCHWARTZ
Counsel of Record
MICHAEL T. LEMANSKI
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004
(212) 558-4000
schwartzmatthew@sullcrom.com

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INTEREST OF *AMICA CURIAE*[1]

Susette Kelo, a registered nurse, was the owner of a little pink house in New London, Connecticut. When the City of New London tried to take her dream home in the name of "economic development" that principally benefitted pharmaceutical giant Pfizer, Ms. Kelo sued to save her home and protect her constitutional rights. In 2005, Ms. Kelo's case reached this Court, which, in a 5-4 decision, regrettably approved the taking. Since then, Ms. Kelo's little pink house has been relocated to a new neighborhood in New London, Pfizer has left town, and the former site of Ms. Kelo's home remains an empty lot. Ms. Kelo, however, has continued to advocate against eminent domain abuse, testifying before Congress and telling her story in the media to educate the public about how unchecked government takings trample the rights of everyday people. Ms. Kelo's story has been the subject of a book and feature film, LITTLE PINK HOUSE. In response to Ms. Kelo's experience, and this Court's decision to allow the City of New London to take her home, dozens of states have strengthened their legal protections against eminent domain abuse through legislation and voter initiatives, and as the result of litigation.

Ms. Kelo has an interest in ensuring that the courts remain faithful to the Constitution's promise of protec-

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[1] All counsel of record received timely notice of *amica curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation of or submission of this brief. No one other than the *amica curiae* or her counsel made a monetary contribution to the preparation or submission of this brief.

tion for private property rights. She knows how devastating having one's life uprooted by the abuse of eminent domain can be, and how lonely it can feel to take on powerful government interests intent on getting their way regardless of the Constitution. Although the abuse of eminent domain at issue here—the taking of private property under false pretenses for illegitimate ends—differs from the abuse Ms. Kelo suffered, it is no less pernicious and deserves this Court's attention.

SUMMARY OF ARGUMENT

This case concerns whether courts should look beyond a government's claim that it is taking private property for "public use" when the property owner has adequately pleaded that the government's real purpose is to prevent the unpopular, but wholly legal, use of that property. In a 2-1 panel decision, the Second Circuit answered "no": so long as the government offers an explanation that facially satisfies the Fifth Amendment's public-use requirement, courts must accept that explanation. In other words, if the real reason for a taking is bigotry, retaliation for unpopular speech, or even a personal vendetta, the Second Circuit's message to aggrieved property owners is "too bad, the Fifth Amendment allows it."

The Second Circuit's decision creates a direct split with other courts, is wrong on the law, and leaves property owners vulnerable to pretextual and unlawful takings without judicial recourse to protect their rights. This Court should grant *certiorari* and reverse.

First, the Second Circuit's decision parts ways with other courts—including, most notably, the Connecticut Supreme Court—that have held the Fifth Amendment requires a more searching inquiry into whether a taking satisfies the public-use requirement. This Court

should resolve this intra-circuit split and, moreover, bring clarity to takings law across the country.

Second, the Second Circuit's decision is wrong in holding that courts should not scrutinize pretextual takings because the inquiry lacks judicially administrable standards. State courts routinely ask whether the government's stated reason for a taking is the true purpose to ensure that the condemnation complies with the federal and state constitutions and with state statutory limits on the eminent domain power. Federal courts also determine whether a taking's alleged public use actually is a cover for conferring a private benefit. These cases clearly show that scrutinizing the government's reasons for taking private property does not, as the majority below feared, inevitably devolve into a "judicial inquiry into the subjective motivation of every official" involved in the taking, Pet. App. 9a. The Second Circuit's belief that looking past the stated purpose of a taking is "fraught with conceptual and practical difficulties," and so is best avoided, *ibid.*, cannot be squared with the experience of numerous jurisdictions that have had no such trouble giving full effect to property owners' constitutional rights. The Court should correct the Second Circuit's error.

