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 IN OPPOSITION

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QUESTION PRESENTED

The Town of Southold, New York properly exercised its eminent domain power in taking an undeveloped piece of property beneficially owned by Hank and Ben Brinkmann, upon which they intended to construct a big box hardware store in a small, semi-rural hamlet on eastern Long Island. The Town's intended use for the property is the paradigmatic public use of a park. The Brinkmanns nonetheless challenged the Town's public-use determination, made in accordance with state eminent domain law, under the Fifth Amendment on the basis that the stated public use was a pretext for the Town's true, iniquitous purpose of stymying the Brinkmanns' proposed commercial development of the Property. The District Court granted the Town's motion to dismiss because the Brinkmanns failed to allege a private benefit as required by this Court's decision in *Kelo v. City of New London*. The Second Circuit affirmed that well-reasoned decision in a lengthy panel opinion.

The question presented is as follows: whether a cognizable challenge lies to a public-use determination under the Takings Clause of the Fifth Amendment where the municipality's purpose in taking the property was for a public park.

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INTRODUCTION

The Town of Southold, New York's (hereinafter referred to as the "Town") exercise of its eminent domain authority under state law in taking an undeveloped piece of property for a public park, title to which is now inalienably vested in the Town, was appropriate and should not be second-guessed by the courts. Petitioners Hank and Ben Brinkmann (hereinafter collectively referred to as the "Brinkmanns") do not dispute that the Town complied procedurally and substantively with New York eminent domain law, and the Brinkmanns failed to challenge the public-use determination under state law. Instead, the Brinkmanns now seek to upend decades of this Court's settled precedent to carve out an exception to the deep-seated principle that the propriety of a public-use determination is a legislative, not judicial, prerogative. This Court should decline that invitation.

It is uncontested that the purpose of the taking in this case is a public park, long recognized by this Court as a bona fide public use. However, the Brinkmanns seek this Court's mandate for courts to look behind the curtain of municipal decision making, a complex and multifaceted process, on the claim that the Town's stated public purpose is a mere pretext for its more nefarious intention to run the Brinkmanns and their big box hardware store out of town. This is particularly true where there is a multimember legislature, as is the case here. However, in this Court's seminal decision of *Kelo v.*

City of New London, wherein the Court considered whether a taking for economic development constituted a public use, the Court set forth two scenarios where the court should have a heightened role in evaluating a sovereign's stated public purpose: (1) where property is taken "for the purpose of conferring a private benefit on a particular private party" and (2) where property is taken "under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." 545 U.S. 469, 477–78 (2005). The District Court dismissed the Brinkmanns' claim, and the Second Circuit affirmed that dismissal, because no private benefit was, or could be, alleged. App. 1a–56a, 57a–71a.[1] That should have ended the inquiry. Decades of caselaw from this Court, in cases involving takings of homes for economic development, property redistribution schemes, and the attempted curing of urban blight, makes clear that local legislatures, which are directly accountable to their constituents, should be "afford[ed] . . . broad latitude in determining what public needs justify the use of the takings power." *Kelo*, 545 U.S. at 482–83. A legislature's motivation should be irrelevant where title to the property has been vested in the municipality for actual use by any of its citizens as a public park.

The Brinkmanns further contend that pretextual public uses perpetuate grave injustices against

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[1] Citations to "App." refer to the Appendix to the Petition for a Writ of Certiorari.

marginalized groups. Setting aside that the Brinkmanns belong to no such group, other constitutional protections, including the Equal Protection, Free Exercise, and Due Process Clauses, serve as safeguards against so-called despotic uses of the eminent domain power. Likewise, a de facto or de jure rational basis review of public-use determinations where there is no allegation of a private benefit accords with constitutional interpretation in other arenas, including non-suspect classes under the Equal Protection Clause, neutral and generally applicable laws incidentally burdening religious exercise, and non-fundamental rights. Basic principles of federalism require that courts defer to local legislatures as the "main guardian of the public needs to be served by social legislation." *Berman v. Parker*, 348 U.S. 26, 32 (1954). The Town's decision to take property for a public park is simply not one that merits the expansion of the courts' "extremely narrow" role "in determining whether th[e] [eminent domain] power is being exercised for a public purpose." *Id.*

Finally, the Brinkmanns' manufactured claim of a split between the Second Circuit and five state high courts does not warrant granting the petition. Four of the five decisions the Brinkmanns identify are not exclusively based on the federal Takings Clause, predate *Kelo*, or both. The rampant chaos the Brinkmanns claim is created by the inconsistency they identify between a 2010 decision of the Supreme Court of Connecticut and the Second Circuit is drastically overstated. It is clear from

even a cursory survey of the relevant caselaw that the vast majority of Public Use Clause cases concern economic development takings, not takings for public parks. The issue of pretext simply does not arise as frequently as the Brinkmanns assert. The Public Use Clause, while a genuine limitation on the sovereign's eminent domain authority, is intended to prevent takings that provide only an ancillary benefit to the public while truly benefiting private interests. That is the polar opposite of the facts presented here, and the petition should therefore be denied.

