No. 12-723

In The
Supreme Court of the United States

ARTEMIO M. ILAGAN, *et ux.*,

***Petitioners*,**

v.

ENGRACIA UNGACTA, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GUAM

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICI CURIAE* THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER; CATO INSTITUTE; GOLDWATER INSTITUTE; OWNERS COUNCIL OF AMERICA; AMERICAN FOREST RESOURCE COUNCIL; BECKET FUND FOR RELIGIOUS LIBERTY; CHAPMAN CENTER FOR CONSTITUTIONAL JURISPRUDENCE; MOUNTAIN STATES LEGAL FOUNDATION; NEW ENGLAND LEGAL FOUNDATION; ATLANTIC LEGAL FOUNDATION; 1851 CENTER FOR CONSTITUTIONAL LAW; MACKINAC CENTER; RUTHERFORD INSTITUTE; AND CONSTITUTIONAL AND PROPERTY LAW PROFESSORS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER; CATO INSTITUTE; GOLDWATER INSTITUTE; OWNERS COUNCIL OF AMERICA; AMERICAN FOREST RESOURCE COUNCIL; BECKET FUND FOR RELIGIOUS LIBERTY; CHAPMAN CENTER FOR CONSTITUTIONAL JURISPRUDENCE; MOUNTAIN STATES LEGAL FOUNDATION; NEW ENGLAND LEGAL FOUNDATION; ATLANTIC LEGAL FOUNDATION; 1851 CENTER FOR CONSTITUTIONAL LAW; MACKINAC CENTER; RUTHERFORD INSTITUTE; AND CONSTITUTIONAL AND PROPERTY LAW PROFESSORS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Supreme Court rule 37.2(b), *Amici curiae*, the National Federation of Independent Business ("NFIB") Small Business Legal Center; Cato Institute; Owners Council of America; American Forest Resource Council; Becket Fund for Religious Liberty; Chapman Center for Constitutional Jurisprudence; Mountain States Legal Foundation; New England Legal Foundation; Atlantic Legal Foundation; 1851 Center for Constitutional Law; Mackinac Center; Rutherford Institute; and Constitutional and Property Law Professors, respectfully request leave of this Court to file the following brief in support of the petitioners in the above captioned matter. In support of the motion, the *amici* state:

1. On behalf of the coalition of listed *amici*, the NFIB Small Business Legal Center requested the consent of both petitioners and respondents to file an *amicus curiae* brief in this case. This request was timely, in accordance with Supreme Court Rule 37.2. The petitioners granted consent in writing. The Respondents have withheld consent.

2. *Amici curiae* seek leave to file in this matter because this case raises an important issue of national concern, and a question over which the lower courts are split. *Amici* believe that they offer valuable perspective and expertise and will therein aid the Court in reviewing this petition.

3. Each signatory to this coalition brief has an interest in defending private property rights, curbing the abuse of eminent domain powers and protecting fundamental constitutional rights. Many of the organizational signatories have prepared and filed briefs in this Court in other property rights cases, including in *Kelo v. New London*, 545 U.S. 469 (2005). Likewise, many of the signatories have authored articles, books and other academic works on eminent domain, property rights and other constitutional issues.

4. Each signatory has submitted a statement of interest more fully outlining their organizational or personal interests in this case in Appendix A.

A*mici curiae* respectfully request leave to file the attached brief.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Does the Public Use Clause of the Fifth Amendment permit condemnations where the official stated purpose is a pretext for the true purpose of benefiting a private party?

2. Does the Public Use Cause of the Fifth Amendment permit the use of eminent domain to take property for transfer to a known private entity that will get the vast majority of the benefit from the taking?

3. Should this Court overrule *Kelo v. City of New London's* ruling that transferring property from one private owner to another for purposes of "economic development" is a public use justifying the use of eminent domain under the Fifth Amendment?

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INTEREST OF THE *AMICI CURIAE*[1]

Each of the thirteen organizations joining in this coalition has an interest in defending constitutional property rights and curbing the abuse of eminent domain. Likewise, each of the constitutional and property law professors joining in this coalition has a professional interest in the issues presented here, and in advancing a proper understanding of the Public Use Clause. A full statement of interest for each of the *amici* is set forth in Appendix A.

STATEMENT OF THE CASE

Amici incorporate by reference the description of the facts outlined in the petition for writ of *certiorari*. Pet. Cert. at 4-8. Here, we would like to briefly emphasize a few key facts that make this case a particularly appropriate vehicle for this Court to examine important questions left open by *Kelo v. City of New London*, and to consider overruling, or cabining, that now-infamous decision. 545 U.S. 469 (2005). First, the taking of the Petitioners' property was not part of any "integrated development plan" of the sort the Supreme Court upheld in *Kelo*. The property was condemned long after the Agana Plan, that supposedly justified the condemnation, became moribund—if not completely inactive. Pet. Cert. at 7-8. Second, the condemnation had a clear beneficiary whose identity was well-known in advance: the

[1] In accordance with Rule 37.6, the *amici* state that no counsel for a party authorized any portion of this brief and no counsel or party made a monetary contribution intended to fund the brief's preparation or submission.

Ungacta family, including Felix Ungacta, then mayor of the city of Agana. Pet. App. A-5-6. Third, the Ungacta family obtained the lion's share of the benefits of the condemnation. Finally, given the absence of any carefully considered development plan, and Mayor Ungacta's critical role in instigating the condemnation of the Petitioners' land, the governments' motives, in using eminent domain, are at least open to serious question.

SUMMARY OF ARGUMENT

This case presents an opportunity for this Court to clarify the definition of a "pretextual taking" under the Public Use Clause of the Fifth Amendment. In *Kelo v. City of New London*, the Court ruled that "economic development" is a public use justifying the exercise of eminent domain authority. 545 U.S. 469 (2005). But the Court also emphasized that government may not "take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." *Id.* at 478; *cf. Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (noting that the "Court's cases have repeatedly stated that one person's property may not be taken for the benefit of another private person without a justifying public purpose") (internal citation omitted). In his concurrence, Justice Kennedy noted that a taking characterized by "impermissible favoritism" may be unconstitutional. *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring).

Unfortunately, *Kelo* provided only limited guidance on what constitutes a pretextual taking. *See*, *e.g.*, *Goldstein v. Pataki*, 488 F. Supp. 2d 254,

288 (E.D.N.Y. 2007), *aff'd*, 516 F.3d 50 (2d Cir. 2008) ([A]lthough *Kelo* held that merely pretextual purposes do not satisfy the public use requirement, the *Kelo* majority did not define the term 'mere pretext'"). As a result, lower courts have applied widely divergent standards. *See* Daniel Kelly, *Pretextual Takings: Of Private Developers, Local Governments, and Impermissible Favoritism*, 17 SUP. CT. ECON. REV. 173 (2009) (providing a detailed discussion of widely divergent post-*Kelo* case law on pretext); Ilya Somin, *The Judicial Reaction to* Kelo, 4 ALB. GOV'T L. REV. 1, 24-35 (2011).

