

No. 12-723

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IN THE  
**Supreme Court of the United States**

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ARTEMIO M. ILAGAN, *et ux.*,

*Petitioners,*

*v.*

ENGRACIA UNGACTA, *et al.*,

*Respondents.*

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

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**BRIEF IN OPPOSITION**

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**QUESTION PRESENTED**

1. Whether the Supreme Court of Guam properly concluded, after a careful review of the record, that the proposed exercise of eminent domain was pursuant to and a part of the historical rehabilitation and redevelopment plan known as the Agana Plan, and would therefore serve a valid public purpose consistent with the Public Use Clause, by establishing “order out of chaos” through the consolidation and conformance of the municipality’s oddly-shaped lots and twisting streets into orderly blocks and lots.

**TABLE OF CONTENTS**

	<i>Page</i>
QUESTION PRESENTED .....	i
TABLE OF CONTENTS.....	ii
TABLE OF CITED AUTHORITIES .....	iii
INTRODUCTION.....	1
STATEMENT OF THE CASE .....	3
REASONS FOR DENYING THE PETITION .....	7
THE “PUBLIC USE” ISSUE PRESENTED IN THE PETITION DOES NOT WARRANT THIS COURT’S REVIEW.....	7
A. The Supreme Court of Guam’s Decision Raises No Important Issue Warranting Review .....	7
B. The Supreme Court of Guam’s Decision Is Consistent With <i>Kelo</i> .....	11
C. There Is No Conflict Among The Lower Courts That Warrants This Court’s Review ...	15
CONCLUSION .....	19

## TABLE OF CITED AUTHORITIES

	<i>Page</i>
<b>CASES</b>	
<i>Berman v. Parker</i> , 348 U.S. 26 (1954) .....	8, 9
<i>Carole Media LLC v.</i> <i>New Jersey Transmit Corp.</i> , 550 F.3d 302 (3d Cir. 2008).....	17
<i>County of Hawaii v.</i> <i>C&amp;J Coupe Family Ltd. P'ship</i> , 198 P.3d 615 (Haw. 2008) .....	17
<i>Franco v. National Capital Revitalization Corp.</i> , 930 A.2d 160 (D.C. 2007) .....	17
<i>Government of Guam v. Moylan Motor Co., Inc.</i> , 407 F.2d 567 (9th Cir. 1969) .....	2, 6, 16
<i>Hawaii Housing Authority v. Midkiff</i> , 467 U.S. 229 (1984) .....	<i>passim</i>
<i>Kelo v. City of New London</i> , 545 U.S. 469 (2005) .....	<i>passim</i>
<i>Mayor of Baltimore City v. Valsamaki</i> , 916 A.2d 324 (Md. 2007).....	17
<i>Middletown Township v. Lands of Stone</i> , 39 A.2d 331 (Pa. 2007) .....	17

*Cited Authorities*

*Page*

**AMENDMENTS, STATUTES AND RULES**

1 Guam Code Annotated (“GCA”) § 403(b) .....3

Public Law No. 16-118.....4

Public Use Clause ..... 1, 2, 11, 12-13

## INTRODUCTION

Petitioners seek review of a unanimous decision of the Supreme Court of Guam that applied well-established principles of the Public Use Clause to hold that the taking in this case was for a valid public purpose and in accordance with the policies of the Agana Plan.<sup>1</sup> The Agana Plan was adopted shortly after the devastation of Agana during World War II to promote the economic development of Guam's capital city and to establish "order out of chaos" by straightening the border lines and uniting fractional lots in order to form geometric, orderly blocks. In holding that the taking in this case was for a public purpose, the Court rejected the trial court's finding that multiple, contemporaneous takings were required to establish a valid economic development plan, and thus rejected the trial court's isolated review of the taking at issue separate and apart from the Agana Plan.