STATEMENT OF THE CASE

I. The Brinkmanns Purchase the Property, and the Town Imposes a Moratorium.

Ben and Hank Brinkmann, along with their sister Mary Brinkmann[2], run Brinkmann's Hardware, a big box hardware store with several locations across Long Island, New York. App. 75a–77a. On December 2, 2016, the Brinkmanns, through Mattituck 12500 LLC, contracted to purchase the subject property, an approximately 1.75-acre parcel located at 12500 NYS Route 25 in the Hamlet of Mattituck, Town of Southold (hereinafter referred to as the "Property"). App. 75a–78a. Southold is a small, semi-rural town located on the North Fork of Long Island.

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[2] Ms. Brinkmann is not involved in the proposed Southold store and is not a party to this action. App. 76a.

The Brinkmanns intended to build a sixth Brinkmann's Hardware location on the Property. App. 77a–78a. In 2017 and early 2018, the Brinkmanns met with the local civic association and the Town Planning Department in order to create and revise site plan applications for the Property. App. 78a–81a. The Brinkmanns' plan depicted a "12,000 square-foot hardware store, a 3,000 square-foot paint store, 5,000 square feet of storage, and 80 parking spaces." App. 81a. In June 2018, the Town informed the Brinkmanns that, due to the large size of the proposed store, it required a special exception permit and market study. App. 82a.

On February 26, 2019, the Town enacted a six-month moratorium on any new building permits along one mile of Route 25, which included the Brinkmanns' proposed site, among several other businesses. App. 88a. The moratorium was twice extended in August 2019 and in July 2020. App. 89a. While other impacted property owners applied for and obtained waivers under the moratorium, the Brinkmanns did not apply. App. 90a. Instead, on May 23, 2019, the Brinkmanns filed a state court proceeding challenging the moratorium. *See Brinkmann Hardware Corp., et al. v. Town of Southold, et al.*, Index No. 002790/2019 (N.Y. Sup. Ct. Suffolk Cnty. 2019).

II. The Town Initiates Eminent Domain Proceedings.

On September 10, 2019, the Town adopted a resolution indicating its desire to acquire the Property and directing the Town Attorney to "proceed to acquire" the Property, which it determined was "required for the creation of a public park," by "negotiated purchase" or "[e]minent [d]omain." *Brinkmann v. Town of Southold*, Case No. 22-2722 (2d. Cir. 2022), Doc. No. 36 at 85–87. On July 14, 2020, the Town adopted a resolution giving notice of a public hearing pursuant to the New York Eminent Domain Procedure Law (hereinafter referred to as the "EDPL"). *Id.* at 87–88.

In August 2020, the Planning Board held a public hearing on the proposed project to build a public park, the "Village Green," on the Property. App. 91–92a. On September 8, 2020, the Town issued its formal "Findings and Determination" pursuant to EDPL § 204. App. 92a.[3] Specifically, the Town's Findings and Determination stated that:

> [t]he acquisition will benefit the public, in that, it will afford the residents of

[3] Pursuant to EDPL § 207, the Brinkmanns had thirty days to challenge the Findings and Determination under state law. A proceeding under EDPL § 207 permits the court to consider, *inter alia*, whether (1) "the proceeding was in conformity with the federal and state constitutions" and (2) "a public use, benefit or purpose will be served by the proposed acquisition." App. 92a; EDPL § 207(C).

> Mattituck and Southold at large the opportunity to create a "Village Green" or other community gathering place in a prominent location on Main Road, within the Mattituck Hamlet Center and close to the Love Lane Corridor, an asset not currently existing in the Hamlet and called for by both [the] Draft Town Comprehensive Plan[4] and prior land use studies of the hamlet.

Brinkmann v. Town of Southold, Case No. 22-2722 (2d. Cir. 2022), Doc. No. 36 at 108–09.

On May 6, 2021, after complying with the EDPL and without timely contest by the Brinkmanns, the Town filed a Verified Petition initiating condemnation proceedings on the Property. *Town of Southold v. Mattituck 12500 LLC*, Index No. 608406/2021 (N.Y. Sup. Ct. Suffolk Cnty. 2021), NYSCEF Doc. No. 1. On December 14, 2022, a Justice of Supreme Court, Suffolk County entered an order vesting the title to the Property in the Town. *Id.*, NYSCEF Doc. No. 35. On January 9, 2023, the Town filed a notice of acquisition and acquisition map pursuant to that order. *Id.*, NYSCEF Doc. No. 36. The Brinkmanns' challenge to the moratorium was marked disposed and a stipulation of discontinuance filed on January 18, 2023, once title to the

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[4] The draft Town Comprehensive Plan included as a "goal" for Mattituck/Laurel to "[c]reate a 'village green' near Love Lane." *Brinkmann v. Town of Southold*, Case No. 22-2722, Doc. No. 32 at 243.