Third, the Second Circuit's refusal to intervene in these cases is not harmless. Using eminent domain to stop the construction of a house of worship, to change the racial demographics of a neighborhood, to punish a homeowner for criticizing public officials, or to prevent a legal but unpopular business from opening serves no legitimate public purpose. And applying a veneer of constitutionality to such acts—*e.g.*, by turning the land taken from a religious congregation into a park—does not change that conclusion. This is not a matter of trying to police "bad reasons for doing good things," as the

Second Circuit seemed to suggest, Pet. App. 11a; rather, the decision below shields blatant abuses of public authority from scrutiny so long as public officials give the right excuses. As Ms. Kelo knows all too well, losing one's home, place of worship, or business in a taking can be a traumatic, life-changing experience; knowing the government did this to you out of animus or spite adds insult to the injury; a court of law turning a blind eye when that happens squares it. This Court should intervene to ensure that vulnerable property owners in the Second Circuit enjoy the Constitution's full protection.

ARGUMENT

I. THE SECOND CIRCUIT'S DECISION BREAKS WITH THE APPROACH OF OTHER COURTS.

The Second Circuit's deferential approach to pretextual takings opens a rift with other courts that have looked past the stated reason for a taking to its true purpose when determining whether it satisfies the Fifth Amendment's public-use requirement. Two state supreme court decisions, including one from a state *in the Second Circuit*, illustrate this split.[2]

1. *New England Estates, LLC* v. *Town of Branford*, 294 Conn. 817 (2010), offers a clear contrast. There, the Connecticut Supreme Court upheld a jury verdict in favor of a property developer who sued under 42 U.S.C. § 1983 alleging that the town's pretextual taking of a piece of land violated the Fifth Amendment (as applied to state government entities by the Fourteenth

[2] Both the Brinkmanns' petition for a writ of *certiorari* and Judge Menashi's dissent below identify numerous other state courts that line up opposite the Second Circuit on this issue. *See* Pet. 9-11; Pet. App. 29a-33a.

Amendment). The jury heard evidence that the town's stated reasons for the taking—to remediate environmental contamination from a nearby landfill and, ultimately, build supposedly much-needed sports fields—was a sham, and that the real reason for the taking was to stop the plaintiff's affordable housing development. *Id.* at 822-29. The court squarely held that "a government actor's bad faith exercise of the power of eminent domain is a violation of the takings clause," and concluded that the jury was within its rights to find that the town "act[ed] in bad faith in exercising its eminent domain power" and "violated the public use requirement of the taking clause." *Id.* at 840, 853-54.

Two additional aspects of the decision sharpen the contrast. *First*, there is no ambiguity about whether the decision rested on the Fifth Amendment right at issue here or on an alternative state-law ground. Because only the plaintiff's federal-law claim reached the jury, *New England Estates*, 294 Conn. at 828 n.13, the Connecticut Supreme Court addressed only the federal constitutional right.

Second, the pretext was not particularly difficult to detect, provided one was willing to look, as the town's actions had all the hallmarks of sham decision-making. Sudden departure from long-settled plans? Check. The jury heard that the town's concerns about contamination from the landfill materialized only after town officials caught wind of an imminent planning application for the development. *Id.* at 825-28. Indeed, the town plan had designated the land in question for residential development for more than 20 years while the landfill operated next door—a curious choice for a supposedly contaminated site. *Id.* at 822-27. Nor did the town raise similar concerns with earlier development plans that called for market-rate apartments and a golf

course. *Id.* at 823-24, 827. Similarly, town officials only raised the possibility of acquiring the land for playing fields *after* they learned that New England Estates planned to build affordable housing on the site. *Id.* at 826-27 & n.9.

Justifications unsupported or contradicted by the available evidence? Check. The town's only evidence that the land actually was contaminated came from a five-page report—submitted to the town attorney for comments before it was finalized—discussing *possible* environmental concerns that *typically* arise in residential developments near a landfill *generally*, not an analysis of the site in question. *Id.* at 827-28.

Last-minute additions to the record in support of the decision? Check. To support its supposed need for playing fields, the town relied on little more than a "sketch" by the town engineer created at the eleventh hour for the express purpose of supporting the planned condemnation. *Id.* at 826-27.