Several state supreme courts look to the motives of the condemnor. Others focus on whether the new private owner captures most of the benefits of the condemnation. A third group focuses on the extent of the planning process preceding the taking. The Third Circuit emphasizes the presence of a known private beneficiary of the taking. Finally, the lower court in the present case, the New York Court of Appeals, and the Second Circuit define pretext so narrowly that even the most blatant favoritism will escape judicial scrutiny. This extreme confusion calls out for resolution by this Court.

The Court should also address the question of pretextual takings because it is of great importance for property owners across the nation. Since World War II, hundreds of thousands of Americans have been forcibly displaced from their homes or businesses as a result of economic-development and blight condemnations. Most of those displaced are poor or ethnic minorities with little political influence. Judicial enforcement of constitutional

property rights is often their only hope for protection against pretextual takings. These people deserve protection against the abuse of the "despotic power" of eminent domain. *Vanhorne's Lessee v. Dorrance*, 2 U.S. 304, 311, 2 Dal. 304, 311 (1795).

The present case includes all four factors that this Court and lower courts have identified as indications of pretext: evidence of pretextual intent, benefits that flow predominantly to a private party, haphazard planning, and a readily identifiable private beneficiary. For this reason, it gives the Court an excellent opportunity to clarify the relative importance of each factor in adjudicating pretextual takings and to reexamine the now-infamous *Kelo* decision.

REASONS FOR GRANTING THE PETITION

I. STATE SUPREME COURTS AND LOWER FEDERAL COURTS DISAGREE OVER THE DEFINITION OF A PRETEXTUAL TAKING

In deciding whether to grant the writ of *certiorari*, this Court gives preference to cases where "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." Sup. Ct. R. 10(b). There are few more confused splits than the division over pretextual takings after *Kelo*.

Two state supreme courts and several federal court decisions focus on the actual intentions of the

condemning authority. The District of Columbia Court of Appeals focuses instead on the relative magnitude of the expected public benefits from the taking. Two other state high courts emphasize the extent of the planning process behind a condemnation. The Third Circuit emphasizes the presence or absence of a known private beneficiary of the taking. Finally, the Second Circuit, the New York Court of Appeals, and the Supreme Court of Guam in the present case, define pretextual takings so narrowly that it becomes virtually impossible to invalidate even the most abusive condemnations.

A. State Supreme Courts and Federal Courts Emphasizing the Intentions of Condemning Authorities

Two state supreme courts interpret *Kelo's* pretextual-taking inquiry as focusing primarily on the intentions of condemning authorities. In *Middletown Township v. Lands of Stone*, the Pennsylvania Supreme Court interpreted *Kelo* as requiring courts to examine "the real or fundamental purpose behind a taking ... the true purpose must primarily benefit the public." 939 A.2d 331, 337 (Pa. 2007); *see also In re O'Reilly*, 5 A.3d 246, 250 (Pa. 2010) (*quoting Lands of Stone*, 939 A.2d at 337). In *In re O'Reilly*, the same court also noted that the crucial factor in determining purpose is that "the public must be the primary and paramount beneficiary of the taking." *O'Reilly*, 5 A.3d at 258.

The Hawaii Supreme Court has also focused on motive. Its decision, in *County of Hawaii v. C&J Coupe Family Ltd. P'ship*, states that *Kelo* requires courts to look for "the actual purpose" of a taking to determine whether the official rationale was "a mere pretext." *See* 198 P.3d 615, 647-49 (Haw. 2008). Hawaii and Pennsylvania differ in that the latter relies far more on the distribution of benefits as an indication of purpose.

A recent federal district court decision emphasized "[t]he purposes of the statutory scheme… at issue" in its analysis of a pretext claim, which suggests a focus on motive. *Hausler v. JPMorgan Chase Bank*, 845 F. Supp. 2d 553, 576 (S.D.N.Y. 2012); *cf. id.* (focusing on "'transfers intended to confer benefits on particular, favored private entities with only incidental or pretextual public benefits'") (quoting *Kelo*, 545 U.S. at 490 (Kennedy, J., concurring)).

Several other pre- and post-*Kelo* federal decisions also emphasized the importance of motive. *See Armendariz v. Penman*, 75 F.3d 1311, 1321 (9th Cir. 1996) (en banc) (invalidating a taking because the official rationale of blight alleviation was a mere pretext for "a scheme ... to deprive the plaintiffs of their property ... so a shopping-center developer could buy [it] at a lower price"); *Ranch de Calistoga v. City of Calistoga*, 2012 WL 2501075 at *3-4 (N.D. Cal. June 27, 2012) (applying the standard adopted in *Armendariz*); *J.D. Francis, Inc. v. Bremer County*, 2011 WL 978651 at *7 (N.D. Iowa Mar. 17, 2011) (focusing on whether the government's "motives were improper" or "pretextual"); *Aaron v. Target*

Corp., 269 F. Supp. 2d 1162, 1174-76 (E.D. Mo. 2003), *rev'd on other grounds*, 357 F.3d 768 (8th Cir. 2004) (holding that a property owner was likely to prevail on a claim that a taking ostensibly to alleviate blight was actually intended to serve the interests of the Target Corporation); *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203, 1229 (C.D. Cal. 2002) ("Courts must look beyond the government's purported public use to determine whether that is the genuine reason or if it is merely pretext."); *99 Cents Only Store v. Lancaster Redev. Agency*, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001) ("No judicial deference is required ... where the ostensible public use is demonstrably pretextual").

B. Courts Emphasizing the Magnitude and Distribution of Expected Benefits

In contrast to the Hawaii and Pennsylvania supreme courts, the Court of Appeals of the District of Columbia emphasizes the magnitude of the public benefits of the taking relative to the private ones: "If the property is being transferred to another private party, and the benefits to the public are only 'incidental' or 'pretextual,' a 'pretext' defense may well succeed." *Franco v. Nat'l Capital Revitalization Corp.*, 930 A.2d 160, 173-74 (D.C. 2007). The court remanded *Franco* with instructions to "focus primarily on the benefits the public hopes to realize

from the proposed taking." *Id.* at 173.[2] Justice Kennedy's concurring opinion in *Kelo* suggested that a taking might be invalidated if it has "only incidental or pretextual public benefits." *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring).

In *MHC Fin Ltd. P'ship v. City of San Rafael*, the Northern District of California also interpreted *Kelo* as requiring "'careful and extensive inquiry into whether, in fact, the development plan is of primary benefit to the developer …. [with] only incidental benefit to the City.'" 2006 WL 3507937, at *14 (N.D. Cal. Dec. 5, 2006) (quoting *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring)). A pre-*Kelo* Seventh Circuit case also emphasizes the importance of the distribution of the benefits of a taking. *See Daniels v. Area Plan Comm'n*, 306 F.3d 445, 456-66 (7th Cir. 2002) (holding that the true purpose of the takings was "to confer a private benefit" on business interests because "any speculative public benefit would be incidental at best.")