The Government of Guam invoked its inherent powers of eminent domain and condemnation in order to implement the Agana Plan by condemning property throughout Agana to consolidate and conform the confused nature of the municipality into orderly blocks and lots. The objective of uniting the previously fractional oddly-shaped land lots was to create a sanitary environment and to prevent Agana from turning into a slum city. Further, the Agana Plan would improve residents' access to their properties, and facilitate the development of infrastructure such as water, sewer, power lines and access to roads.

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1. Petition ("Pet.") at A-23-A-24.

The Supreme Court of Guam held that although the taking of Lot 237-3-2-1 was not contemporaneous with any known takings that occurred many years before, the Agana Plan imposed no limitations for the acquisition of private property and uniting fractional lots to contingent landowners. The Court further held that the absence of a limitations period was reasonable because economic development plans of this magnitude were by nature long term undertakings.<sup>2</sup> The Court properly exercised its judicial deference by not substituting its judgment with respect to the complicated mechanics of developing and implementing the Agana Plan.

Petitioners allege the taking of Lot 237-3-2-1 provided no public purpose and was simply a disguised impermissible taking benefitting only the Respondents. Petitioners effectively request that the taking in the matter be reviewed in isolation from the Agana Plan from which it resulted. However, the record reflects that there is no dispute that the Agana Plan was adopted for valid public purposes consistent with the Public Use Clause. Petitioners did not dispute such a fact in the lower courts, and each of the trial court, the Supreme Court of Guam, and the Ninth Circuit Court have found that the Agana Plan was adopted for valid public purposes.<sup>3</sup>

In conclusion, this case raises no issue of takings law of general importance warranting this Court's review.

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2. Pet. at A-20-A21.

3. See *Government of Guam v. Moylan Motor Co., Inc.*, 407 F.2d 567, 568 (9<sup>th</sup> Cir. 1969) (“We simply cannot distinguish the public purpose of establishing order out of chaos in the new Agana from redevelopment public purposes.”).

## STATEMENT OF THE CASE

Petitioners attempt to isolate the taking of Petitioners' property from the Agana Plan in order to convince this Court to accept this matter. However, this case does not test the limits of *Kelo v. City of New London*, 545 U.S. 469 (2005). Indeed, the Supreme Court of Guam followed and adhered to the guidance provided by this Court. The condemnation of the Petitioners' property was pursuant to and in accordance with a well thought-out comprehensive plan, involving exhaustive public input and participation, and complicated private and public procedures. Petitioners overstate their allegations in effectively asserting that out of the entire and enormous undertaking of the Agana Plan, somehow there was a concerted effort dedicated to primarily providing private benefits to Respondents, thereby reverting the Agana Plan into a private benefit plan with incidental public benefits.

In July, 1944, United States military forces returned to and reoccupied Guam, driving out Japan military forces. The village of Hagatna<sup>4</sup> was essentially destroyed by bombs during the reoccupation effort of the American forces.<sup>5</sup> The U.S. military and local government officials (hereinafter, the "Government") agreed to reconstruct the war-ravaged village, but recognized that following the pre-war lot lines could potentially create an unsanitary environment and turn Agana into a slum city.<sup>6</sup>

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4. The capital city of Guam was previously known as Agana, and is now legally known as Hagatna. *See* 1 Guam Code Annotated ("GCA") § 403(b).

5. Pet. at A-3-A-4.

6. *Id.*.

Prior to World War II, Hagatna had grown with oddly shaped lots and twisting, crooked streets.<sup>7</sup> After the war, the Government adopted the Agana Plan to consolidate and reform the “confused” nature of the municipality into orderly blocks and lots.<sup>8</sup> More specifically, the Agana Plan was designed to facilitate the development of infrastructure such as water, sewer, power lines, and access to roads, and to improve residents’ access to their properties.<sup>9</sup> In order to implement the Agana Plan, the Government invoked its inherent powers of eminent domain and condemnation.<sup>10</sup> The reconstruction representing the Agana Plan was codified under Guam law, and to this day, the Department of Land Management of the Government of Guam retains the power and authority to dispose of fractionalized lots taken over or owned by the Government.<sup>11</sup>

