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

REPLY IN SUPPORT OF CERTIORARI

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REPLY IN SUPPORT OF CERTIORARI

The decision below creates a square split between the Second Circuit and the Connecticut Supreme Court. The Takings Clause now means different things within the Second Circuit depending on whether you are in state or federal court. The Town does not dispute that. Nor does the Town dispute that every previous court to consider facts like those here has sided with the property owners. Nor does the Town dispute that this one-claim case is the perfect vehicle for resolving the split. The Town does not, because it cannot, contest that this case checks all the boxes for a writ of certiorari.

Instead, the Town argues the merits, hoping the Court will deny review because the Town is destined to win. It isn't. But even if it were, review would still be necessary to resolve the split. In any case, the Town's unconvincing merits argument only underscores why review is needed. The Town concedes that courts must *sometimes* inquire into the actual, not just stated, purpose of a taking to determine if it is lawful. According to the Town, that happens only when there are allegations of a private benefit or if some other constitutional provision is implicated. If, however, the actual purpose is driving an unwanted citizen or business out of town, concededly not a public use, then courts can't look behind the asserted purpose of making a public park. Neither the Second Circuit nor the Town explain why Takings Clause rights warrant this far worse treatment than other rights when it comes to sham parks.

Regardless of who is correct about the merits, the relevant question is whether the criteria for review are satisfied. The answer is plainly yes. Judge Menashi, the Connecticut Supreme Court, and numerous other courts disagree with the Second Circuit. This is the perfect case to decide which side is right.

I. The split of authority on the meaning of "public use" is real and serious.

In their Petition, the Brinkmanns demonstrated that the decision below splits with five state supreme courts (and lower state courts), which have unanimously recognized that pretextual takings are unconstitutional, even without any private benefit. Pet. 9–12. The Town acknowledges that the Connecticut Supreme Court and the Second Circuit are now in direct conflict over pretextual takings. Yet the Town claims that the split still isn't serious because the other four state supreme court decisions are supposedly "predicated on state law or state constitutions and/or predate *Kelo*." BIO 25. The Town is mistaken. Every one of these decisions applied the federal Constitution, and whether some cases predate *Kelo* is irrelevant.

As this Court has long recognized, when state courts address constitutional claims, they frequently treat analogous state and federal provisions interchangeably unless there is a particular reason to analyze them independently. Accordingly, this Court has adopted a clear rule: Absent a "plain statement" that a state-court decision "rested on an adequate and independent state ground," federal courts presume that state courts are interpreting their state constitutions in lockstep with the federal

Constitution. *Michigan* v. *Long*, 463 U.S. 1032, 1044 (1983). Every state court decision in the split cited federal law for its public-use holding, and none confined its analysis to state-law grounds:

- In *Middletown Township* v. *Lands of Stone*, the Pennsylvania Supreme Court explicitly cited the Fifth Amendment, locating the pretext doctrine in *Kelo* itself. 939 A.2d 331, 337 (Pa. 2007) ("The Takings Clause of the Fifth Amendment provides the only means of validly overcoming the private right of property ownership and that is to take for the 'public use.'"); *id.* at 338 ("The United States Supreme Court placed great weight upon the existence of a 'carefully considered' development plan in order to rule that the taking in *Kelo* * * * was not pretextual[.]").

- In the first paragraph of the constitutional discussion in *Earth Management, Inc.* v. *Heard County*, the Georgia Supreme Court stated that "the Fourteenth Amendment to the United States Constitution [guarantees] * * * that no private property shall be taken except for a public purpose." 283 S.E.2d 455, 459 (Ga. 1981); see also *Chi., Burlington & Quincy R.R.* v. *City of Chicago*, 166 U.S. 226 (1897) (incorporating the Takings Clause). The court discussed the pretext doctrine in terms of "bad faith," *Earth Mgmt.*, 283 S.E.2d at 459–460, the precise phrase that federal courts have used since at least the 1940s. See Pet. App. 36a (Menashi, J., dissenting) ("It is difficult to maintain that the 'bad faith' limitation on the eminent domain power is a creature of state law when the

state courts adopted the limitation from federal law.").

- In *Rhode Island Economic Development Corp.* v. *The Parking Co.*, 892 A.2d 87 (R.I. 2006), the state supreme court explicitly grounded its pretext holding in the state and federal constitutions. *Id.* at 96 ("[B]oth the United States Constitution and the Rhode Island Constitution place restrictions on [eminent-domain] exercise."); *id.* at 107–108 ("[T]he manner in which [the statute] was applied in the case * * * fails to pass constitutional scrutiny * * * and was not a public use under the Takings Clause."). The court cited *Kelo* for the proposition that condemning authorities must act in "good faith." *Id.* at 104.

