No. _____

In the

Supreme Court of the United States

ARTEMIO M. ILAGAN and CARMELITA ILAGAN; 162.40 Square Meters of Land More or Less, Situated in the Municipality of Agana and Unknown Owners,

Petitioners,

v.

ENGRACIA UNGACTA AND FELIX UNGACTA; GOVERNMENT OF GUAM,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Guam

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Mr. Ilagan owns land on which he owns and operates an apartment building. His neighbors—the Ungactas—own an adjacent, residentially zoned lot. In 1981, the Ungacta property lacked access to a road. That same year, while Mr. Ungacta was Mayor of the City of Agana, the Ungactas appraised a part of Mr. Ilagan's property that had access to a road and which was used to provide parking for tenants of the Ilagan apartment. Soon after, the government condemned the appraised area, paying for it with compensation supplied by the Ungactas, and transferred it to the Ungactas.

The government justified the property transfer as an "economic development" measure occurring under the "Agana Plan," a post-World War Two redevelopment plan enacted to reconfigure irregular lot lines in Agana. The Plan had been defunct for seven years prior to the 1981 Ilagan taking. When active, it did not contemplate a single lot taking and had never been used that way. No other lots were taken under purported authority of the Plan at the time of the Ilagan taking. In the 30 years since then, the Plan has never been used to take any property. Although the Guam trial court held the taking unconstitutional, the Guam Supreme Court reversed. At the urging of the Real Parties in Interest Ungactas (the Government did not appeal), that court applied a standard of "judicial deference" pursuant to *Kelo v. City of New London*, 545 U.S. 469 (2005), and held the taking served a valid public purpose.

The Questions Presented are:

1. Does the Public Use Clause of the Fifth Amendment prohibit a taking which the government claims is for economic development, when the evidence shows it is actually designed to give property to a favored private party for that party's own private purposes and enjoyment?

2. Does the doctrine of *Kelo v. City of New London*, 545 U.S. 469 (2005), according deference to a legislative claim that a taking serves a public economic purpose, apply when there is a real risk that the taking serves a private purpose because (a) the taking was initiated and funded by the private party who acquired the property; (b) that party was identified before the taking, (c) the taking produces no meaningful public benefit, but (d) clearly advances the private goals of the property transferee?

LIST OF ALL PARTIES

All parties have been identified on the caption.

CORPORATE DISCLOSURE STATEMENT

No corporations have an interest in this suit.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Artemio M. Ilagan and Carmelita Ilagan respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Guam.

OPINIONS BELOW

The opinion of the Guam Supreme Court was originally issued on October 18, 2011. It is published at 2011 Guam 17. The opinion is attached here as Appendix A. The court denied rehearing in an opinion dated September 11, 2012. This opinion is attached as Appendix C.

The unpublished opinion of the Guam Superior Court was issued on June 25, 2010. It is attached here as Appendix B.

JURISDICTION

This Court has jurisdiction over this case under 28 U.S.C. § 1257(a), and the Fifth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides, in pertinent part, "nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment provides, in pertinent part, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

This case tests the limits of the deferential "public purpose" test articulated in *Kelo v. City of New London*, 545 U.S. 469 (2005), for determining whether a taking that transfers property to a private party for alleged public economic purposes satisfies the Public Use Clause. In *Kelo*, the Court considered a taking that transferred a private home from its owner to a private corporation for the purpose of implementing a comprehensive redevelopment plan designed to increase tax revenue and jobs. A majority of the Court held that since the redevelopment plan underlying the taking served valid public purposes, the taking itself served such a purpose (and so, satisfied the Public Use Clause), despite the fact that it benefitted a private party.

The *Kelo* majority cautioned, however, that the government "would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party." *Id.* at 477. Justice Kennedy's concurrence—the deciding vote—similarly observed that *Kelo*'s deferential "public

purpose" standard would not sustain an economic development taking "intended to favor a particular private party, with only incidental or pretextual public benefits." *Id.* at 491 (Kennedy, J., concurring). Justice Kennedy elaborated that "[t]here 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." *Id.* at 493 (Kennedy, J., concurring) (citation omitted).