Property was vested in the Town. *Brinkmann Hardware Corp., et al.*, Index No. 002790/2019, NYSCEF Doc. Nos. 90–91.

III. The Brinkmanns Contest the Public-Use Determination.

On May 4, 2021, the Brinkmanns filed the instant action against the Town in the Eastern District of New York, alleging the Town's Findings and Determination were pretextual in violation of the Fifth Amendment. App. 72a–98a. The Brinkmanns sought (1) a declaratory judgment that the Town's "stated purpose of acquiring the Plaintiffs' property to open a public park is a mere pretext for the illegitimate objective of halting an entirely lawful use of property by its owners, and that such a taking violates" the Fifth Amendment; (2) a permanent injunction prohibiting the Town from acquiring the Property using eminent domain; (3) an award of nominal damages of $1 each; and (4) attorneys' fees, costs, and expenses. App. 96a–98a.

After a failed motion for a preliminary injunction wherein the District Court previewed that the Brinkmanns were unlikely to succeed on the merits of their case, Hon. LaShann DeArcy Hall granted the Town's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) on September 30, 2022, holding:

> [I]t is clear that Plaintiffs have failed to state a claim under the Takings Clause. Plaintiffs do not allege that their property was taken to bestow a private benefit. Nor

> do Plaintiffs allege that the Town Board failed to follow the procedure provided by New York's eminent domain laws or that the Town Board's findings and determinations concerning whether a park is a 'public use' are unsupported. And, Plaintiffs do not, and could not, dispute that building a public park is a public use.

App. 57a–71a.

The court further held that "[w]hile Plaintiffs allege difficulties in obtaining a permit, their lack of knowledge about Defendant's plan to build a park, other available land for the park, and a statement from the Town Supervisor that nothing would be built on Plaintiffs' property, those allegations do not amount to anything more than the Town's desire to leave the plot of land undeveloped. That is, Plaintiffs' allegations do not support an inference of a nefarious, improper motive necessitating 'closer objective scrutiny.'" App. 70a–71a (citing *Goldstein v. Pataki*, 516 F.3d 50, 63 (2d Cir. 2008)).

IV. The Second Circuit Affirms the District Court.

On March 13, 2024, the Second Circuit affirmed the District Court, 2-1. App. 1a–56a. Judge Dennis Jacobs, writing for the panel, held that "when the taking is for a public purpose, courts do not inquire into alleged pretexts and motives," and "a park is a public amenity that serves a public purpose." App. 3a. The Second Circuit further held that "Plaintiffs'

complaint does not allege that the Town meant to confer any such private benefit or intends to use the property for anything other than a public park," and "Plaintiffs have not pointed to any Town *purpose* that violates the Takings Clause." App. 8a (emphasis added).

The court rejected the Brinkmanns' invitation to upend settled Takings Clause jurisprudence, reasoning that "judicial deference" in the context of a taking "is justified by federalism." App. 10a (citing *Kelo*, 545 U.S. at 482; *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984); *Berman*, 348 U.S. at 32). The court concluded that "[a] condemning authority, therefore, has 'a complete defense to a public use challenge' if, 'viewed objectively, the Project bears at least a rational relationship to . . . well-established categories of public uses, among them . . . the creation of a public, open space[.]'" App. 11a (citing *Goldstein*, 516 F.3d at 58–59). The court emphasized that it would be permitted to "intercede if an exercise of eminent domain runs afoul of some *other* constitutional or statutory provision which *does* permit an examination of motives, such as Title VII of the Civil Rights Act or the Equal Protection Clause," and that states are permitted to "place additional limitations on the power of their instrumentalities to exercise the power of eminent domain." App. 19a (emphasis in original).

Judge Menashi dissented, contending that the decision created a split with the Supreme Court of Connecticut and that "thwarting the rightful owner's lawful use of his property is not a public pur-

pose." App. 24a, 29a. Judge Menashi focused on what he perceived as the workability of "identifying [ ] a bad faith purpose" and inaptly claimed that neither *Kelo* nor *Goldstein* "overruled the longstanding prohibition on bad faith takings." App. 28a, 46a. Judge Menashi concluded that he would reverse and "allow the[ ] claim to proceed" "[b]ecause the Brinkmanns plausibly allege that the Town effected the taking in bad faith for the impermissible purpose of thwarting the owners' lawful use of their property." App. 56a. The Brinkmanns filed their Petition for a Writ of Certiorari to this Court on June 11, 2024.