C. Courts Focusing on the Extent of the Pre-Condemnation Planning Process

The Maryland, Pennsylvania, and Rhode Island supreme courts have relied on the absence of extensive planning as an indication of pretext. *See*

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[2] Somewhat inconsistently, the court later ruled, in an appeal arising from the same case, that "the District need only show that the D.C. Council approved the Skyland legislation for the purpose of economic development in order to defeat the allegation of pretext." *Franco v. D.C.*, 39 A.3d 890, 894 (D.C. 2012).

Middletown, 939 A.2d at 338 (concluding that "evidence of a well-developed plan of proper scope is significant proof that an authorized purpose truly motivates a taking"); *Mayor & City Council of Balt. v. Valsamaki*, 916 A.2d 324, 352-53 (Md. 2007) (noting absence of a clear plan for the use of the condemned property, and contrasting with *Kelo*); *R. I. Econ. Dev. Corp. v. The Parking Co.*, 892 A.2d 87, 104 (R.I. 2006) (emphasizing that "New London's exhaustive preparatory efforts that preceded the takings in *Kelo*, stand in stark contrast to [the condemning authority's] approach in the case before us").[3] These decisions build on *Kelo's* emphasis on the presence of an "integrated development plan" behind the takings upheld in that case. *Kelo*, 545 U.S. at 487.

D. The Presence of a Known Private Beneficiary

The Third Circuit focuses its pretext analysis on the presence or absence of a private beneficiary of the taking whose identity is known in advance. In *Carole Media v. N.J. Transit Corp.*, the Third Circuit upheld a taking of a firm's license to post advertisements on public billboards owned by the New Jersey Transit Corporation. 550 F.3d 302, 311 (3d Cir. 2008). The New Jersey state legislature had adopted a new policy under which the billboard licenses would be allocated by competitive bidding. *Id.* at 305-306. The court upheld the condemnations largely because "there is no allegation that NJ Transit, at the time it terminated Carole Media's

[3] The Pennsylvania Supreme Court also relied on an intent-based analysis. *See* § I.A, *supra*.

existing licenses, knew the identity of the successful bidder for the long-term licenses at those locations." *Id.* at 310-11.

Both the majority opinion in *Kelo* and Justice Kennedy's concurrence note that there is a greater risk of a pretextual taking when the taking's private beneficiary is known in advance. *See Kelo*, 545 U.S. at 478 n. 6; *id.* at 491-92 (Kennedy, J., concurring). Despite these statements and the Third Circuit's decision in *Carole Media*, other lower courts have either ignored this aspect of *Kelo's* analysis or given it negligible weight. *See*, *e.g.*, *Goldstein v. Pataki*, 516 F.3d 50, 55-56 (2d Cir. 2008) (dismissing the significance of this factor).

E. Courts That Virtually Define Pretextual Takings Out of Existence

The Second Circuit, the New York Court of Appeals, and the lower court in the present case have defined pretextual takings so narrowly that it is virtually impossible to challenge a condemnation on that basis.

1. The *Atlantic Yards* Cases

In *Goldstein*, a case considering the constitutionality of the dubious Atlantic Yards condemnations in New York City,[4] the Second Circuit held that so long as a taking is "rationally related to a classic public use," it is impermissible to "give close scrutiny to the mechanics of a taking ... to gauge the purity of the motives of various government officials who approved it." *Id.* at 62.

The Second Circuit also rejected claims that the takings should be invalidated because most benefits would flow to developer Bruce Ratner or because any benefits to the community would be "dwarf[ed]" by the project's costs. *Id.* at 58. Similarly, the court rejected the idea that any significant scrutiny was required because Ratner was the originator of the project and his status as the main private beneficiary of the takings was known from the start. *Id.* at 55-56.

Finally, both the Second Circuit and a later decision by the New York Court of Appeals upholding the same takings failed to seriously consider evidence that the planning process was deliberately skewed to benefit Ratner. The original

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[4] For detailed discussions of the Atlantic Yards cases, which describe the many abuses that occurred, *see* Ilya Somin, *Let There Be Blight: Blight Condemnations in New York after* Goldstein *and* Kaur, 38 FORDHAM URBAN L. J. 1193, 1197-99, 1200-1216 (2011) (Symposium on Eminent Domain in New York); and Amy Lavine & Norman Oder, *Urban Redevelopment Policy, Judicial Deference to Unaccountable Agencies, and Reality in Brooklyn's Atlantic Yards Project*, 42 URB. LAW. 287 (2010).

rationale for the condemnation was "economic development-job creation and the bringing of a professional basketball team to Brooklyn." *In re Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164, 189 (N.Y. 2009) (Smith, J., dissenting). "[N]othing was said about 'blight' by the sponsors of the project until 2005," when the ESDC realized that a blight determination might be legally necessary. *Id.* By "that point Ratner had already acquired many of the properties he wanted (thanks to eminent domain) and left them empty, thus *creating* much of the unsightly neglect he [later] cite[d] in support of his project." Damon Root, *When Public Power Is Used for Private Gain*, REASON.COM (Oct. 8, 2009), available at http://reason.com/archives/2009/10/08/when-public-power-is-used-for.

2. The *Kaur* Case

The New York Court of Appeals' decision in *Kaur v. N.Y. State Urban Dev. Corp*, also gave free reign to pretextual takings just as much as the opinions in the *Goldstein* cases. 15 N.Y.3d 235 (N.Y. 2010). The case involved the condemnation of property for transfer to Columbia University under the guise of an extremely dubious "blight" designation. In upholding the condemnation, the court ignored extensive evidence of pretextual motive, evidence that Columbia would reap most of the condemnation's benefits, evidence of inadequate planning, and the undisputed fact that Columbia's identity as the main beneficiary of the taking was known from the beginning. Amazingly, the court's decision failed to even cite *Kelo* at all, despite a

lower court's extensive reliance on *Kelo's* pretext analysis to invalidate the takings.[5] *See Kaur v. N.Y. State Urban Dev. Corp.*, 892 N.Y.S.2d 8, 18-22 (N.Y. App. Div. 2009), *rev'd*, 15 N.Y.3d 235 (N.Y. 2010) (striking down the Columbia takings under the *Kelo* pretext standard).

3. The Supreme Court of Guam Ignored All Four Possible Indications of Pretext in the Present Case

The Supreme Court of Guam's treatment of pretext issues was just as extreme as that of the Second Circuit and the New York Court of Appeals in *Goldstein* and *Kaur*. It too minimized the significance of all four possible indicia of pretext.

a. Evidence of Pretextual Motive

The key role played by then-Mayor Felix Ungacta in instigating the condemnation of the Ilagans' property and the fact that his family is likely to capture the lion's share of the benefits from the condemnation at least raises serious questions about the possibility that the official rationale for this taking was pretextual. If motive is relevant to a pretext inquiry, the case should at least be remanded to the trial court for further fact-finding on this issue.