A rushed decision with little to no discussion or debate? Check. The approval process took just over one month from start to finish and consisted of only three public (but poorly publicized) meetings conducted behind the property owner's back. *Id.* at 827-28.

Add to the mix internal communications between town officials suggesting that "the town was not receptive to an affordable housing development," and jurors had no trouble finding that "the town had been dishonest about its reasons for taking the land and had used a pretext" to stop the plaintiff's proposed development. *Id.* at 822, 825-26, 842. In fact, the town did not challenge the jury's finding of pretext on appeal, arguing instead that "it did not violate the [Fifth Amendment's] public use requirement by being dishonest about the

reasons for which it took the land"—a position the Connecticut Supreme Court rejected, *id.* at 853-54, but which the Second Circuit endorsed below, Pet. App. 3a.

2. Similarly, *Rhode Island Economic Development Corp.* v. *The Parking Co.*, 892 A.2d 87 (R.I. 2006), took a hard look at a state agency's stated reason for taking private property (an airport parking garage) to determine whether the taking's true purpose complied with the Fifth Amendment's public-use requirement. *Id.* at 102-07. In court, the agency claimed that "the primary public purpose for the condemnation [was] increased parking" near the airport. *Id.* at 105. But the evidence showed "no additional parking spaces were created" as a result of the taking, and, indeed, "there was no finding that there was a shortage of parking spaces * * * or that the motoring public was unable to park at the airport or was inconvenienced in any way." *Ibid.* The agency, in fact, "failed to make *any* findings" to support its assertions of need. *Ibid.* (emphasis added). This "hasty maneuvering," the Rhode Island Supreme Court held, demonstrated that the agency's true purpose lay elsewhere. *Id.* at 106.

The Rhode Island Supreme Court similarly rejected the agency's vague economic-development rationales, noting that, even if "promot[ing] a healthy and growing economy" and providing the public with "appropriate transportation facilities" were valid public purposes for a taking, "[t]here is no correlation between these * * * goals and the condemnation of a temporary easement in a [parking garage]." *Id.* at 105-06. Nor had the agency even bothered to make any formal findings to that effect. *Id.* at 106.

Rather, the record revealed another purpose. A related state agency had obtained a purchase option for

the property years earlier, but the strike price it contractually agreed with the owner was more than it now was willing to pay. *Id.* at 93, 104-06. The true purpose of the taking therefore was "to gain control of [the garage] at a discounted price" and "to benefit from a profitable business at the expense of its rightful owner." *Id.* at 107. The court held that this "arbitrary" and "bad faith" attempt to circumvent the terms of an existing contractual relationship, obscured by the government's purported interest in flyer convenience and economic development, "was not * * * a public use," and thus violated the Takings Clause. *Id.* at 106-07.

II. THE SECOND CIRCUIT'S ASSUMPTION THAT SCRUTINIZING PRETEXTUAL TAKINGS WOULD BE UNMANAGEABLE IS WRONG.

A. Courts Routinely Look Beyond Government's Stated Reason For A Taking To Its True Purpose.

Following this Court's precedents, courts routinely look to legislative purposes to determine whether government actions are constitutional.[3] Yet, according to the Second Circuit, looking behind the stated reason for a taking of private property to its true purpose is an impractical, if not impossible, task. The decision below warns that doing so invites "a full judicial inquiry into the subjective motivation of every official" who voted for, approved, or otherwise supported the taking, and means asking courts to "gauge the purity of the

[3] *See* Pet. App. 26a-27a (Menashi, J., dissenting) (collecting cases); *see also* Pet. 26-27. The same is true outside the legislative context. Indeed, just this term, this Court reaffirmed that plaintiffs bringing First Amendment retaliatory-arrest claims may rely on objective evidence that they were singled out for their speech notwithstanding the existence of probable cause. *Gonzalez* v. *Trevino*, 144 S. Ct. 1663, 1667 (2024).

motives of * * * government officials." Pet. App. 9a-10a (quotation omitted). Because "[s]uch motives are by nature fragmented—and rarely, if ever, pure"—and "[d]ifferent legislators may vote for a single measure with different goals," there is little point in trying. Pet. App. 10a. Given these "conceptual and practical difficulties," the Second Circuit therefore suggested it is better not to look too closely beyond what the government *says* it is doing when it takes someone's property. Pet. App. 9a.