The Government originally filed its complaint seeking the condemnation of Lot No. 237-3-2-1 on December 1, 1981. On October 1, 1982, Petitioners filed an answer. But rather than contesting the validity of the taking, Petitioners initially only challenged the amount deposited by Respondents for just compensation. Shortly thereafter, on October 27, 1982, the Government enacted Public Law No. 16-118, mandating that the aforementioned lot be sold to Respondent Engracia F. Ungacta. Presumably, the Government believed there was no contestable issue other than the fair market value of the property.

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7. *Id.*

8. Pet. at B-2.

9. Pet. At A-33

10. Pet. at B-2.

11. Pet. at B-2-B-3.

On November 15, 1982, Government entered into an agreement to sell Lot No. 237-3-2-1 to Respondent Engracia Ungacta for the sum of Nine Thousand Seven Hundred Forty-Four Dollars (\$9,744.00). Two (2) years after the Government agreed to sell the property, on November 19, 1984, Petitioners filed a motion for leave to file an amended answer. Petitioners' amended answer, filed on April 8, 1985, asserted for the first time that property was not taken for a public purpose, but for the economic benefit and convenience of Respondents. On June 15, 1999, Petitioners filed a motion seeking a temporary restraining order against Respondents, restraining them from constructing a fence until the lawsuit was resolved.

A bench trial was conducted from January 20, 2010 to January 22, 2010. The trial court acknowledged that there is no dispute concerning the validity of the Agana Plan as being adopted for a valid public purpose.<sup>12</sup> However, the trial court dismissed the Government's Complaint involving the condemnation of the property owned by Petitioners, finding that the Government offered no evidence demonstrating that the taking in question was pursuant to and in accordance with the Agana Plan.<sup>13</sup> The trial court's rationale for rejecting the taking was the lack of other contemporaneous takings and the method of execution with respect to the taking at issue here.<sup>14</sup> Thus, the trial court analyzed the taking at issue in isolation from the Agana Plan.

Respondents appealed the trial court's decision to the Supreme Court of Guam, which, after carefully reviewing

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12. Pet. at B-7.

13. Pet. at B-8-B-9.

14. *Id.*

the record in this matter, held that the taking of Lot No. 237-3-2-1 was pursuant to and in accordance with the Agana Plan, and therefore the taking was for a valid public purpose.

The record in this matter reflects that it was undisputed that neither Petitioners nor Respondents questioned the validity of the Agana Plan as an economic development plan that satisfied the “public use” requirement.<sup>15</sup> Indeed, the Ninth Circuit Court of Appeals had already performed an analysis of the Agana Plan in *Government of Guam v. Moylan Motor Co., Inc.*, 407 F.2d 567, 568 (9<sup>th</sup> Cir. 1969), finding that the plan was adopted for a valid public purpose.

The issue present on appeal therefore was whether the trial court erred in misreading *Kelo* and holding that an economic development plan meeting public use purposes required multiple and contemporaneous takings.

The Supreme Court of Guam reversed the trial court, analogizing the taking to the takings found in *Midkiff* and *Norfolk*. The Court held that the Agana Plan imposed no limitations period for acquiring private property and uniting fractional lots of contingent landowners.<sup>16</sup> In addition, the Court held that the absence of a limitations period was reasonable because economic development plans of this magnitude were by nature long term undertakings.<sup>17</sup>

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15. Pet. at A-16.

16. Pet. at A-20.

17. Pet. at A-20-A21.

The Court discussed the mechanisms chosen by the Government to implement the Agana Plan, properly deferring to the Government by acknowledging that it is not the Court's function to substitute its judgments for that of the legislature.<sup>18</sup> Finally, although the Court acknowledged that the taking of Lot 237-3-2-1 occurred many years after any last known taking, it held that such delay did not negate the fact that the taking was calculated to achieve the objectives of the Agana Plan.