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[5] For a more extensive discussion of these aspects of *Kaur*, *see* Somin, *Let There Be Blight*, at 1210-17.

b. Evidence That the Ungactas Are the Primary Beneficiaries of the Taking

There is little doubt that the Ungactas will capture the lion's share of the benefits of this condemnation. As the trial court noted, the land taken from the Ilagans is to be used for the "provision of public road access to a private lot" owned by the Ungactas. Pet. App. B-10. They stand to derive substantial benefit from such access. But there is no evidence, beyond bare assertion that it will promote "economic development," that there will be any benefit to the general public of remotely comparable magnitude. *Id*.

c. Lack of Careful, Objective Planning

Unlike the condemnation upheld in *Kelo,* the use of eminent domain in the present case was not undertaken "pursuant to a carefully considered development plan." *Kelo*, 545 U.S. at 478 (citation omitted). The Guam Supreme Court concluded that the taking was part of the Agana development plan. Pet. App. A-16-24. In reality, no condemnations were conducted under the Agana Plan between 1974 and the present case, and even the Guam Supreme Court recognizes that the government's implementation of the plan was often "inconsistent and haphazard" before 1974, and at best sporadic since then. *Id.* at 21. Most importantly, as the trial court pointed out, "the Government has not (in almost 30 years)

presented any evidence that *this* taking was part of a larger plan beyond stating that it is." Pet App. B-8.

Even if the present condemnation were part of a plan in some technical sense, it was not the result of any kind of "carefully considered development" that rigorously weighed the potential costs and benefits. In *Kelo*, the Court cited the 2001 case of *99 Cents Only Stores v. Lancaster Redevelopment Agency* as an example of a pure "one-to-one transfer of property, executed outside the confines of an integrated development plan." *Kelo*, 545 U.S. at 487 & n.17. *99 Cents* actually struck down a taking that the government justified as necessary to implement a redevelopment plan. *See 99 Cents*, 237 F. Supp. 2d at 1125-26 (noting that the case involved condemnation authority established by the "Amargosa Redevelopment Plan"). The *Kelo* Court singled out *99 Cents* because the redevelopment plan in that case lacked the careful planning needed to justify judicial deference to the government's judgment. The same is true in the present case.

d. There is no Dispute that the Ungactas were Identifiable Private Beneficiaries of the Taking

No one denies that the Ungactas were major "private beneficiaries" of the taking whose identities were well-known in advance. *Kelo*, 545 U.S. at 492 (Kennedy, J., concurring). That differentiates the present case from *Kelo*, where the Court concluded that the identity of the main private beneficiaries

was "still unknown" at the time the government decided to undertake the condemnation of the properties at issue. *Id.*

II. THE COURT MUST ESTABLISH CLEAR STANDARDS FOR PRETEXTUAL TAKINGS IN ORDER TO PROTECT THE RIGHTS OF NUMEROUS PROPERTY OWNERS AGAINST ABUSIVE CONDEMNATIONS DRIVEN BY FAVORITISM

The issues raised by this case affect the rights of numerous property owners across the country who are threatened by dubious takings. If courts do not protect property rights against pretextual condemnations, many people—particularly the poor, racial minorities, and those lacking political influence—risk losing their homes and businesses to condemnations undertaken for the benefit of well-connected private interest groups. "Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner." *Id.* at 494 (O'Connor, J., dissenting).

A. Blight and Economic-Development Takings Threaten Numerous Property Owners

Since World War II, as many as several million Americans have been forcibly displaced by blight and economic development takings. *See* Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings after* Kelo, 15 SUP. CT. ECON.

REV. 183, 267-71 (2007). Property owned or rented by the poor, minorities, and politically weak individuals is especially likely to be targeted for condemnation for transfer to politically influential interest groups. *See id.* at 190-93, 267-71; Dick Carpenter & John Ross, *Testing O'Connor And Thomas: Does The Use Of Eminent Domain Target Poor And Minority Communities?*, 46 URBAN STUD. 2447 (2009) (describing particular vulnerability of the poor and racial minorities); Brief for the NAACP et al. as Amici Curiae Supporting Petitioners, *Kelo v. City of New London*, 545 U.S. 469 (2004) (No. 04-108) (same)); *see also Kelo*, 545 U.S. at 505 (O'Connor, J., dissenting) ("The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more"); *id.* at 521 (Thomas, J., dissenting) (noting that "losses will fall disproportionately on poor communities" in part because they are "the least politically powerful").

Small businesses are also often victimized. They usually lack the political clout of large enterprises, and are often undercompensated for their losses. *See*, *e.g.*, Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 106 (2006) (noting that uncompensated losses "work to the particular detriment of small business owners [because] some find that they are unable to reopen after they are displaced by eminent domain, while others relocate but subsequently fail").

Nonprofit and religious organizations are also unusually vulnerable to economic development condemnations. Because nonprofits do not pay property taxes and produce little development, they make tempting targets for local governments hoping to increase tax revenue or to boost the regional economy. *See* Brief for Becket Fund for Religious Liberty as Amicus Curiae in support of Petitioners, *Kelo v. City of New London*, 545 U.S. 469 (2004) (No. 04-108), 2004 WL 2787141, at *8-11 & n.20 (describing special vulnerability of religious nonprofits).

B. Post-*Kelo* Eminent Domain Reform Laws Have Not Eliminated the Problem of Pretextual Takings

Since *Kelo*, forty-four states have adopted eminent domain reform legislation. But many of the new laws only pretend to restrict blight and economic development takings without actually constraining them in a significant way. *See* Ila Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 Minn. L. Rev. 2100 (2009), 2120-37 (surveying numerous relatively ineffective state reform laws); Marc Mihaly & Turner Smith, *Kelo's Trail: A Survey of State and Federal Legislative and Judicial Activity Five Years Later*, 38 ECOLOGY L.Q. 703 (2011) (same). Although genuine progress has been made in some states, many of the new laws still allow state and local governments to condemn property for the benefit of private interests. In some twenty states with post-*Kelo* reform laws, it is still possible for almost any area to be declared "blighted" and subject to

condemnation on that basis. Somin, *Limits of Backlash*, at 2121-31; *see also* Martin E. Gold & Lynne B. Sagalyn, *The Use and Abuse of Blight in Eminent Domain*, 38 FORDHAM URB. L.J. 1119 (2011) (describing persistence of loose definitions of "blight" in many states). This Court's intervention is essential in order to protect property owners against unconstitutional pretextual takings.

III. THE PRESENT CASE IS AN IDEAL VEHICLE FOR THIS COURT TO DEFINE THE MEANING OF PRETEXTUAL TAKINGS

The present case is an excellent vehicle for this Court to define "pretextual" takings and resolve the widespread confusion in the lower courts on this important issue. The case features all four elements that this Court and lower courts have identified as possible indicators of a pretextual taking. The Court can therefore use this case to consider the weight to be accorded to each of the four criteria. It can provide much-needed guidance to state courts and lower federal courts.