The Second Circuit's concerns are vastly overblown. The experience of numerous courts around the country demonstrates that "giv[ing] close scrutiny to the mechanics of a taking," Pet. App. 10a (quotation omitted), is neither impossibly difficult, nor particularly unusual. Both *New England Estates* and *Rhode Island Economic Development Corp.* relied on objective evidence of the true purpose driving the government's use of eminent domain to invalidated pretextual takings. *See* pp. 4-8, *supra*. And numerous other courts across the country have similarly looked past pretextual justifications—whether to measure the taking against the Fifth Amendment's constitutional minimum or against more stringent standards under their respective states' own constitutions and various statutes regulating the use of eminent domain.

1. Pennsylvania courts' experience with pretextual takings is instructive. For over 100 years, the state's courts have required that a "public interest * * * lie at the basis of the exercise [of eminent domain power]" to comply with the state constitution and have recognized that taking property for a use other than "the purpose which justifies its taking * * * would be a fraud on the owner, and an abuse of power." *Lance's Appeal*, 55 Pa. 16, 25 (1867). Pennsylvania also places statutory limits

on the public uses for which different government entities can take private property. *E.g.*, 32 Penn. Stat. § 5008(b) (providing that certain local governments are not authorized to take private property for conservation purposes under the Open Space Lands Act).

To determine whether a taking complies with these constitutional and statutory limitations, as well as with the Fifth Amendment, Pennsylvania courts look not only at the stated reason for the taking, but also at all available evidence from which they can discern its true purpose. In *Middletown Township* v. *Lands of Stone*, 595 Pa. 607 (2007), for example, the Pennsylvania Supreme Court rejected the township's explanation that a taking was for "recreational purposes," citing objective evidence that the true purpose of the condemnation was to stop potential development on the land and to maintain open spaces, a purpose not authorized by statute, *id.* at 610-21.[4]

The court observed that the township's interest in recreational use was speculative at best, as it merely was "consider[ing]" "various recreational options," but had no concrete plans. *Id.* at 619. And the township's supposed interest in using the property as parking for a festival previously held in a neighboring park not

[4] Although the Pennsylvania Supreme Court ultimately decided the case on the narrower statutory grounds, it emphasized that the "Takings Clause of the Fifth Amendment provides the only means of validly overcoming the private right of property ownership," and that the "true purpose [of the taking] must primarily benefit the public" to satisfy the Constitution's public-use requirement. *Id.* at 617. If anything, the statutory basis for the Pennsylvania Supreme Court's decision required it to more finely parse different motivations for the township's actions, further demonstrating that the Second Circuit's concern about the judicial administrablility of a coarser-grained pretext analysis under the Fifth Amendment, *see* Pet. App. 9a-11a, is wholly unfounded.

only was equally speculative (the township was only considering reinstituting the festival "in the future") but also, at most, justified taking a small part of the land abutting the park, not an entire 175-acre working farm. *Id.* at 619-20. Finally, the court dismissed the township's suggestion that the farmland might "provid[e] passive recreation"—a euphemism for leaving the land empty, albeit publicly accessible—because the record disclosed no "suggestion that the Township ha[d] considered, let alone created, such a plan." *Id.* at 620.

In contrast, there was ample objective evidence that the township's purpose was to stop residential development on the land. The property came to the township's attention only *after* it became aware of possible development. *Ibid.* And officials proposed allowing the current owner to continue commercially farming the land, which was inconsistent with the township's supposed recreational interest, but would serve the purpose of stopping any development. *Id.* at 610, 619-20. Statements by individual public officials, like "We just don't want [the land] to go to developers," simply confirmed what the objective evidence already made clear. *Id.* at 610, 620.