- The Town does not dispute that the Massachusetts high court relied on the Takings Clause in *Pheasant Ridge Associates Limited Partnership* v. *Town of Burlington*. See 506 N.E.2d 1152, 1155–1156 (Mass. 1987) (citing *United States* v. *Carmack*, 329 U.S. 230 (1946), for the proposition that "bad faith" takings are unlawful). The Town instead claims that *Pheasant Ridge* is irrelevant because the plaintiff prevailed on a "most unusual fact pattern." BIO 26. So what? The facts are *materially* the same as here: clear allegations of pretext for a sham park. And the property owner won there because the Supreme Judicial Court explicitly rejected the previously unprecedented rule announced by the Second Circuit below. 506 N.E.2d at 1156 ("Bad faith in the use of the power of eminent domain is not limited to action taken solely to benefit private interests. It includes the use of the

> power of eminent domain solely for a reason that is not proper[.]" (citing *Earth Mgmt.*, 283 S.E.2d 455)).

Finally, while acknowledging the clear split with the Connecticut Supreme Court, the Town minimizes its importance by asserting that the public-use holding in *New England Estates, LLC v. Town of Branford*, 988 A.2d 229 (Conn. 2010), has been cited only once. BIO 29. The explanation, however, is simple. Until now, no court had ever allowed a condemnation where the asserted public use was a pretext for stopping the owner from making a lawful but disfavored use of his or her property. Until the Second Circuit created a dramatic split, the rule was straightforward. Most municipalities don't do things that courts have unanimously held are unconstitutional—particularly when doing so could result in attorneys' fees and damages.

Now, of course, cities have a new license from the Second Circuit to abuse eminent domain. As the Realtors' Amicus Brief explains (at 8), "[t]he 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." There can be little doubt that local governments will take advantage of this new power. And those who suffer will be the outsiders, those with less money and fewer political connections. See Pet. App. 53a (Former Town Councilmember asking, "[I]f this application had been filed by anyone but an outsider, if this business was owned and operated by a member of the 'old boys club,' would the town still be seizing their private property?").

II. This case raises important questions about pretext and deference that prior precedent does not resolve.

A. This Court needs to resolve whether pretextual takings warrant complete deference or greater judicial scrutiny.

Only this Court can resolve the split, which is perfectly embodied in the debate between the panel majority and Judge Menashi: Does a legislature's condemnation for a public park trigger "complete" deference? Pet. App. 11a. Or, if there is objective evidence of pretextual bad faith, should judges inquire into whether the actual, not just stated, purpose is a public use? Until the decision below, everyone thought the answer to that second question was "yes."

This is the perfect case to resolve that debate. There is no dispute that the complaint alleges pretext. There is no dispute that using eminent domain to "thwart[] the rightful owner's use of his property is not a public purpose." Pet. App. 24a (Menashi, J., dissenting). "That is why the [panel majority]'s decision depends on the Town lying about its purpose." *Ibid.* Whether courts need to defer to *that*—to a lie that the objective evidence refutes—is an important question about the Public Use Clause that review can answer.

The Town opposes review with a merits argument, suggesting that review is pointless because existing "deference" precedent answers all questions. But that is wrong because the deference precedent isn't pretext precedent. In the Town's familiar cases, the stated and actual purposes were the same. Each case was

about whether a factually new use of eminent domain satisfied the Public Use Clause—whether, for example, Washington, D.C. of the 1950s could raze a non-blighted "department store" to redevelop an area with "slum housing." *Berman* v. *Parker*, 348 U.S. 26, 31 (1954).[1] Deference came into play because, under the separation of powers, the Court was careful not to intrude on legislative prerogatives as "the needs of society * * * evolve[] over time in response to changed circumstances." *Kelo* v. *City of New London*, 545 U.S. 469, 482 (2005).

By contrast, relevant precedent in the pretext context rejects reflexive deference. *Kelo* reiterated that the government can't sanitize an unconstitutional taking by stating a valid purpose contrary to the actual one: "Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." 545 U.S. at 478; Pet. 15–16 (citing cases where this Court has said that the government can condemn property only in good faith).[2] As Justice Kennedy's

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[1] The other cases the Town cites are no different. See *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1001 (1984) ("This Court never has squarely addressed the applicability of * * * the Taking clause * * * to commercial data."); *Haw. Hous. Auth.* v. *Midkiff*, 467 U.S. 229, 231–232 (1984) (examining whether Hawaii could take "real property from lessors and transfer[] it to lessees in order to reduce the concentration of [property] ownership"); *Kelo*, 545 U.S. at 477 (answering "whether a city's decision to take property for the purpose of economic development satisfies the 'public use' requirement").

[2] As Judge Menashi explained in his dissent, "[t]he Supreme Court's specific mention of private benefits [in *Kelo*] reflected the record before it." Pet. App. 41a (footnote omitted).

Kelo concurrence explained about private-benefit pretext, a "court confronted with a plausible allegation * * * should treat the objection as a serious one and review the record to see if it has merit." *Kelo*, 545 U.S. at 491. Although this Court has so far only *assumed* that bad-faith takings violate the Public Use Clause, state supreme courts have explicitly so held. In the state cases about sham parks, courts inquired into whether the taking was *for* a valid public use even though a park *is* a public use. Where the stated purpose was demonstrably pretextual, state high courts rejected blind deference.