This case presents the very scenario that concerned the Justices in *Kelo* (and alarmed the public and commentators): a taking and resulting transfer of property from one owner to another that bears all the hallmarks of a disguised and impermissible private taking. Ostensibly justified as an economic development measure (because it straightened a portion of one lot line), the taking here transferred a parcel from one property owner to his politically connected next-door neighbor so the neighbor could have access to a road. Supplemental Excerpts of Record (SER) at 1-2. The taking was initiated and paid for by the neighbor, Petition Appendix (Pet. App.) at B-3, and occurred without reference to any active, comprehensive development plan. *Id.* at B-3, B-8. Despite the evidence that the taking was for private purposes and benefit, the Guam Supreme Court deferred to the government's economic development justification and upheld the taking as a valid public purpose. Pet. App. at A-22-A-23.

Consequently, this case raises an important constitutional issue as to whether the Public Use Clause—as interpreted in *Kelo*—will permit the government to use an economic justification as a

pretext for carrying out a taking that is designed to serve the private purposes of a particular, favored private party. Post-*Kelo* lower courts are regularly confronting claims of pretextual economic development takings, and they are sharply divided on the proper approach to such claims. Ultimately, this case raises the question of whether the prohibition against private takings found in this Court's Public Use Clause precedent has force in practice, and is more than just a theoretical aspiration.

FACTS

A. The Property, the Taking, and the Transfer of Title to the Ilagans' Neighbors

This case arises from the 1981 condemnation of a small area of land located in Hagatna, Guam. Hagatna, the capitol city of Guam, was formerly known as Agana. Petition Appendix (Pet. App.) at B-1. Historically, the condemned area was a portion of a larger parcel owned by the Ilagans, *id.* at B-2, and used by them to operate an apartment building. The condemned area had been specifically used by the Ilagans to provide parking for their apartment tenants. Pet. App. at A-8. The condemned land has access to a public road on its north side.

The Ungactas own a parcel of land immediately to the west of the Ilagans' property. In 1981, their parcel contained a home, but lacked access to a public road.[1] In early 1981, Felix Ungacta—then Mayor of the City of Agana—commissioned an appraisal of a portion of the Ilagans' land that was situated to the northwest of

[1] The Ungactas lost access to a road to the south of their property decades before.

the Ungactas' property and which had road access. Pet. App. at A-5. The appraisal valued this land at $9,744.[2] *Id.*

A few months later, the Government of Guam filed a Declaration of Taking to condemn the land appraised by the Ungactas, giving it the designation of Lot 237-3-2-1. *Id.* at A-5-6. On December 21, 1981, Engracia Ungacta deposited $9,744 dollars with the Government. Later the same day, the Government deposited that same amount in the court.[3] Pet. App. at B-3.

The Government's Declaration of Taking stated that it was taking the Ilagans' land for "the use and benefit of the people of the Territory of Guam. The property taken under the aforesaid authority is to be used for economic development, together with access for purposes necessary or incidental to said project." SER at 1-2. In October, 1982, while the condemnation action remained pending, the Guam legislature passed a law promising to sell the condemned land to the Ungactas. Pet. App. at A-5-A-6.[4]

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[2] At a later trial, unrebutted evidence showed that the property was really worth $45,000. Pet. App. at B-3.

[3] At trial, the government stated that the only money available to pay for the condemned land was the $9,744 that came from the Ungactas. SER at 24.

[4] That law—Public Law 16-118—provided, in pertinent part:

> Notwithstanding any other provisions of law with respect to the sale of government land including but not limited to the Chamorro Land Trust Act and the laws requiring the concurrence of the Legislature in the sale of government land, the Governor shall sell at fair market

(continued...)