Lands of Stone is not an isolated case. Pennsylvania courts regularly undertake a similar analysis to determine whether government takings are constitutional and authorized by statute.[5] In all events, however, the government "is not free to give mere lip service to its

[5] *See, e.g.*, *In re General Mun. Auth. of City of Nanticoke*, 292 A.3d 1162, 1171-75 (Pa. Commw. Ct. 2023) (remanding for factual findings about the taking's "true purpose"); *Bear Creek Twp.* v. *Riebel*, 37 A.3d 64, 70-71 (Pa. Commw. Ct. 2012) (rejecting after-the-fact justifications for taking and concluding that its true purpose exceeded township's statutory authority).

authorized purpose or * * * offer retroactive justification." *Lands of Stone*, 595 Pa. at 617.

2. Massachusetts courts conduct a similar analysis under the federal and state constitutions. In *Pheasant Ridge Associates L.P.* v. *Town of Burlington*, 399 Mass. 771 (1987), the Supreme Judicial Court held that "a municipal land taking, proper on its face, may be invalid because it was undertaken in bad faith." *Id.* at 775. A "bad faith" taking, it explained, "is not limited to action taken solely to benefit private interests," and includes any taking with an improper true purpose. *Id.* at 776. There, town authorities took land slated for a housing development that included affordable units ostensibly for "parks, recreation, and the construction of moderate income housing." *Id.* at 772-73. The court rejected the town's explanation, and concluded based on undisputed facts that it improperly took the land solely to block the planned development. *Id.* at 777-79.

The court looked to three main pieces of evidence shedding light on the town's true purpose. *First*, as in *New England Estates*, *Lands of Stone*, and the present case, the town's interest in the property arose only *after* the property owner took steps towards developing it. *See id.* at 778. Indeed, the site was never previously "considered for acquisition for park or recreational uses." *Ibid.* Ditto for building "low and moderate income housing on or near the site." *Ibid.*

Second, the court highlighted a number of ways the town departed from its normal procedures. *See id.* at 778-79. For example, town officials never consulted any of the agencies responsible "for town activities in the areas for which the land was to be taken" about the proposal's "merits or feasibility." *Id.* at 778. Instead, the taking's supposed purpose "w[as] developed by the selectmen and town counsel within minutes before

the * * * town meeting" called to approve the taking. *Ibid.*

Third, the court considered the statements of public officials at the meeting that approved the taking. The Supreme Judicial Court was sensitive to the difficulty, which motivated the Second Circuit's inaction here, of "attribut[ing] improper motives to a town [as a whole], and to its citizens voting at [the] town meeting." *Id.* at 777. It therefore distinguished between the statements of individual public officials, in general, which it held were not, by themselves, "admissions that may be used against the town," and specific statements probative of what the townspeople were asked to vote on and approve at the meeting—there, a "presentation by the chairman of the board of selectmen" about the condemnation proposal that "show[ed] beyond question that the town meeting was being asked to consider the motion, not on the merits of the acquisition of the site for uses stated in the motion, but to bar the plaintiffs' development." *Id.* at 779-80.

To be sure, proving pretext often "is not easy," and the especially clear record of the town's true purpose in *Pheasant Ridge* might be "unusual," *id.* at 775-76, but the difficulty falls on property owners challenging the taking, who must prove their case, not on courts, which are more than capable of examining the objective evidence of a taking's true purpose when presented.

3. That numerous other states have applied similar pretext analyses simply underscores the point that this inquiry is not beyond the ken of judges and juries, as the Second Circuit majority supposed. *See, e.g.*, *FKM P'ship* v. *Board of Regents*, 255 S.W.3d 619, 628-31 (Tex. 2008) (considering objective evidence of taking's purpose to determine whether it was "fraudulent, without a true public purpose, and intended solely to * * *