In resolving the split over sham-park takings, the Court can examine the judicial and legislative roles when it comes to pretext. Deference isn't a value to be maximized for its own sake. "Judicial deference is based * * * on due regard for the decision of the body constitutionally appointed to decide." *Oregon* v. *Mitchell*, 400 U.S. 112, 207 (1970) (Harlan, J. dissenting). Review will resolve whether the Second Circuit's complete deference, even when faced with plausible allegations of a bad-faith taking, was proper or an abdication of the judiciary's paramount duty to ensure compliance with the Public Use Clause.

B. Review will also provide important guidance on how courts should analyze pretextual, bad-faith takings that implicate other rights.

The panel's holding is dangerous because it potentially greenlights the abuse of eminent domain to violate other rights as long as the government is willing to create a park: "Supreme Court precedent wisely

forecloses inquiry into whether a government actor had bad reasons for doing good things." Pet. App. 11a. That is what happened here. There is no dispute that the Town would have violated the Public Use Clause if it simply seized the Brinkmanns' land to stop their lawful activity and fenced the property off. That is why the Town had to sanitize its unconstitutional activity by pledging to establish a "passive park" (*i.e.*, an empty field people can walk in).

The Second Circuit's holding would seem to endanger other enumerated rights. If the government can sanitize unconstitutional activity by putting the seized land to a nominal public use, then everything may be up for grabs. As the Petition explained, a city could seize, for example, the parking lot of the Santeria practitioners in *Church of the Lukumi Babalu Aye* for traffic control, or the property of the group home in *Cleburne* for a park. After all, traffic control and parks are "good things" so "bad reasons" shouldn't matter. That is the logic of the holding below. The Town argues that no such risk exists, that other enumerated rights would kick in. Maybe. But that isn't obvious because that is not the logic of the Second Circuit's holding.

And even if other rights would kick in—and that's a big *if*—the Town has no explanation for why enumerated Takings Clause rights get the worst treatment of any right. Under the holding below, the fact that a park is a traditional public use meant the Town had a "complete defense to a public-use challenge." Pet. App. 11a. By contrast, for a Free Exercise challenge, like that in *Lukumi*, property owners getting heightened scrutiny can ask courts to look behind the

stated pretextual purpose. Similarly, non-suspect-class property owners bringing an Equal Protection claim, like the group home in *Cleburne*, can ask courts to look for pretext when applying rational-basis review. But, under what we might call the Second Circuit's "complete defense" test, property owners bringing a Takings claim seemingly receive a never-before-seen lower level of review, one below the rational-basis test. All the Town must do is identify a traditional public use like a park and the inquiry ends. The Town's merits argument offers no underlying theory of why Takings Clause rights should be treated so much more poorly than other enumerated rights. That theory certainly isn't in the Second Circuit opinion. And there is no underlying theory because it is almost certainly wrong. Treating enumerated Takings Clause rights worse than every other would again "relegate[] the Takings Clause to the status of a poor relation among the provisions of the Bill of Rights." *Knick* v. *Twp. of Scott*, 588 U.S. 180, 189 (2019) (cleaned up).

This case will establish whether review of sham-park takings is at least on par with ordinary rational-basis review. And in deciding the status of Takings Clause rights in this one-claim case, the Court will likely articulate principles that will apply in other pretextual Takings cases that have more than just takings claims (under facts such as *Lukumi*). Thus, the Court can deal with the simplest situation here and provide a baseline for more complex facts and claims down the road.

III. This case is the perfect vehicle for the question presented.

The Town does not dispute that this case is a clean vehicle. On the facts: The panel acknowledged that the complaint thoroughly pleaded pretext. On the split: In *New England Estates*, the property owner brought an affirmative Section 1983 claim under the Takings Clause. Here, the Brinkmanns did the exact same thing. The property owner won on the merits in *New England Estates*, but the Brinkmanns failed to state a claim. There are no other claims or alternative bases for judgment. This case is perfectly teed up on the facts and law.

The Town wanly tries to cloud the issue by chastising the Brinkmanns for not litigating their federal rights in a state-court takings proceeding under a 30-day statute of limitations. The Town stops short of saying this matters because it doesn't. It remains "as true for takings claims as for any other claim grounded in the Bill of Rights" that "plaintiffs may bring constitutional claims under [Section] 1983 without first bringing any sort of state lawsuit, even when state court actions addressing the underling behavior are available." *Knick*, 588 U.S. at 194 (cleaned up); see also *Felder* v. *Casey*, 487 U.S. 131, 147 (1988) (invalidating a state notice-of-claim requirement because state "authority to prescribe rules and procedures governing suits in their courts" does not "permit States to place conditions on the vindication of a federal right"). Nor does it matter that, technically, title has passed to the Town under state law. "It has long been established that where a defendant with notice in an injunction proceeding completes the acts sought

to be enjoined[,] the court may by mandatory injunction restore the status quo." *Porter* v. *Lee*, 328 U.S. 246, 251 (1946).

This one-question case is a clean vehicle for resolving the split and settling an important issue.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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