The question of how to weigh the different factors is one best addressed when and if this court decides to grant the petition for *certiorari*. Here, we mention just a few considerations relevant to each of the four factors. In the view of *amici*, the presence of any one of them is a strong indication that a taking might well be pretextual.

Both the presence of a pretextual motive and that of a project where all or most of the benefits go

to a private party are strong indications of a pretextual taking. If the government's objective in condemning property is to benefit a private party, it becomes a pure "A to B" taking of the sort that this Court has always considered to be unconstitutional. *See Kelo*, 545 U.S. at 477 (noting that "it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*"). Similarly, if a private party monopolizes most of the benefits of a taking, that is a strong indication that there is no public benefit. A taking that "serve[s] no legitimate purpose of government" cannot "withstand the scrutiny of the public use requirement." *Midkiff*, 467 U.S. at 245.

The lack of a careful planning process is also an indication of favoritism. *See Kelo*, 545 U.S. at 487 (noting that a "a one-to-one transfer of property, executed outside the confines of an integrated development plan" may require additional judicial scrutiny); *id.* at 493 (Kennedy, J., concurring) (the fact that "[t]his taking occurred in the context of a comprehensive development plan" reduces the need for "a demanding level of scrutiny").

Finally, the presence of a private beneficiary whose identity was known in advance should also trigger a higher level of judicial scrutiny to guard against "the risk of undetected impermissible favoritism." *Id.*

IV. THE COURT SHOULD USE THIS CASE AS AN OPPORTUNITY TO CONSIDER OVERRULING *KELO V. CITY OF NEW LONDON*

The Court need not overrule *Kelo v. City of New London* in order to find that the taking of the Ilagans' property was unconstitutional. As described above, this case has numerous indicia of a pretextual taking that would be invalid even under *Kelo* itself. *See* § I.E.3, *supra*. But the case does provide a valuable opportunity for the Court to consider overruling *Kelo*. If the Court were to overrule *Kelo's* holding that the transfer of condemned property to private parties for "economic development" is a permissible public use (*Kelo*, 545 U.S. at 478-85), it would necessarily invalidate the taking in the present case, which is defended largely on the basis of its supposed economic benefits.

This Court has stated that it will "overrule an erroneously decided precedent … if: (1) its foundations have been 'ero[ded] by subsequent decisions; (2) it has been subject to 'substantial and continuing' criticism; and (3) it has not induced 'individual or societal reliance' that counsels against overturning" it. *Lawrence v. Texas*, 539 U.S. 558, 587-88 (2003). An additional factor that the Court considers in deciding whether to reverse a precedent is whether the original decision was "well reasoned." *Montejo v. La.*, 556 U.S. 778, 793 (2009).

A. *Kelo* has Been Subject to Widespread Criticism

Since *Kelo* is a recent decision and the Court has not decided any other public use cases since then, it has not yet been "eroded" by future Supreme Court precedents. But few Supreme Court cases have been subjected to as much "substantial and continuing criticism" as *Kelo*. The decision has been opposed by over 80 percent of the public and has generated massive criticism across the political spectrum, including by groups as varied as the NAACP, the American Association of Retired Persons, and the Becket Fund for Religious Liberty. *See* Somin, *Limits of Backlash*, at 2108-14 (summarizing the widespread criticism).

Justice Antonin Scalia has publicly stated that he "do[es] not think that the *Kelo* opinion is long for this world," describing it as one of the "very few" cases where the Court has erred in "estimating how far … it could stretch beyond the text of the Constitution without provoking overwhelming public criticism and resistance." Abdon Pallasch, *Scalia Offers Ruling: Deep Dish v. Thin Crust?* CHICAGO SUN-TIMES, Feb. 13, 2012 (quoting Justice Scalia).

Every state supreme court to have considered the question has repudiated *Kelo* as a guide to the interpretation of its state constitution's public use clause. *See City of Norwood v. Horney*, 853 N.E.2d 1115, 1136-38 (Ohio, 2006) (repudiating *Kelo* and holding that "economic development" alone does not justify condemnation, despite the fact that Ohio's Public Use Clause has similar wording to the federal

one); *Bd. of County Com'rs of Muskogee County v. Lowery*, 136 P.3d 639, 646-52 (Okla. 2006) (holding that "economic development" is not a "public purpose" and rejecting *Kelo* as a guide to interpretation of Oklahoma's state constitution); *Benson v. State*, 710 N.W.2d 131, 146 (S.D. 2006) (concluding that the South Dakota constitution gives property owners broader protection than *Kelo*, even though the two have similarly worded public use clauses). *Kelo* has also been criticized by many takings scholars, though it has its academic defenders as well.[6]

We do not suggest that such widespread criticism by itself justifies overruling *Kelo*. But it does strengthen the case for revisiting the case in light of the extensive judicial, academic, and public criticism it has generated.

B. *Kelo* was Decided on the Basis of Seriously Flawed Reasoning

The quality of a precedent's reasoning is a crucial factor in determining whether it should be overruled. *Montejo*, 556 U.S. at 793. The *Kelo* majority opinion's reasoning has grave deficiencies that have become more apparent since 2005. Even Justice John Paul Stevens, author of the Court's opinion, has admitted that its reasoning was based

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[6] For academic criticisms of *Kelo*, *see*, *e.g.*, RICHARD A. EPSTEIN, SUPREME NEGLECT: HOW TO REVIVE CONSTITUTIONAL PROTECTION FOR PRIVATE PROPERTY 83-86 (2008); James T. Ely, Jr., *"Poor Relation" Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2005 CATO SUP. CT. REV. 39; and Somin, *Controlling the Grasping Hand*, at 229-47.

in part on an "embarrassing" error: the assumption that a series of late nineteenth and early twentieth century "substantive due process" Supreme Court decisions applying a highly deferential approach to state government takings were actually decided under the Takings Clause of the Fifth Amendment. John Paul Stevens, Address at University of Alabama School of Law, Albritton Lecture (Nov. 16, 2011), 14-18, available at http://www.supremecourt.gov/publicinfo/speeches/1.pdf. These cases were relied on by the Court as key precedents supporting the proposition that the outcome in *Kelo* was dictated by "more than a century" of precedent. *Kelo*, 545 U.S. at 483; *see also* Somin, *Controlling the Grasping Hand*, at 241-44 (describing this mistake in detail and explaining its significance to the outcome of the case).[7] An "embarrassing" error in reasoning—acknowledged by the author of the Court's opinion—provides strong justification for the Court to at least consider overruling *Kelo*.