avoid paying landowner's expenses under statutory provisions"); *Earth Mgmt., Inc.* v. *Heard Cty.*, 248 Ga. 442, 446-47 (1981) (considering objective circumstances surrounding county's acquisition of land for a park, including whether "other land was ever considered," lack of "on-site surveying, planning, or inspection" before condemnation, officials' stated opposition to property owner's planned use, and timing of taking, to conclude park "was not the true reason" for the taking, and that the true purpose of blocking owner's planned use was "beyond the power conferred upon the county by law"); *City of Lafayette* v. *Town of Erie Urban Renewal Auth.*, 434 P.3d 746, 752-53 (Colo. App. 2018) (finding stated purpose of taking was pretextual based on city's lack of prior interest in property, timing of taking, and inability to explain how land was necessary); *Mount Laurel Twp.* v. *Mipro Homes, L.L.C.*, 379 N.J. Super. 358, 375-76 (App. Div. 2005) (concluding township's acquisition of residential development for "open space" was not pretextual because it was consistent with township's concern that the development would "aggravate traffic congestion and pollution problems in the municipality and impose added stress on its school system and other municipal services"); *see also* Pet. App. 29a-33a (Menashi, J., dissenting) (collecting cases).

B. There Is No Principled Reason To Allow A Court To Ask Whether A Taking's Real Purpose Is To Confer A Private Benefit, But Not Whether Its True Purpose Is Animus Or Spite.

The Second Circuit's determination that courts are ill-equipped to parse a taking's true purpose from mere pretext allows one special carve-out—courts, the Second Circuit says, may nonetheless ask whether the stated reason for a taking is a "pretext for a[] * * * *private*[ ]purpose." *See* Pet. App. 8a (emphasis added).

But this carve-out has no principled basis. The Second Circuit never explains why the desire to confer a private benefit is any easier to detect than, say, religious animus or retaliation for unpopular speech. Nor does the Second Circuit explain why pretextual explanations covering up a private purpose would be any easier for judges and juries to see through than those covering up any other impermissible reason for a taking. In reality, the evidence and analysis in these two situations that the Second Circuit treats as distinct actually are identical, as both federal and state court decisions demonstrate.

1. Federal district courts in at least the Eighth and Ninth Circuits have entertained claims that a taking's stated public purpose was merely a pretext for conferring a private benefit. In *99 Cents Only Stores* v. *Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), the district court granted summary judgment for the property owner, concluding that the agency's true purpose for the taking was "to satisfy the private expansion demands of Costco," *id.* at 1129-30. Just as in other pretext cases not involving a private benefit, the district court found persuasive the agency's lack of preexisting interest in the property. The court observed that, although the agency justified the taking by relying on its power to combat blight in the area, it never made any blight findings about the property in question or any other property in the vicinity. *Id.* at 1129. In fact, the agency had not made any new blight findings in the area for nearly 20 years. *Id.* at 1126-27, 1130 n.2. Also like other pretext cases, 99 Cents Only Stores' challenge relied on statements and admissions by public officials revealing that the agency "was willing to go to any lengths—even so far as con-

demning commercially viable, unblighted real property—simply to keep Costco within the city's boundaries." *Id.* at 1129.

Similarly, in *Aaron* v. *Target Corp.*, 269 F. Supp. 2d 1162 (E.D. Mo. 2003), *rev'd on other grounds*, 357 F.3d 768 (8th Cir. 2004), the court temporarily restrained a sham redevelopment plan whose true purpose was to convey property to Target by eminent domain that the retailer was unable to acquire from the owner directly, *id.* at 1174-75. Here, too, the pretextual taking followed a familiar pattern. The City of St. Louis, which attempted to take the property, showed no interest in it until approached by Target and never designated it as blighted until the city started planning the taking. *Id.* at 1167-68. And the blight study the city *did* prepare was put together with Target's input. *Id.* at 1168, 1174-75; *cf. New England Estates*, 294 Conn. at 827-28 (report detailing purported environmental harms submitted to town attorney for comment). Adding a touch of the absurd, the blight finding rested in part "on the substandard condition of property Target itself was obligated to maintain." *Aaron*, 269 F. Supp. 2d at 1174. Finally, the district court relied on public statements and internal memoranda that confirmed what the other objective evidence before the court made clear—that the city "decided to condemn the [p]roperties in order to appease Target, and act[ed] in concert with Target" to effect the taking. *Id.* at 1175.