REASONS FOR DENYING THE PETITION

I. The Second Circuit's Decision Accords with this Court's Public Use Clause Jurisprudence and Should Not be Disturbed.

A. This Court's Longstanding, Well-Settled Jurisprudence Properly Requires the Courts to Defer to the Legislatures' Public-Use Determinations

The Takings Clause "imposes two conditions on the exercise" of eminent domain authority: "the taking must be for a 'public use' and 'just compensation' must be paid to the owner." *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 231–32 (2003). This Court has recognized a public park as a bonafide public use for more than 130 years. *Shoemaker v. United States*, 147 U.S. 282, 297 (1893) ("The valid-

ity of the legislative acts erecting [public] parks, and providing for their cost, has been uniformly upheld.") (citations omitted); *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 707–08 (1923) ("[T]he condemnation of lands for public parks is now universally recognized as a taking for public use."); *cf. Kelo*, 545 U.S. at 512 (Thomas, J., dissenting) ("States employed the eminent domain power to provide quintessentially public goods, such as public roads, toll roads, ferries, canals, railroads, and *public parks*.") (emphasis added). Where, as here, there is no allegation of a private benefit conferred upon anyone, that ends a court's inquiry.

Neither the Brinkmanns nor Judge Menashi disagree that a public park is the archetypal public use contemplated by the Fifth Amendment. Rather, they rely on an overreading of the *Kelo* dicta to contend that the park in question is a "sham park" or "Fake Park." *See, e.g.*, Petition for a Writ of Certiorari (hereinafter referred to as "Pet.") at 2–3, 7–8. In assessing whether the City of New London's "decision to take property for the purpose of economic development satisfies the 'public use' requirement of the Fifth Amendment," Justice Stevens, writing for the majority, observed two things: (1) "the City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party," and (2) the City would not "be allowed to take property under the mere pretext of a public purpose, *when its actual purpose was to bestow a private benefit*." *Kelo*, 545 U.S. at 477–78 (emphasis added).

Kelo presents a much more compelling case than the case at bar: the City planned to, and ultimately did, take Ms. Kelo's home in order to give the land to a private developer. *Id.* at 475. In doing so, the City had no intention of "open[ing] the condemned land . . . to use by the general public." *Id.* at 478. Here, the Town's exercise of eminent domain frustrates only the Brinkmanns' prospective business enterprise in order to create a park open to any resident of Southold, an amenity that did not previously exist in the hamlet and that was expressly called for by the Town Comprehensive Plan. The requirement of just compensation ensures that, to the extent possible, individuals such as the Brinkmanns are made whole for the value of the property; here, only a commercial investment.

Moreover, in examining the contours of the public-use doctrine, Justice Stevens held that "[w]ithout exception, our cases have defined [public purpose] broadly, reflecting our longstanding policy of deference to legislative judgments in this field," citing *Berman*, *Midkiff*, and *Ruckelshaus v. Monsanto Co. Id.* at 480–82. In *Berman*, this Court upheld the taking of a department store pursuant to a development plan for a blighted area of Washington, D.C. 348 U.S. 26. Justice Douglas observed as follows:

> Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main

> guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia or the States legislating concerning local affairs. This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an *extremely narrow one*.

Id. at 32 (citations omitted and emphasis added).

In *Midkiff*, the Court, relying on *Berman*, upheld a redistribution plan condemning residential properties and transferring them to lessees on the basis that it served the public purpose of "reduc[ing] the perceived social and economic evils of a land oligopoly." 467 U.S. at 240–43. Notably, Justice O'Connor held that "[t]he 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers," and, as such, the courts have "made clear that [they] will not substitute [their] judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'" *Id.* at 240–41 (citing *United States v. Gettysburg Elec. R.R. Co.*, 160 U.S. 668, 680 (1896) (upholding appropriation act, *inter alia*, "surveying, locating, and preserving the lines of battle at Gettysburg, Pennsylvania")).

Finally, in *Ruckelshaus*, the Court held that "any taking[s] of private property that may occur in connection with" the data disclosure provisions of

the Federal Insecticide, Fungicide, and Rodenticide Act were "for a public use" because they would achieve the "procompetitive purpose" of "making new end-use products available to consumers more quickly." 467 U.S. 986, 1015–16 (1984).

The *Kelo* Court thus concluded that:

> Viewed as a whole, our jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances. Our earliest cases in particular embodied a strong theme of federalism, emphasizing the great respect that we owe to state legislatures and state courts in discerning local public needs. For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.

Kelo, 545 U.S. at 482–83 (internal citations and quotations omitted). In accordance with those consistently held principles, the Second Circuit concluded that a "pretext limitation that invalidates a taking for a public park would undo this longstanding policy of deference to legislative judgments in this field by inviting courts in all cases to give close scrutiny to the mechanics of a taking rationally related to a classic public use as a means to gauge the purity of the motives of the various government

officials who approved it." App. 10a (internal citations and quotations omitted). Put differently, for at least seventy years, this Court's precedent has "wisely foreclose[d] inquiry into whether a government actor had bad reasons for doing good things." App. 11a.