The Court held that Lot No. 237-3-2-1 was taken pursuant to and in accordance with the Agana Plan and was done pursuant to a valid public purpose.

## **REASONS FOR DENYING THE PETITION**

### **THE "PUBLIC USE" ISSUE PRESENTED IN THE PETITION DOES NOT WARRANT THIS COURT'S REVIEW**

#### **A. The Supreme Court of Guam's Decision Raises No Important Issue Warranting Review**

Petitioners argue that this case "tests the limits of the deferential 'public purpose' test articulated in [*Kelo*] for determining whether a taking that transfers property to a private party for alleged economic purposes satisfies the Public Use Clause."<sup>19</sup> Petitioners rely upon Justice Kennedy's concern in *Kelo* as articulated in his concurring opinion regarding takings "intended to favor a particular

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18. Pet. at A-22 (citations omitted).

19. Pet. at 2.

private party, with only incidental or pretextual public benefits.”<sup>20</sup>

This case does not remotely raise the concerns set forth by Petitioners or Justice Kennedy. Instead, as is evident in the Supreme Court of Guam’s analysis, the primary question at issue was whether the trial court erred by reviewing the taking in *isolation*, separate and apart from the Agana Plan. Indeed, Petitioner’s attack on this Court’s deferential “public purpose” test is misguided, as such policies have been part of this Court’s discourse for decades. *See Kelo*, 545 U.S. at 480 (“Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field.”). *Kelo* also highlighted the exact fatal position taken by Petitioners here with respect to an *isolated* review of each taking. *Kelo* sets forth the following discussion of the relevance of *Berman v. Parker*, 348 U.S. 26 (1954):

The owner of a department store located in the area challenged the condemnation, pointing out that his store was not itself blighted and arguing that the creation of a “better balanced, more attractive community” was not a valid public use. Writing for a unanimous Court, **Justice Douglas refused to evaluate this claim in isolation, deferring instead to the legislative and agency judgment that the area “must be planned as a whole” for the plan to be successful.** The Court explained that “community redevelopment programs

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20. Pet. at 3 (citing *Kelo*, 545 U.S. at 491).

need not, by force of the Constitution, be on a piecemeal basis--lot by lot, building by building.” The public use underlying the taking was unequivocally affirmed . . .

*Kelo*, 545 U.S. at 480-481 (emphasis added; citations omitted).

With respect to the one particular taking at issue in this case, Petitioners, like the owner of the department store in *Berman*, also seek to have this Court evaluate such taking in complete *isolation* from the Agana Plan. The trial court erred in agreeing with Petitioners despite such position being at complete odds with this Court’s jurisprudence. The Supreme Court of Guam properly deferred instead to the Government’s judgment that the ravaged capital city required nothing less than one comprehensive plan. The careful deference exercised by the Supreme Court of Guam in this matter did not test any limits of this Court’s deferential public purpose test. The exercise of deference based on the record before the Court was entirely consistent with the principals established by *Berman* and *Kelo*.

Petitioners also highlight Justice Kennedy’s concern in *Kelo* that “there may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause.”<sup>21</sup> Again, painfully stretching the facts, Petitioners perform an isolated review of the taking at issue by describing it as straightening “a portion of one lot line” for the sole

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21. Pet. at 3, quoting *Kelo*, 545 U.S. at 493.

private purpose of permitting Respondents access to a road.<sup>22</sup> Petitioners carefully ignore the record before the Supreme Court of Guam and its findings:

[W]e cannot distinguish the taking that occurred in this case from the takings that occurred in *Moylan*. **In both instances, lands held by private parties were taken to consolidate oddly shaped properties, reunify the fractional lots, and create geometric shaped lots in the village of Agana.** The fact that 22 parcels of land and about two dozen owners were involved in *Moylan* is not dispositive. The takings in *Moylan* were based on the original Agana Plan, as is the taking of Lot 237-3-2-1. As to legislative authorization, the legislature passed Public Law 16- 118, which clearly authorized the taking of Lot No. 237-3-2- 1. Accordingly, we conclude that the trial court erred in holding that the government's taking of Lot 237-3-2-1 was invalid.<sup>23</sup>

The record in this case does not present any overt concerns regarding inexpressible favoritism of private parties, including Respondents. As found by the Supreme Court of Guam, the taking in this matter was entirely consistent with the objections of the Agana Plan. The

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22. Pet. at 3. Indeed, Petitioners bury in footnote 1 the fact that Respondents lost access to the road south of their property decades before, without including the important fact that such access was lost due to an earlier implementation of the Agana Plan. Pet. At A-31, A-32.

23. Pet. at A-24. (emphasis added).

concerns of Petitioners are again overstated and do not warrant this Court's further review.

Ultimately, Petitioners assert that *this case* raises the question of whether prohibitions against private takings found in this Court's Public Use Clause precedent has force in practice, and is more than just a theoretical aspiration.<sup>24</sup> While potentially a worthy academic question with respect to any given case, as evident by the numerous law review authors cited by Petitioners, Respondents submit that based on the *record* in this case, and the Supreme Court of Guam's careful analysis of this Court's precedent, this case does not raise such questions. Instead, the disposition of this case by the Supreme Court properly followed this Court's guidance in determining that the Agana Plan is a proper public vehicle to reform the state of Agana following the ravages of war.

#### **B. The Supreme Court of Guam's Decision Is Consistent With *Kelo***

Petitioners, joined by its amici, challenge the Supreme Court of Guam's employment of a deferential standard of review to determine whether the proposed condemnation in this case advances a public use. The Supreme Court of Guam did not err in doing so. As this Court reaffirmed in *Kelo*, "public use jurisprudence has wisely ...afforded legislatures broad latitude in determining what public needs justify the use of the takings power." 545 U.S. at 483. Moreover, the role of the judiciary has been firmly established in this context. As the Court in *Hawaii Housing Authority v. Midkiff* explained:

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24. Pet. at 4.

There is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use . . . But the Court in *Berman* made clear that it is "an extremely narrow" one. The Court in *Berman* cited with approval the Court's decision in *Old Dominion Co. v. United States*, 269 U.S. 55, 66, 46 S.Ct. 39, 40, 70 L.Ed. 162 (1925), which held that deference to the legislature's "public use" determination is required "until it is shown to involve an impossibility." The *Berman* Court also cited to *United States ex rel. TVA v. Welch*, 327 U.S. 546, 552, 66 S.Ct. 715, 718, 90 L.Ed. 843 (1946), which emphasized that "[a]ny departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields." In short, the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use "unless the use be palpably without reasonable foundation." *United States v. Gettysburg Electric R. Co.*, 160 U.S. 668, 680, 16 S.Ct. 427, 429, 40 L.Ed. 576 (1896).

*Midkiff*, 467 U.S. 229, 240-241 (1984).

The Supreme Court of Guam's review was in line with this Court's precedent. Petitioners fail to raise any significant facts or law applicable in this case which warrant the introduction of a heightened Public Use

Clause scrutiny. Petitioners rely on the traditional and common assertion that the private recipient of property was identifiable or “picked out” prior to the taking.<sup>25</sup> As discussed above, Petitioner as a result requests that this Court revisit *Kelo* to address the danger that alleged economic development takings will be used as a pretext for advancing private interests. Petitioners assert that the facts of this case provide the ideal vehicle for addressing whether a heightened scrutiny should apply, and forbid, an economically premised property transfer that “appears intended to serve a private purpose.”<sup>26</sup>