2. State-court pretext analyses involving a private benefit likewise demonstrate that there is no principled reason to limit courts' scrutiny of the stated purpose of a taking to these facts.

In Massachusetts, for example, courts analyzing private-benefits takings look to the *Pheasant Ridge* case, which did not involve any alleged private benefit,

for guidance on how to parse the true purpose behind a taking from pretext. *See, e.g.*, *Benevolent & Protective Order of Elks, Lodge No. 65* v. *Planning Bd. of Lawrence*, 403 Mass. 531, 551-53 (1988) (concluding that taking property to remedy blight was not pretext to confer private benefit on Emerson College "by providing it with a favorable location on advantageous terms" because "the city and various elected officials expressed considerable interest in the project area before they learned of Emerson College's plans to relocate," the city previously attempted to address blight by other means, and "local authorities * * * considered the project in depth and based their approvals on substantial evidence"); *Deep* v. *City of North Adams*, 2006 WL 2853878, at *4 (Mass. App. Ct. Oct. 6, 2006) (rejecting bad-faith claim after comparing evidentiary record to evidence considered probative of bad faith in *Pheasant Ridge*).

The same is true of Pennsylvania's courts, which analyze pretextual takings claims involving a private benefit in exactly the same way as cases that do not involve private benefits. *See, e.g.*, *In re Township of Robinson*, 2023 WL 3047814, at *4-14 (Pa. Commw. Ct. Apr. 24, 2023) (concluding, after reviewing extensive evidentiary record and testimony of public officials, that road-safety rationale for taking land near intersection was pretextual, and that the true purpose was to benefit development on neighboring property, based on lack of prior complaints about safety, safety evaluation of intersection, or "carefully developed plan" related to road safety, "inconsistent" reasoning supporting condemnation, rushed and poorly documented decision making, and evidence taking was initiated by engineer working for neighboring property owner).

And numerous other courts across the country have endorsed similarly searching inquiries into whether a taking, ostensibly for a public purpose, is a pretext for conferring a private benefit.[6] These cases show that parsing impermissible private purposes from permissible public ones is no less fact-intensive, and no less intrusive, than identifying any other improper true purpose. If anything, after this Court's decision in *Kelo*,[7] determining how much private benefit is too much, and how little public benefit is too little, likely is the *more* difficult inquiry. And, similarly, second-guessing local and state decisions on these issues is, if anything, *more* likely to trigger the "state-sovereignty" and "federalism" concerns the Second Circuit cited as a reason not to scrutinize pretext in other contexts, Pet. App. 10a. The special carve-out for takings whose real purpose is to confer a private benefit thus is not only arbitrary, but also counterintuitive.

III. THE SECOND CIRCUIT'S DECISION PUTS THE RIGHTS OF UNPOPULAR MINORITIES AT RISK.

The danger pretextual takings pose to the rights of disfavored individuals or groups is not just theoretical. Just as the Town of Southold used eminent domain to target the Brinkmanns, other municipalities also have singled out unpopular residents for pretextual takings

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[6] *See, e.g.*, *County of Hawaii* v. *C&J Coupe Family L.P.*, 119 Haw. 352, 381-89 (2008); *Franco* v. *National Capital Revitalization Corp.*, 930 A.2d 160, 169-75 (D.C. 2007); *City of Rapid City* v. *Finn*, 668 N.W.2d 324, 326-29 (S.D. 2003); *Brannen* v. *Bulloch Cty.*, 193 Ga. App. 151, 153-56 (1989).

[7] The present case does not require this Court to reconsider *Kelo*. Of course, Ms. Kelo encourages the Court to do so, and to overrule *Kelo*, in an appropriate case.

to prevent them from lawfully using their property. In addition to the examples above of where local governments repeatedly attempted to block the development of affordable housing, two further examples from the Tri-State area involving disfavored religious groups illustrate the threat.