The Brinkmanns nonetheless claim that "the Second Circuit concluded that *Kelo* overruled, *sub silentio*, the longstanding federal and state consensus that the Takings Clause forbids pretextual, bad-faith takings, including those that do not involve a private benefit." Pet. at 14. As the Second Circuit correctly recognized, such a putative limitation on a bad faith taking has never been dispositive. App. 18a–19a (*citing United States v. Carmack*, 329 U.S. 230, 243–44 (1946); *United States v. 58.16 Acres of Land, More or Less In Clinton Cnty., State of Ill.*, 478 F.2d 1055, 1058–59 (7th Cir. 1973); *S. Pac. Land Co. v. United States*, 367 F.2d 161, 162 (9th Cir. 1966)). Rather, *Kelo* made clear that the pretext doctrine is limited to the "pretext of non-public (that is, private) use." App. 19a. The Brinkmanns' assertions that "the public use must be the actual and legitimate purpose of a condemnation" and "[t]he public must want and need the public use" are thus belied by decades of caselaw from this Court, as affirmed by *Kelo*. Pet. at 15. It is not the prerogative of the courts to determine whether the government "does not genuinely want" a park that the government actually created following condemnation. *Id.* at 16. Instead, it is the legislature's prerogative to determine

"public needs to be served by social legislation," an authority that should not be disturbed except in the most egregious case, i.e., where the proposed public use is not "rationally related to a conceivable public purpose." *Midkiff*, 467 U.S. at 239, 241. This is not such a case.

B. Other Constitutional Amendments Alleviate the Brinkmanns' Purported Concerns of Potential Abuse of the Eminent Domain Power

The Brinkmanns further argue that a probing investigation of a municipality's motive in exercising its eminent domain authority to create a park is necessary because a municipality could otherwise "do things that this Court previously said were off limits, compounding injury to vulnerable groups." Pet. at 16–18. Those vulnerable groups, according to the Brinkmanns, include "minority communities during the era of 'urban renewal'" who were "uproot[ed] . . . from their homes." *Id.* at 17 (citing *Kelo*, 545 U.S. at 521 (Thomas, J., dissenting)). While it may be the case that "minorities, the poor, and other vulnerable groups are inordinately hurt by eminent-domain abuse," the Brinkmanns, as standard bearers, do not belong in any of those categories. *Id.* at 18. It bears repeating that the Brinkmanns' intended use of the property was a big box hardware store, which had not yet even been built. *See Goldstein*, 516 F.3d at 52 ("For affected property owners, monetary compensation may understandably seem an imperfect substitute for the

hardships of dislocation and the loss of a home or business. But federal judges may not intervene in such matters simply on the basis of our sympathies.").

Moreover, as the Second Circuit made clear, such abuses would implicate other constitutional rights. As the Brinkmanns explain, this Court in *City of Cleburne, Texas v. Cleburne Living Center* held that a municipal zoning ordinance requiring a special use permit for a group home for the intellectually disabled violated the Equal Protection Clause as applied because the permit requirement "appear[ed] . . . to rest on an irrational prejudice against" the residents. 473 U.S. 432, 435, 450 (1985). Similarly, in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, this Court struck down under the Free Exercise Clause ordinances proscribing ritual animal sacrifice under a strict-scrutiny standard, as they were not neutral or generally applicable but, instead, targeted a Santeria church. 508 U.S. 520, 524, 527–28, 545–47 (1993). The Brinkmanns thus claim that "cities like Cleburne and Hialeah" are given "a free pass as long as they use eminent domain for a sham park when they want to harm or banish unpopular minorities." Pet. at 19. As this Court's decisions make clear, those putative "unpopular minorities" are protected by other constitutional amendments keyed to discrete and insular minority status, i.e., the Equal Protection and Free Exercise Clauses. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152, n.4 (1938).

The principle that a claim be analyzed under the "standard appropriate to [a] more specific [constitutional] provision" rather than substantive due process analysis is irrelevant where, as in the Brinkmanns' hypotheticals, conduct implicates two enumerated rights. Pet. at 21 (internal quotations omitted) (citing *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 833 (1998)). A "sham park taking for the actual purpose of naked religious discrimination," for example, would undoubtedly give rise to both a Takings Clause and Free Exercise Clause claim. *Id.* The Free Exercise claim, where the governmental action in question is not neutral and generally applicable, would be assessed under a strict scrutiny standard, while the Takings claim would be assessed under rational basis review.