Thereafter, and still before this eminent domain action was resolved in the courts, the Government executed documents transferring title to the subject property to the Ungactas. Pet. App. at B-2. In November, 1983, the Government entered into a written contract for the sale of the parcel to Engracia Ungacta. In September, 1984, Engracia transferred her interest in the property to her son, Felix Ungacta, and his wife, Evelyn Ungacta. In 1988, the Government issued a Certificate of Title for the lot to Felix and Evelyn Ungacta. *Id.*

The Ilagans' property accordingly became part of the Ungactas' land, giving the Ungactas access to the public road lying to the north of the condemned property. The Ungactas no longer have a home on their property (and have not for many years), and the tract they acquired from the Ilagans through condemnation sits unused and vacant. Pet. App. at B-2. For their part, the Ilagans lost five parking spaces for their apartment tenants and guests, SER at 32, and experienced a loss of rental income as a result.

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[4] (...continued)
value to Engracia F. Ungacta, government real property located in the municipality of Agana, particularly described as follows:

> Agana Fractional Lot No. 237-3-2-1, containing an area of 162.40 square meters, situated within Lot 35, Block No. 10, New Agana, Land Management Drawing No. 14-81T149.

Pet. App. at A-5-A-6.

B. The Agana Plan

In a Supplemental Complaint filed against the Ilagans' property in 1985, the Government alleged that the taking of the Ilagans' land—and its transfer to the Ungactas—was "in accordance with the fractional Lot 'Agana Plan.'" SER at 3 ¶ 1.

The Agana Plan arose from the United States' occupation and reconstruction of Guam after World War Two. Pet. App. at A-4. Prior to the War, the City of Agana was characterized by a haphazard and irregular configuration of lots and streets. *Id.* at A-3. After the War largely destroyed the City, the American military and provisional local government "created the Agana Plan to straighten the village lot lines and streets into modern, geometric blocks." *Id.* at A-4. The Plan divided the City into 30 Blocks. It then proposed the use of eminent domain to take all existing lots within such areas for the purpose of reconfiguring lot lines and streets to create a geometric pattern. Pet. App. at B-2; *id.* at A-4. The reconfigured lots of property would then be sold back to property owners in their new configuration. Under the Plan, all lots within every Block were to be taken. Pet. App. at C-5-6.

The creators of the Plan understood that implementation of geometric lot lines and patterns would create some left-over pieces of property, called "fractional lots." Pet. App. at A-4. The Plan provided that any pre-existing or Plan-created fractional lots would be consolidated with newly created rectangular lots. *Gov't of Guam v. Moylan,* 407 F.2d 567, 567 (9th Cir. 1969). To accomplish this, the Plan gave "the contiguous landowner with the largest area in terms of

square meters . . . first priority" in purchasing any adjacent fractional piece of property. Pet. App at A-4.

The Agana Plan was executed between 1947 and 1974. Pet. App. at A-5. It was upheld, on its face, as a valid exercise of the government's eminent domain power in *Moylan*, 407 F.2d 567. By 1974, however, the Plan had become inactive, and was no longer used. Pet. App. at B-3.

When the property at issue here was taken from the Ilagans in 1981 and given to the Ungactas, it partially straightened the lot line between the Ilagans' and Ungactas' properties, in addition to giving the Ungactas road access. Pet. App. at C-3. No other crooked lot lines within the Block were adjusted at the time. There were "no other contemporaneous takings of land in the neighborhood 'despite clear evidence . . . that such takings would be required if the Agana Plan were in fact being followed.'" Pet. App. at B-8. Indeed, the only property ever taken in the Ilagans' Block is the parcel here. This taking "occurred many years after the government's last known condemnation proceeding under the Agana Plan." Pet. App. at A-14. In the three decades since the taking of the Ilagans' parcel, no other property has been taken anywhere in Hagatna under alleged authority of the Agana Plan, though many areas remain "irregularly" configured. Pet. App. at B-2, C-6.

C. Procedure

The Government initiated this case by filing a Complaint in Condemnation on December 12, 1981. Pet. App. at B-2. The Ilagans timely filed an Answer. In 1985, the Government filed its Supplemental Complaint and the Ilagans filed an Amended Answer

which contended that the taking of their land was for the "economic benefit . . . of private parties," not for a public purpose, and "unlawful." Pet. App. at A-6; SER at 7. The Ungactas appeared as real parties in interest. Pet. App. at B-1.