In 2006, the Township of Wayne, New Jersey attempted to use eminent domain to prevent a local Muslim congregation from building a new mosque. *See Albanian Assoc. Fund* v. *Township of Wayne*, 2007 WL 2904194, at *1-3 (D.N.J. Oct. 1, 2007). The township claimed to want the property for "open space," a permitted public use under New Jersey law, but the justification was pretextual. *Id.* at *5, *7. According to one public official, the township enacted its "open space" plan in part because of the congregation's building application for the mosque, and the congregation's property was the *only* one identified for acquisition under the plan the township actually tried to take using eminent domain. *Id.* at *2, *11.

The congregation ultimately obtained an injunction preventing the township from taking the property, *id.* at *4, and after its claims under the Takings Clause, First Amendment, and RLUIPA survived summary judgment, *id.* at *1, the congregation obtained a settlement from the township. That success, however, comes with some caveats. For one thing, the district court's summary judgment decision as to the Takings Clause claim rested on New Jersey's bad-faith taking precedents, *see id.* at *5-7, which the Second Circuit here declined to credit, Pet. App. 12a-14a. Had the taking occurred in New York, it is doubtful the congregation's claim would have succeeded under the Second Circuit's rule. For another, courts are divided about whether RLUIPA applies to takings, as opposed to zoning and

land-use regulations. *Compare Cottonwood Christian Ctr.* v. *Cypress Redev. Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002) (applying RLUIPA), *with St. John's United Church of Christ* v. *City of Chicago*, 502 F.3d 616 (7th Cir. 2007) (holding RLUIPA does not apply); *Faith Temple Church* v. *Town of Brighton*, 405 F. Supp. 2d 250 (W.D.N.Y. 2005) (same). Whether a religious group can successfully bring a claim under RLUIPA thus is far from assured.

More recently, in 2022, the Village of Atlantic Beach on Long Island, New York attempted to exercise eminent domain to take a Jewish community center shortly after it opened to create its own government-run community center on the site. *See Chabad Lubavitch of the Beaches, Inc.* v. *Village of Atlantic Beach*, Case No. 22 Civ. 4141, slip op. at 8-13 (E.D.N.Y. Sept. 6, 2022). Although the property had been for sale for years, the village showed no interest in it until *after* the Jewish group moved in. *Id.* at 8-13, 24-25. Indeed, the village already owned other properties on which it could have built its community center without displacing a Jewish one in the process had that been its genuine goal, rather than a pretext. *Id.* at 6-7, 27.

The Jewish group in Atlantic Beach obtained a preliminary injunction against the taking on the strength of its First Amendment claim and likewise settled with the local authorities, allowing it to retain its property. But this success also comes with caveats. Using eminent domain for the purpose of taking or forestalling a house of worship may well give rise to a successful First Amendment free-exercise claim, *see* Patrick E. Reidy, C.S.C., Note, *Condemning Worship: Religious Liberty Protections and Church Takings*, 130 YALE L.J. 226, 253-56 (2020) (contrasting success of religious groups in asserting rights against taking of sanctuaries

themselves with mixed record involving other land or structures), but other forms of religious targeting are sure to be less clear-cut.

In such cases, the Second Circuit's instruction that courts must take government's stated public purpose for taking private property at face value severely constricts the legal options victims of discriminatory or retaliatory takings have. If a municipality targeted, say, a Christian business for its owner's faith by taking its parking lot for "road safety" reasons, or if it targeted a minority-owned restaurant for expropriation by declaring it "blighted," the Second Circuit's unjustified deference to explanations covering up that abuse deprives property owners of an important—and, indeed, natural—line of defense under the Constitution's plain text. The availability of *some* other claims to *some* property owners under *some* circumstances should not dissuade the Court from correcting the Second Circuit's error. The Fifth Amendment's Takings Clause is not a "poor relation among the provisions of the Bill of Rights," *Knick* v. *Township of Scott*, 588 U.S. 180, 189 (2019), and it should not be treated as such here.

CONCLUSION

The Court should grant the petition for a writ of *certiorari*.

Respectfully submitted.

MATTHEW A. SCHWARTZ
Counsel of Record
MICHAEL T. LEMANSKI
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004
(212) 558-4000
schwartzmatthew@sullcrom.com

Attorneys for Amica Curiae *Susette Kelo*

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