At base, the legislative deference at the heart of rational basis review does not render the Takings Clause a "second-class" right. *Id.* at 20. This Court, through centuries of painstakingly developed jurisprudence, treats each constitutional right differently. However, to the Brinkmanns, an enumerated right is an enumerated right, and it is, or, perhaps, should be, irrelevant whether the right concerns private property, gun ownership, the free exercise or establishment of religion, or equal protection of the laws. A holding in a Second Amendment case that conduct covered by the amendment's plain text is presumptively protected is not automatically imputed to the Fifth Amendment's Takings Clause. *Id.* (citing *N.Y. State Rifle & Pistol Assoc., Inc. v. Bruen*, 597 U.S. 1, 18 (2022)). While "the applica-

bility of one constitutional amendment" does not "pre-empt[] the guarantees or another," it accords with basic principles of constitutional analysis that two constitutional guarantees can be evaluated under different standards of review. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 49 (1993).

In fact, myriad other alleged constitutional violations are assessed under a rational basis standard. *See, e.g.*, *Fulton v. City of Phila., Pa.*, 593 U.S. 522, 533 (2021) (free exercise clause challenge to neutral and generally applicable law assessed under rational basis standard); *Trump v. Hawaii*, 585 U.S. 667, 673–74, 704–05 (2018) (establishment clause challenge to executive order suspending entry from certain nations assessed under rational basis standard); *City of Dallas v. Stanglin*, 490 U.S. 19, 22–23, 25 (1989) (equal protection clause challenge to age-based classification assessed under rational basis standard); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976) (same); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1978) (equal protection clause challenge to wealth-based classification assessed under rational basis standard); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (same); *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (equal protection clause challenge to taxation system differentiating between longer-term and newer property owners assessed under rational basis standard); *Ambach v. Norwick*, 441 U.S. 68, 80 (1979) (equal protection clause challenge to state alienage classification assessed under ration-

al basis standard); *Foley v. Connelie*, 435 U.S. 291, 296 (1978) (same); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 462 (1981) (equal protection clause challenge to economic regulation assessed under rational basis standard); *Williamson v. Lee Optical*, 348 U.S. 483, 491 (1955) (due process clause challenge to economic regulation assessed under rational basis standard). In fact, the rational basis review undertaken by those courts is even more deferential than that articulated by the Second Circuit here: the governmental entity need not even proffer a purpose, as the court can itself formulate potential, viable purposes for the government action in question. *See, e.g.*, *Stanglin*, 490 U.S. at 27–28.

Moreover, merely because a legislative enactment is subject to rational basis review does not mean it will necessarily be upheld. *See, e.g., Cleburne Living Ctr.*, 473 U.S. at 432; *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (striking down criminal sodomy statute); *Romer v. Evans*, 517 U.S. 620, 624, 631–32 (1996) (striking down state constitutional amendment prohibiting protected status based on sexual orientation); *Plyler v. Doe*, 457 U.S. 202, 205, 224 (1982) (striking down law denying free public education to undocumented minors); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973) (striking down law proscribing food stamp eligibility for households containing unrelated individuals); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 165 (1972) (striking down worker's compensation law precluding benefits for non-marital children);

Eisenstadt v. Baird, 405 U.S. 438, 440 (1972) (striking down law preventing distribution of contraception to unmarried individuals).

A member of a non-suspect class is also not without recourse under the Equal Protection Clause. This Court has concluded, in the context of a municipality demanding a 33-foot easement to connect a property to a municipal water supply versus a 15-foot easement for similarly situated owners, that a "class of one" can bring a claim under the Equal Protection Clause. *Vill. of Willowbrook v. Olech*, 528 U.S. 562 (2000); *see also Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n of Webster Cnty., W. Va.*, 488 U.S. 336, 346–47 (1989). Judge DeArcy Hall also noted that the Brinkmanns could have, but did not, bring a substantive due process challenge to the condemnation on the basis that the Town had acted arbitrarily and unreasonably. App. 70a (citing *49 WB LLC v. Vill. of Haverstraw*, 511 F. App'x 33 (2d Cir. 2013)); *see also City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 754 n.13 (1999); *Theodorou v. Measel*, 53 F. App'x 640, 642–43 (3d Cir. 2002).

Thus, the requirement that the public use not be a pretext for a private benefit and the availability of other constitutional remedies foreclose the parade of potential abuses the Brinkmanns detail. A stated public use masking a private benefit is unique in that it does not implicate any other constitutional amendment and thus merits more searching scrutiny under the Public Use Clause. Nonetheless, this Court's unbroken line of decisions

has properly accorded principal responsibility for public-use determinations to local legislatures, which are best able to assess their community's needs. This deference, rooted in federalism, reinforces an appropriate exercise of police power in an area properly reserved for the legislature rather than often unelected and geographically removed judges. As the Second Circuit concisely held, "courts do not need to search the motives of public officials who prefer a public park to an eyesore in the form of a large hardware store with the prospect of 80 vehicles at a time parked and circling." App. 21a.