The fear raised by Petitioners may indeed be present in a future case before this Court. However, the record in this matter presents no such danger. The Agana Plan was established decades before this case arose, and mapped out in sufficiently detailed fashion how the distorted lots were to be redrawn. As the undisputed record reflects, there is no corresponding incidental, trivial or implausible public purposes. The Agana Plan was a significant and necessary undertaking to provide order to Guam’s capital city following the ravages of World War II. Critically, the design and purpose of the taking at issue here was found to be entirely consistent with the objectives of the Agana Plan. Considering the breadth of the undertaking, it is completely apparent that the plan was established with little, if any, attention and recognition given to the private benefit obtained by Respondents. Indeed, this case is a perfect example of a private benefit being completely incidental to the important public purposes emphasized by the Agana Plan.

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25. Pet. at 17.

26. Pet. at 17.

Respondents, along with Petitioners and almost every significant original land owner in Agana, were picked out to lose certain fractional lots, and gain certain fractional lots, by the nature of the Agana Plan. Some parties took advantage of the initial mechanism of private negotiations to effectuate the straightening and consolidation of their lots. Others were subject as a last resort to condemnation proceedings. What is not in doubt is that the Agana Plan was not prepared and established in a vacuum. The Agana Plan was a necessary and complicated endeavor that included comprehensive public input, and significant mechanisms to avoid eminent domain proceedings. In light of such undertaking, Petitioners are clearly misguided in asserting that Respondents were singularly picked out to enjoy the benefits of the Agana Plan.

Furthermore, nothing in *Kelo* suggests that the Court's concern about the use of eminent domain for a purely "private purpose" reaches so far as to require the government to be unaware of the identity of any private beneficiary when the government authorizes the exercise of eminent domain for a public benefit. See *Kelo*, 545 U.S. at 482 (reaffirming the holding in *Midkiff*, 467 U.S. at 244, that a taking does not violate public use requirement merely because private parties ultimately receive the property, as "**it is only the taking's purpose, and not its mechanics,' ... that matters in determining public use**").

It is important to note that the Agana Plan was not a typical pure economic development plan like the plans present in *Kelo* and other cases. The Agana Plan did not specifically seek to take and transfer private property to other private individuals for the sole purpose of initiating large scale commercial developments. Instead, the Agana

Plan's primary objective was to straighten the border lines and unite fractional lots in order to form geometric, orderly blocks. The actual takings and transfers of private property were essentially collateral to this endeavor. See *Kelo*, 545 U.S. at 486 ("any number of cases illustrate that the achievement of a public good often coincides with immediate benefitting of private parties.").

Finally, Petitioners again perform an isolated review of the taking at issue by describing the public benefits of the one taking at issue here, in comparison to the private benefit enjoyed by Respondents. Of course, Petitioners improperly conclude that the public benefit is incidental to the private benefit derived by Respondents. As set forth above, an evaluation of a taking in isolation is against the guidance of this Court's jurisprudence. The Supreme Court of Guam's rejection of the Petitioner's and trial court's isolated review, and, deferring instead to the Government's judgment in crafting the comprehensive Agana Plan, was consistent with *Kelo*'s clear guidance on the matter.

### **C. There Is No Conflict Among The Lower Courts That Warrants This Court's Review**

Petitioners assert that lower courts are in conflict over how to identify a pretextual taking. In particular, Petitioners suggests that "lower courts have struggled to address and identify alleged pretextual economic development takings."<sup>27</sup> Whether or not lower courts have struggled to identify alleged pretextual economic development takings is irrelevant to the matter before

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27. Pet. at 19. (citation omitted).

this Court. The facts of this case do not include common economic development plans or significant private to private takings at issue in *Kelo* or other cases. The Agana Plan does not provide for a wholesale taking of property for distribution to private parties for commercial development. More importantly, however, the validation by each of the trial court, the Supreme Court of Guam, and the Ninth Circuit Court of Appeals that the Agana Plan was adopted for valid public purposes, precludes any relevance with respect to the struggle to identify alleged pretextual economic development takings. As set forth above, the disposition of this case by the Supreme Court of Guam properly followed this Court's guidance in determining that the Agana Plan is a proper public vehicle to reform the state of Agana following the ravages of war.