In addition, *Kelo* represents an unusual anomaly in this Court's jurisprudence on the Bill of Rights. In sharp contrast to its treatment of every other individual right enumerated in that document, the Court's decision in *Kelo* allows the very same governments whose abuses the Public Use Clause is intended to constrain to define the scope of the rights

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[7] Justice Stevens continues to believe that *Kelo* was correctly decided, but he justifies that conclusion by embracing the extreme proposition that "neither the text of the Fifth Amendment Takings Clause, nor the common law rule that it codified, placed any limit on the states' power to take private property, other than the obligation to pay just compensation to the former owner." Stevens, Albritton Lecture, at 18.

that are to be protected. Even though it recognizes that the Fifth Amendment protects citizens against takings that are not for a "public use," *Kelo* gives almost unlimited deference to "legislative judgment" in determining what counts as a valid public purpose, if the official rationale is not a mere pretext. *Id.* at 480. "[A]mong all the guarantees of the Bill of Rights, only the public use limitation is singled out for heavy [judicial] deference." James T. Ely, Jr., *"Poor Relation" Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2005 CATO SUP. CT. REV. 39, 62.

C. *Kelo* has not yet Generated Substantial Reliance Interests

Because it was decided only a few years ago, *Kelo* has not generated significant "individual or societal reliance." *Lawrence*, 539 U.S. at 577. The dominant trend of both state legislation and state judicial decisions has actually gone against *Kelo*.[8] *See* Somin, *Judicial Reaction to* Kelo, at 7-12 (describing generally negative state court reaction to *Kelo*). In November 2012, Virginia voters overwhelmingly enacted Question 1, which bans Kelo-style economic development takings, thereby making Virginia the thirteenth state to adopt restrictions on takings by referendum since 2005. *See* A. Barton Hinkle, *Opponents Made Best Case for Takings Amendment*, RICHMOND TIMES-DISPATCH, Nov. 7, 2012. This Court has recognized that recent

[8] Although many state post-*Kelo* reform laws have been largely ineffective, a substantial minority of states have enacted laws that ban or severely restrict *Kelo*-style economic development takings since 2005. *See* Somin, *Limits of Backlash*, at 2138-49.

precedents are less likely to generate reliance interests than long-established ones, and therefore more easily overruled if found to be incorrect. A precedent that is "only two decades old," for example, can be overruled because "eliminating it would not upset expectations." *Montejo*, 556 U.S. at 793. *Kelo* was decided only seven years ago, and it has not yet generated substantial reliance interests.[9]

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of *certiorari*.

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[9] Overruling *Kelo* would not require the courts to overturn already completed economic development takings. State supreme court decisions overruling previous cases permitting economic development condemnations under state public use clauses did not have any such effect. *See*, *e.g.*, *County of Wayne v. Hathcock*, 684 N.W.2d 765, 788 (Mich. 2004) (overruling *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981)) (applying reversal of ruling permitting economic development takings only to "pending cases in which a challenge to *Poletown* has been raised and preserved").

Respectfully submitted,

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APPENDIX A

TABLE OF CONTENTS

I. Statement of Interest for the National Federation of Independent Business Small Business Legal Center

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

NFIB represents 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses. The NFIB Legal Center has filed in numerous other property rights cases, in recent years, including *Koontz v. St. Johns River*

Management District, 11-1447 (2012), *Arkansas Game & Fish Commission v. United States*, 568 U.S. __ (2012), *Stop the Beach Renourishment v. Florida*, 560 U.S. __ (2010), and *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). We file here because small businesses are often victimized—at the expense of more powerful business interests—when private property is taken for the purpose of "economic development."

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II. Statement of Interest for the Cato Institute

Established in 1977, the Cato Institute is a non-partisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and publishes the annual Cato Supreme Court Review. Cato Institute files here because this case raises an important issue of property rights, which is of national concern.

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III. Statement of Interest for the Goldwater Institute

The Goldwater Institute was established in 1988 as a nonpartisan public policy and research foundation dedicated to advancing the principles of limited government, economic freedom and individual responsibility through litigation, research papers, editorials, policy briefings and forums. Through its Scharf-Norton Center for Constitutional Litigation, the Institute litigates and frequently files amicus briefs. The Institute recently appeared before the United States Supreme Court in *McComish v. Bennett* (No. 10-239).

A principal goal of the Goldwater Institute is to enforce the features of our state and federal constitutions that protect property rights. The Institute was a chief proponent of Arizona's Private Property Rights Protection Act ("PPRPA"), which was approved by voters in 2006 and guarantees every Arizonan the right to compensation for laws and regulations that restrict the use of their property. The Goldwater Institute has represented property owners in just compensation claims, including in the first successful lawsuit under the PPRPA, *Goodman v. City of Tucson*, C-20081560 (Pima County Super. Ct. Nov. 3, 2009).

The Goldwater Institute is a non-partisan, tax-exempt educational foundation under Section 501(c)(3) of the Internal Revenue Code. It has no parent corporation. It has issued no stock. It certifies that it has no parents, trusts, subsidiaries

and/or affiliates that have issued shares or debt securities to the public.

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IV. Statement of Interest for the Owners Council of America

Owners' Counsel of America (OCA) is a national, invitation-only network of the most experienced eminent domain and property rights attorneys who seek to advance, preserve and defend the rights of private property owners and thereby further the cause of liberty, because the right to own and use property is "the guardian of every other right" and the basis of a free society. *See* JAMES W. ELY, THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (2d ed. 1998). OCA is a non-profit organization, organized under I.R.C. § 501(c)(6) and sustained solely by its members. Only one member lawyer is admitted from each state. As the lawyers on the front lines of eminent domain law, OCA members have firsthand experience attempting to apply *Kelo v. City of New London*, 545 U.S. 469 (2005), and understand how this Court's statements about pretext and private-purpose takings in that case have resulted in confusion and fractured interpretations in the nation's courts.

OCA brings unique experience to this task. Its member attorneys have been involved in landmark property law cases in nearly every jurisdiction nationwide. Additionally, OCA members and their firms have been counsel for a party or amici in many

of the takings cases this Court has considered in the past forty years.[1]

OCA members have also authored treatises, books, and scholarly articles on eminent domain, inverse condemnation, and regulatory takings, including authoring and editing chapters in the seminal treatise NICHOLS ON EMINENT DOMAIN. OCA believes that its members' long experience in advocating for property owners and protecting their constitutional rights will provide an

[1] *See*, *e.g.*, *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Kelo v. City of New London*, 545 U.S. 469 (2005); *Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008); *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l Protection*, 130 S. Ct. 2592 (2010). Most recently, OCA filed amicus briefs in *Arkansas Game & Fish Comm'n v. United States*, No. 11-597 (cert. granted Apr. 2, 2012) and *Koontz v. St. Johns River Water Mgm't Dist.*, No. 11-1447 (cert. granted Oct. 5, 2012).

additional, valuable viewpoint on the issues presented to the Court.