Contrary to the Brinkmanns' suggestion, neither the Second Circuit nor the Town indicated that it would be *impossible* to more closely scrutinize the legislature's motivation. Rather, both observed that ascertaining legislative motivation is an imprudent and imperfect exercise. *See, e.g.*, *Edwards v. Aguillard*, 482 U.S. 578, 636–37 (1987) (Scalia, J., dissenting) ("[W]hile it is possible to discern the objective 'purpose' of a statute . . . discerning the subjective motivation of [a legislative body] is, to be honest, almost always an impossible task. The number of possible motivations, to begin with, is not binary, or indeed even finite."). Such an intensive inquiry, employed in conjunction with laws impacting, *inter alia*, "race, political opinion, religious worship, firearms ownership, access to counsel, [and] the right to direct the upbringing of one's own children," would make it nearly impossible for any Takings Clause claim to be dismissed at the

pleadings stage and would thus give license to plaintiffs to engage in costly fishing expeditions on conclusory allegations in every condemnation proceeding. Pet. at 27. As the Second Circuit recognized, this would result in "allow[ing] litigation to long delay and ultimately stifle the making of public infrastructure," an outcome that serves no one. App. 20a. Further, the Brinkmanns' insistence that legislative motivation is easy to discern because a taking should follow a particular "order of operations" is belied in this case by the undisputed fact that the Town complied with state substantive and procedural law in exercising its eminent domain authority. Pet. at 24–25; *see Peekskill Heights, Inc. v. City of Peekskill Common Council*, 974 N.Y.S.2d 501, 503 (N.Y. App. Div. 2013) ("The petitioner's assertion that alternate sites would better serve the City's purposes is not a basis for relief under EDPL 207."); *Vill. Auto Body Works, Inc. v. Inc. Vill. Of Westbury*, 454 N.Y.S.2d 741, 742 (N.Y. App. Div. 1982) ("[Claims] that other available sites are more suitable are no basis to set aside the choice. Site selection is properly for the condemning authority . . . not for the court.").

The Town's purpose is a quintessentially public one: a park that any member of the public has a right to enjoy. *See Kelo*, 545 U.S. at 510 (Thomas, J., dissenting) ("The Constitution's text, in short, suggests that the Takings Clause authorizes the taking of property only if the public *has a right to employ it*, not if the public realizes any conceivable benefit from the taking.") (emphasis added). As

Judge Jacobs recognized, a park need not be improved by a "tennis court or a statue or a merry-go-round" to be a public park. App. 21a. The creation of such a park, a centerpiece of American public life, is the furthest thing from despotism.

II. The Brinkmanns' "Split" Misstates the Cases and Does Not Merit Consideration by this Court.

Finally, the Brinkmanns urge this Court to grant the petition because the Second Circuit "squarely split with five state supreme courts" on the scope of the Public Use Clause. Pet. at 9–12. This statement is false. Four of the five state court decisions the Brinkmanns identify are predicated on state law or state constitutions and/or predate *Kelo*. A single post-*Kelo* decision from a state high court interpreting the federal constitution does not justify this Court's review.

First, the Supreme Court of Pennsylvania in *Middletown Township v. Lands of Stone* examined the propriety of the taking of a farm for "public recreational space" under local law because the Township Code and Open Space Lands Act precluded a taking for a purpose other than recreation. 595 Pa. 607, 609–10 (Pa. 2007). In reaching its conclusion, the court relied extensively on Pennsylvania law, which requires the court to assess whether the "primary public purpose" is the "real or fundamental purpose." *Id.* at 617 (citing *Belovsky v. Redev. Auth.*, 357 Pa. 329 (Pa. 1947)). The court concluded

on the record before it that the factual findings made by the trial court in that case did "not support the legal conclusion that the true purpose of the taking was for recreational use," and the "[r]ecreational use must be the true purpose behind the taking or else the Township simply did not have the authority to act, and the taking was void *ab initio*." *Id.* at 617–18.

Second, the Supreme Judicial Court of Massachusetts's decision in *Pheasant Ridge Associates Ltd. Partnership v. Town of Burlington*, which predates *Kelo* by nearly two decades, expressly recognizes that it is a "most unusual" fact pattern "not likely soon to be replicated," as there was no "record support for the town's claim that it did not act in bad faith," resulting in a grant of summary judgment for the plaintiff. 506 N.E.2d 1152, 1155 (Mass. 1987). The court also recognized that "[i]t is not easy to prove that particular municipal action was taken in bad faith," especially where the "significant event is an affirmative vote," and that courts "should not easily attribute improper motives to a town . . . if there were valid reasons that would have supported the town's action." *Id.* at 1156 (citations omitted). The court further held that the "manner in which the town dealt with the attempted acquisition of the subject parcel was not in accord with its usual practices," including that the "purposes for which the taking was to be proposed were developed . . . within minutes before the commencement of the town meeting." *Id.* at 1157. On this developed factual record, the court con-

cluded that the town "was concerned only with blocking the plaintiffs' development." *Id.* Thus, the court's statement that bad faith "is not limited to action taken solely to benefit private interests" comes in a factually inapposite case in the absence of this Court's guidance in *Kelo* on the scope of the pretext doctrine. *Id.* at 1156.