1. The Trial Court Holds That the Taking Does Not Serve a Public Purpose

The case went to trial more than two decades later, in 2009. Observing that *Kelo* did not sanction "'[a] one-to-one transfer of property, executed outside the confines of an integrated development plan,'" Pet. App. at B-9 (quoting *Kelo*, 545 U.S. at 487), the trial court held that "[t]his type of transfer appears to be exactly what has occurred in this case." *Id.* The court further explained that "the [Ilagan] taking was not a proper execution of the Agana plan" as "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." *Id.* at B-8-B-9. Thus, the trial court held that "there was no valid public purpose for this taking, and that it was therefore improper." *Id.* at B-10.

2. The Guam Supreme Court Reverses

The Government did not appeal the trial court's ruling to the Guam Supreme Court, but the Ungactas did as Real Parties in Interest. After concluding that the Ungactas had standing to alone defend the taking, Pet. App. at A-8-A-14, the Guam Supreme Court reversed the trial court's decision. In so doing, the court concluded that this Court's precedent mandated a lenient standard of review:

> In the seminal case of *Kelo v. City of New London*, the United States Supreme Court solidified an expansive interpretation of the eminent domain power—first articulated in *Berman*, and later *Midkiff*—that governments may take one's private property and give it to another for the purpose of promoting economic development.

Pet. App. at A-16. The test, the court continued, "was 'public purpose,' which was to be defined 'broadly, reflecting [the] long-standing policy of deference to legislative judgments in this field.'" *Id.* (quoting *Kelo*, 545 U.S. at 480) (internal citations omitted).

The Guam Supreme Court therefore adopted a standard of limited review such that "'where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.'" *Id.* at A-23 (citing *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 241 (1984)). Applying this test, the court found that the Ilagan taking advanced the Plan's economic development purposes and policies. *Id.* The court emphasized that "[t]he standard [it] adopted to arrive at this conclusion is one of 'judicial deference.'" Pet. App. at C-3.

In upholding the taking, the Guam Supreme Court rejected the contention that the circumstances of the transfer of the Ilagans' land to the Ungactas negated the presumption of validity owed, under *Kelo*, to a governmental assertion that a taking served an "economic development" purpose. Pet. App. at A-22.

The Guam Supreme Court denied rehearing. The Ilagans now timely petition this Court for review of the lower court's decision.

REASONS FOR GRANTING THE WRIT

THIS CASE RAISES AN IMPORTANT QUESTION, ON WHICH LOWER COURTS CONFLICT, AS TO WHETHER THE PUBLIC USE CLAUSE PROHIBITS THE GOVERNMENT FROM USING AN "ECONOMIC DEVELOPMENT" RATIONALE AS A PRETEXT TO TRANSFER PROPERTY TO A PARTICULAR PRIVATE PARTY FOR PRIVATE PURPOSES

A. The Court Must Revisit *Kelo* To Clearly Address the Danger That Alleged Economic Development Takings and Property Transfers Will Be Used as a Pretext for Advancing Private Interests

Kelo's holding that the Public Use Clause does not forbid a taking that transfers property from its owner to a private party where the transfer is designed to facilitate a broader economic redevelopment plan—itself anticipated to benefit the public—was perhaps one of the most controversial judicial decisions of the modern era. It triggered a fear that the government had been set loose to take property at will so as to give it to others. *Kelo*, 545 U.S. at 503 (O'Connor, J., dissenting); Abraham Bell, *Private Takings*, 76 U. Chi. L. Rev. 517, 518 (2009) ("The popular firestorm surrounding the Supreme Court's