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V. Statement of Interest for the American Forest Resource Council

The American Forest Resource Council (AFRC) represents forest products companies and is an advocate for a reliable timber supply from public and private lands. AFRC members own hundreds of mill sites many of which are located on prime development lands in their communities. For example, Boise Cascade sold mills along the Columbia and Willamette Rivers that are now being planned for mixed-use development. AFRC wants to ensure that transfer of land between private parties be market based rather than condemnation driven.

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VI. Statement of Interest for the Becket Fund

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in litigation across the country and around the world. It frequently represents houses of worship whose religious freedom has been violated under the guise of land use regulation, including the use of eminent domain.

The Becket Fund submits this brief because it is concerned that the Supreme Court of Guam's decision will, if left uncorrected, add to the already potent threat that pretextual use of eminent domain poses to the religious liberty of Americans of all faith traditions, particularly locally disfavored religious minorities.

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VII. Statement of Interest for the Chapman Center for Constitutional Jurisprudence

Amicus the Center for Constitutional Jurisprudence was established in 1999 as the public interest law arm of the Claremont Institute, the mission of which is to uphold and restore the principles of the American Founding to their rightful and preeminent authority in our national life, including the foundational proposition that the powers of the national government are few and defined, with the residuary of sovereign authority reserved to the states or to the people. In addition to providing counsel for parties at all levels of state and federal courts, the Center and its affiliated attorneys have participated as amicus curiae or on behalf of parties before this Court in several cases, including *Koontz v. St. Johns River Water Mgmnt Dist.*, No. 11-447; *Arkansas Fish & Game Comm'n v. United States*, __ U.S. __, 133 S. Ct. 511 (2012); *Sackett v. Environmental Protection Agency*, ___ U.S. ___,132 S. Ct. 1367 (2012); *Stop the Beach Renourishment v. Florida Department of Environmental Affairs*, 560 U.S. ___, 130 S. Ct. 2592 (2010); *Rapanos v. United States*, 547 U.S. 715 (2006); and *Kelo v. City of New London, Connecticut*, 545 U.S. 469 (2005).

The Center believes the issue before the Court in this matter is one of special importance to the scheme of individual liberty enshrined in the Constitution. The Framers and Ratifiers considered the individual right to own and use private property to be the cornerstone of all individual liberty. This case goes to the core of that individual right, addressing whether private individuals can employ

the power of government to take property from other private individuals.

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VIII. Statement of Interest for the Mountain States Legal Foundation

Mountain States Legal Foundation ("MSLF"), is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property, individual liberties, limited and ethical government, and the free enterprise system. For over thirty years, MSLF attorneys have represented clients against overreaching by the government to ensure the sanctity of private property. *E.g.*, *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423 (10th Cir. 1986); *Stupak-Thrall v. United States*, 89 F.3d 1269 (6th Cir. 1996); *Laguna Gatuna, Inc. v. United States*, 50 Fed. Cl. 336 (2001). MSLF has also participated as amicus curiae before this Court in numerous cases involving the proper interpretation and application of the Fifth Amendment. *E.g.*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Kelo v. City of New London*, 545 U.S. 469 (2005).

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IX. Statement of Interest for the New England Legal Foundation

Amicus Curiae New England Legal Foundation ("NELF") is a nonprofit, nonpartisan public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston, Massachusetts. NELF's membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth for the United States and the New England region, protecting the free enterprise system, and defending economic and property rights. In particular, NELF's members and supporters include a cross-section of large and small businesses from New England and elsewhere in the United States. NELF has regularly appeared as *amicus curiae* in this Court in cases affecting property rights or raising issues of general economic significance to both the New England and the national business communities.[2]

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[2] *See*, *e.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Sorrell v. IMS Health Inc.,* 131 S. Ct. 2653 (2011); *Hall Street Assocs., L.L.C., v. Mattel, Inc.,* 552 U.S. 576 (2008); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007); *Watters v. Wachovia Bank, N.A.,* 550 U.S. 1 (2007); *Rapanos v. United States*, 547 U.S. 715 (2006); *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.,* 547 U.S. 370 (2006); *Kelo v. City of New London*, 545 U.S. 469 (2005); *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005); *Comm'r v. Banks,* 543 U.S. 426 (2005); *Green Tree Fin. Corp. v. Bazzle,* 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.,* 534 U.S. 279 (2002).

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X. Statement of Interest for the Atlantic Legal Foundation

The Atlantic Legal Foundation is a nonprofit, nonpartisan public interest law firm. It provides legal representation, without fee, to scientists, parents, educators, other individuals, small businesses and trade associations. The Foundation's mission is to advance the rule of law in courts and before administrative agencies by advocating for limited and efficient government, free enterprise, individual liberty, school choice, and sound science. The Foundation's leadership includes distinguished legal scholars and practitioners from across the legal community.

Atlantic Legal Foundation has served as counsel for plaintiffs and *amici* in numerous "takings" cases, including: *Cole v. County of Santa Barbara*, 537 U.S. 973 (2002) (counsel for *amici* associations of small property owners in support of petition for *certiorari* in challenge to a state law procedural bar to claims for unconstitutional takings based on "ripeness"); *Sackett v. Environmental Protection Agency*, ___ U.S. ___, 132 S. Ct. 1367 (2012) (counsel for National Association of Manufacturers as *amicus* in challenge to issuance by Environmental Protection Agency of an administrative compliance order under § 309 of the Clean Water Act); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) (counsel for real property owners' associations as *amici* in challenge to development moratoria); *Minnich v. Gargano*, No. 00 Civ. 7481, 2001 WL 46989 (S.D.N.Y. Jan. 18, 2001)

and 2001 WL 1111513 (S.D.N.Y. Sept. 20, 2001) and *Brody v. Village of Port Chester*, 261 F.3d 288 (2d Cir. 2001), 345 F.3d 103 (2d Cir. 2003) and 434 F.3d 121 (2d Cir. 2005) (co-counsel for plaintiff in challenge to taking of property for non-public use under Takings Clause of Fifth Amendment and inadequate notice of final decision to condemn under due process requirements of Fourteenth Amendment).

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XI. Statement of Interest for the 1851 Center for Constitutional Law

Amicus 1851 Center for Constitutional Law is Ohio's premier advocate for advancement of the human condition through protection of constitutional liberties. Specifically, protecting individuals' private property rights, and limiting governments' increasing utilization of eminent domain, are central to the 1851 Center's mission. The 1851 Center has developed particular expertise in Ohio and federal constitutional law, including the limitations on eminent domain enshrined in the Takings Clause of both the Ohio and Federal Constitutions. Ohio Const. art. I Sec. 19; US Const. amend. V. Accordingly, the 1851 Center files in this case because it raises an important question under the Takings Clause of concern to property owners throughout the United Stated, including the citizens of Ohio.

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XII. Statement of Interest for the Mackinac Center

The Mackinac Center for Public Policy is a Michigan-based, nonprofit, nonpartisan research and educational institute that advances policies fostering free markets, limited government, personal responsibility and respect for private property. The Center is a 501(c)(3) organization founded in 1988.