Third, the Supreme Court of Georgia in *Earth Management, Inc. v. Heard County*. considered whether the condemnation for a park was undertaken in bad faith without citing a single federal case. 283 S.E.2d 455, 459 (Ga. 1981). The case the court cited for the standard on bad faith, *City of Atlanta v. First National Bank of Atlanta*, itself also relies exclusively on Georgia state caselaw. *Id.* at 460; 271 S.E.2d 821, 822–23 (Ga. 1980). As the Second Circuit recognized, "any issue as to bad faith was simply part of the inquiry into whether the taking was within the scope of [the Town's] statutory [and constitutional] authority." App. 16a.

Fourth, the Supreme Court of Rhode Island in *Rhode Island Economic Development Corp. v. The Parking Co., L.P.* addressed a taking of a garage for airport parking under a statute that deemed property "required for public use until otherwise determined," explicitly reviewed the taking "in the context of the Rhode Island Economic Development Corporation Act . . . and the quick-take statute," and cited to Rhode Island cases for the discussion of bad faith. 892 A.2d 87, 100–07 (R.I. 2006) (citing *Romeo v. Cranston Redev. Agency*, 254 A.2d 426, 431, 434 (R.I. 1969); *Cap. Props., Inc. v. State*, 749

A.2d 1069, 1086, 1087 (R.I. 1999); *In re Advisory Op. to the Governor*, 324 A.2d 641, 645–47, 656 (R.I. 1974)).

The Brinkmanns' leading argument thus hinges on *New England Estates v. Town of Branford*, a 2010 case from the Supreme Court of Connecticut concerning the condemnation of seventy-seven acres for a public park. 988 A.2d 229 (Conn. 2010). The court in *New England Estates* concluded that a "violation of the public use requirement" need not be "limited to situations in which the government takes private property for a use that is not a public use." *Id.* at 252. In doing so, the court claimed to accord with "many state courts [that] have found a violation of the takings clause on the basis of a bad faith exercise of the power of eminent domain," citing a case from the Georgia Supreme Court that relies on *Earth Management*; *Pheasant Ridge Associates*, discussed above; and two New Jersey and New York trial-level decisions that were never appealed. *Id.* at 252–53 (citing *Carroll Cnty. v. Bremen*, 347 S.E.2d 598 (Ga. 1986); *Pheasant Ridge Assocs. Ltd. P'ship*, 506 N.E.2d at 1152; *Essex Fells v. Kessler Inst. for Rehab., Inc.*, 673 A.2d 856 (N.J. 1995); *In re Hewlett Bay Park*, 265 N.Y.S.2d 1006 (N.Y. Sup. Ct. 1966)).

Since its issuance nearly fifteen years ago, *New England Estates* has been cited sixty-nine times: fifty-four times by Connecticut state courts, ten times by the District of Connecticut, twice by Connecticut bankruptcy courts, once by the Connecticut Compensation Review Board, once by a

Colorado court, and in the appealed-from decision from the Second Circuit. Of those sixty-nine citations, only one case, an unreported decision from the District of Connecticut, cites *New England Estates* for its conclusion on the public use doctrine—in dicta.

In *Wellswood Columbia LLC v. Town of Hebron*, Judge Bryant observed that *New England Estates* was "one of the only cases within the Second Circuit or the states therein to address violations of the public use requirement on the basis of a bad faith exercise of the power of eminent domain rather than on a taking for a non-public use." 2013 WL 5435532, at *2, 4 (D. Conn. Sept. 30, 2013). There is good reason for that. As this Court knows, the vast majority of Public Use Clause cases concern uses that are marginally public, if public at all, i.e., takings for economic development where title is typically vested in a private or semiprivate company. It is notable that the Brinkmanns were able to identify only five high court and three lower court cases in the last forty years where the issue of a pretextual public use determination was dispositive. Likewise, the federal circuits have discussed a potential bad faith taking primarily in dicta. *See, e.g., S. Pac. Land Co. v. United States*, 367 F.2d 161 (9th Cir. 1966). That is because, as members of this Court have recognized, the Public Use Clause is intended to ensure that the public benefits directly from the taking and that the power is not employed only to privilege certain private individuals or enterprises over others. The

Brinkmanns' theoretical future Section 1983 plaintiff with a choice between Connecticut federal and state courts is therefore unlikely to come to fruition. If he or she were to exist, it is possible the Connecticut Supreme Court, with guidance from the Second Circuit, would simply accord with that interpretation.

CONCLUSION

No reason proffered by the Brinkmanns or amici merits this Court's consideration of the case. For all the aforementioned reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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