Furthermore, Respondents submit that this Court should affirm regardless of whether or not it agrees with Petitioners that Courts have struggled to identify alleged pretextual economic takings. Petitioners argue that the Supreme Court of Guam improperly deferred to the Government's assertion that the taking properly served a public purpose, in light of multiple alleged facts indicating that the taking actually served Respondents' private purposes.<sup>28</sup> Petitioners again ignore the entire connection between the Agana Plan and the taking at issue here. See Pet. at A-24, where the Guam Supreme Court found that in both this case and *Moylan*, lands held by private parties were taken to consolidate oddly shaped properties, reunify the fractional lots, and create geometric shaped lots in the village of Agana, consistent with the entire objective of the Agana Plan. Petitioners' continued and repetitive references to the *mechanics* employed by the Government,

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28. Pet. at 27.

for better or worse, does not change the character of the taking here from a predominantly public purpose to a primarily private purpose. It is only the taking's purpose, not its mechanics, that matters in determining public use. See *Midkiff*, 467 U.S. at 244. As repeatedly set forth above, there is simply no factual basis for Petitioners' "pretext" allegations in this case.

In any event, Petitioners cite a number of cases in an attempt to establish a supposed conflict in the analysis of economic development takings after *Kelo*. The limited case law suggests a restricted conflict at most, and Petitioners clearly overstate the alleged chaotic state of the law in this area. Respondents submit that a review by this Court would be premature.

Petitioners cite *County of Hawaii v. C&J Coupe Family Ltd. P'ship*, 198 P.3d 615 (Haw. 2008) and *Franco v. National Capital Revitalization Corp.*, 930 A.2d 160 (D.C. 2007) for the proposition that some courts focus on the private benefits derived from the taking; *Middletown Township v. Lands of Stone*, 39 A.2d 331 (Pa. 2007) for the proposition that some courts consider the real and actual public purpose behind the takings; *Carole Media LLC v. New Jersey Transmit Corp.*, 550 F.3d 302 (3<sup>rd</sup> Cir. 2008) for the proposition that some courts focus on whether the private beneficiary of a taking was known prior to the taking; *Mayor of Baltimore City v. Valsamaki*, 916 A.2d 324 (Md. 2007) for the proposition that the scope of planning is relevant in determining whether a taking is for a public purpose; and of course, the case at hand and others for the proposition that courts are required to defer to a taking's public purpose rationale, despite alleged presence of factors that may indicate a private purpose.

Clearly, none of the propositions set forth above, even if adopted by the Supreme Court of Guam in place of the deference it exercised with respect to its analysis of the Agana Plan, would change the outcome in this matter. The private benefits derived by Respondents were incidental compared to the required necessity of reforming Agana after the war. The real and actual purpose of the Agana Plan has been set forth repeatedly above, and all the parties and each court considering the matter agreed that the Agana Plan served a significant public purpose. The Agana Plan was a comprehensive undertaking, which identified multiple landowners whose property were to be consolidated and conformed into orderly blocks and lots. As such, the nature of the Agana Plan made it nearly impossible to have any relevant focus to purposely identify particular landowners to benefit from the plan. A court's focus on whether private beneficiaries were identified beforehand would be irrelevant to the outcome of this matter. Finally, the Agana Plan was an undertaking to reform and redevelop a war ravaged capital city. The scope of planning was an undertaking the territory had never experienced before. While the implementation and various mechanics used to accomplish the Plan's objectives were not perfect, again, the extent of the Agana Plan clearly supports a public purpose.

Based on the foregoing, this Court should refrain from taking this case.

**CONCLUSION**

The petition for writ of certiorari should be denied.

Respectfully submitted,

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