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XIII. Statement of Interest for the Rutherford Institute

The Rutherford Institute is an international civil liberties and human rights organization headquartered in Charlottesville, Virginia. Founded in 1982 by its president, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or violated. The Institute also strives to educate the public about constitutional and human rights issues. During its 30-year history, Institute attorneys have represented numerous parties before the U.S. Supreme Court. The Institute has also filed briefs as an *amicus* of the Court in cases dealing with critical constitutional issues.

The Rutherford Institute believes strongly in an unwavering commitment to our basic and fundamental constitutional framework as the best guarantor of our nation's liberty and security. The Institute is participating as *amicus* herein because it regards this case as an opportunity for the Court to confirm and establish limits upon the extraordinary power granted to governments in *Kelo* and to protect the right to own private property against government usurpation on behalf of the powerful and politically well-connected.

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XIV. Statement of Interest of the Constitutional and Property Law Professors

A. Statement of Interest for Professor James Ely

James Ely is a professor of law at Vanderbilt University. He is a renowned legal historian and property rights expert whose career accomplishments were recognized with both the Brigham-Kanner Property Rights Prize and the Owner Counsel of American Crystal Eagle Award in 2006. He is the author of several books that have received widespread critical acclaim from legal scholars and historians, including The Guardian of Every Other Right: A Constitutional History of Property Rights, The Fuller Court: Justices, Rulings and Legacy in which he examines the work of the Supreme Court between 1888 and 1910, and Railroads and American Law in which he systematically explores the way that the rise of the railroads shaped American legal culture. He has written extensively on eminent domain issues. Accordingly, he has a professional interest in the issues presented in this case, and in advancing a proper understanding of the Public Use Clause.

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B. Statement of Interest for Professor David L. Callies

David L. Callies is a professor of law at the University of Hawaii at Manoa William S. Richardson School of Law where he teaches land use, state and local government and real property. He is past chair of the Real Property and Financial Services Section of the Hawai‘i State Bar Association; past chair of the American Bar Association Section of State and Local Government Law and the recipient of its Lifetime Achievement Award in 2006; past chair, section of state and local government law, the American Association of Law Schools; past chair, Academics Forum, and member of Council, Asia Pacific Forum, of the International Bar Association; a member of the American Law Institute (ALI); a Member of the College of Fellows of the American Institute of Certified Planners (FAICP), a member of the American College of Real Estate Lawyers (ACREL) and co-editor of the annual Land Use and Environmental Law Review (with Dan Tarlock). He is also a board member of the Rocky Mountain Land Use Institute in Denver, the Institute for Local Government Studies in Dallas, and APA's Planning & Environmental Law digest.

He has written extensively on land use and eminent domain issues. Among his seventeen books are Bargaining for Development: A Handbook on Development Agreements, Annexation Agreements, Land Development Conditions and Vested Rights (with Curtin and Tappendorf) (ELI, 2003); Taking Land: Compulsory Purchase and Land Use Regulation in the Asia-Pacific (with Kotaka) (U.H.

Press, 2002, republished in Japanese, 2007), Property and the Public Interest (with Hylton, Mandelker and Franzese) (Lexis Law Publishing, 3d ed., 2007); Preserving Paradise: Why Regulation Won't Work (Univ. of Hawaii Press, 1994); Regulating Paradise: Land Use Controls In Hawaii (Univ. of Hawaii Press, 1984), and (with Robert Freilich and Tom Roberts), Cases and Materials on Land Use (Thomson-West, 5th ed., 2008). His latest book (with coauthors) The Role of Customary Law in Sustainable Development was published by Cambridge University Press in 2006. He has delivered endowed lectures at Albany Law School and at John Marshall Law School (Chicago) and is a regular lecturer at the annual conferences of the American Planning Association, the Rocky Mountain Land Use Institute, the Institute on Planning, Zoning and Eminent Domain, and the ALI-ABA Inverse Condemnation Program. Accordingly, he has a professional interest in the issues presented in this case, and in advancing a proper understanding of the Public Use Clause.

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C. Statement of Interest for Professor Todd Zywicki

Todd Zywicki is a professor of law at George Mason University School of Law, a Senior Scholar of the Mercatus Center at George Mason University, and Senior Fellow at the F.A. Hayek Program for Advanced Study in Philosophy, Politics and Economics. He teaches in the area of Bankruptcy, Contracts, Commercial Law, Business Associations, Law & Economics, and Public Choice and the Law.

Professor Zywicki is the author of more than 70 articles in leading law reviews and peer-reviewed economics journals. He is one of the Top 50 Most Downloaded Law Authors at the Social Science Research Network, both All Time and during the Past 12 Months. He served as the Editor of the Supreme Court Economic Review from 2001-02. Accordingly, he has a professional interest in the issues presented here and in advancing a proper understanding of the Takings Clause.

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D. Statement of Interest for Professor Randy Barnett

Randy E. Barnett is the Carmack Waterhouse Professor of Legal Theory at the Georgetown University Law Center, where he teaches constitutional law and contracts. Professor Barnett's publications includes more than one hundred articles and reviews, as well as nine books, including Restoring the Lost Constitution: The Presumption of Liberty (Princeton, 2005), Constitutional Law: Cases in Context (Aspen, 2008), Oxford Introductions to U.S. Law: Contracts (Oxford 2010) and Contracts: Cases and Doctrine (Aspen, 4th ed. 2008).

In 2004, Professor Barnett argued the medical marijuana case of *Gonzalez v. Raich*, 545 U.S. 1 (2005), before the U.S. Supreme Court. He also served an advisory role to the National Federation of Independent Business in *NFIB v. Sibelius*, 567 U.S. __ (2012). As with those cases, he has a professional interest in the issues presented in this case, and in advancing a proper understanding of the Constitution.

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E. Statement of Interest for Professor Eric Claeys

Eric Claeys is a professor of law at the George Mason University School of Law. Before teaching, he practiced appellate and tort litigation and clerked for the Hon. Melvin Brunetti, United States Court of Appeals for the Ninth Circuit, and the Hon. William Rehnquist, Chief Justice of the United States.

Professor Claeys' scholarship focuses on American property and constitutional law, and particularly on the influence of American natural-law/natural-rights theory on the law. Accordingly, he has a professional interest in the issues presented in this case, and in advancing a proper understanding of the Takings Clause.

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F. Statement of Interest for Professor D. Benjamin Barros

D. Benjamin Barros is the Dean of Faculty Research and Development and Associate Professor of Law at Widener's Harrisburg campus. Professor Barros teaches property, business organizations, real estate transactions, and seminars on takings and property theory. His research focuses on property law and theory, property law reform, and takings. In 2008, he was chair of the Property Section of the Association of American Law Schools. He has written extensively on Fifth Amendment Takings and eminent domain issues. As such, he has a professional interest in advancing a proper understanding of the Takings Clause.

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