recent ruling in *Kelo v. City of New London* focused on public incomprehension that the government may simply take property from one private property owner and transfer it to another private owner." (footnotes omitted)). Indeed, *Kelo*'s deferential standard of review raised the specter that governments (and their private partners) could concoct "economic development" justifications to carry out takings and property transfers that were actually designed to reward favored parties at the expense of the powerless. *Kelo*, 545 U.S. at 505 (O'Connor, J., dissenting); Ilya Somin, *Overcoming* Poletown*:* County of Wayne v. Hathcock*, Economic Development Takings, and the Future of Public Use*, 2004 Mich. St. L. Rev. 1005, 1007-08 (Economic development takings "allow politically powerful interest groups to 'capture' the condemnation process for the purpose of enriching themselves at the expense of the poor and politically weak."); Charles E. Cohen, *Eminent Domain After* Kelo v. City of New London*: An Argument for Banning Economic Development Takings*, 29 Harv. J.L. & Pub. Pol'y 491, 547 (2006) (agreeing that a danger that a "politically powerful minority can capture control of governmental processes, using these processes for its own enrichment" is "especially troubling in the area of economic development takings").

Such fears were real and important enough to warrant attention in all of the opinions in the *Kelo* case. In addition to noting that the government "would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party," *Kelo*, 545 U.S. at 477, the *Kelo* majority emphasized that the government would not "be allowed to take property under the mere

pretext of a public purpose, when its actual purpose was to bestow a private benefit." *Id.* at 478.

Justice Kennedy's concurrence also recognized the concern that, after *Kelo*, the Public Use Clause would permit the government to engage in property transfers designed to benefit particular private citizens. His opinion stated that under the Public Use Clause, a court "should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits." *Id.* at 491 (Kennedy, J., concurring). His opinion further anticipated that "[t]here 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." *Id.* at 493 (Kennedy, J., concurring). That is, "there may be categories of cases in which the transfers are so suspicious, or the procedures employed so prone to abuse, or the purported benefits are so trivial or implausible, that courts should presume an impermissible private purpose." *Id.*

Despite the justices' attempts to provide some assurance that *Kelo* would not open the door for the government to carry out private takings in the name of economic progress, they failed to provide any concrete guidance on how and when courts should identify takings as pretextual and improper. Daniel B. Kelly, *Pre-textual Takings: Of Private, Developers, Local Governments, and Impermissible Favoritism*, 17 S. Ct. Econ. Rev. 173, 174 (2009). The majority and concurring *Kelo* opinions did point to several criteria that suggested that pretext was not a problem in *Kelo* itself, *i.e.*, the taking was part of an "integrated

development plan," the transferee was not known before hand, and the public benefits were not incidental. *Kelo*, 545 U.S. at 487, 492; *id.* at 493 (Kennedy, J., concurring). But neither the majority nor concurring *Kelo* opinion clearly outlined whether contrary factual circumstances would—in isolation or in combination—trigger a heightened form of scrutiny designed to ferret out an impermissible private taking operating under the veil of a purported public purpose. The Court instead left this critical question for another day. *Kelo*, 545 U.S. at 487; *id.* at 493 (Kennedy, J., concurring); Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 Cornell L. Rev. 1, 65 (2006) ("[T]he majority and Justice Kennedy left unanswered the question of how courts should determine when a taking becomes too private to constitute a public use.").

The *Kelo* Court's refusal to offer a clear framework for identifying (and striking down) private takings disguised as public measures exacerbated the concern that *Kelo* invited governments to take property to give to favored, private patrons. John Dwight Ingram, *Eminent Domain After* Kelo, 36 Cap. U.L. Rev. 55, 57 (2007) ("If the *Kelo* definition of 'public use' is applied, no private property will be protected from condemnation. A small business will always provide fewer jobs and tax revenues than a big national retail chain. The same can be said if a church is replaced by a large hotel, or a community of homes by a large manufacturing plant."). Indeed, the *Kelo* dissenters objected to the majority opinion largely because they believed it put all private property at risk of being taken for the use and gain of economically powerful private parties. *Kelo*, 545 U.S. at 503-04 (O'Connor, J.,

dissenting). The dissenters did not believe the majority and concurring justices' vague assurance that their opinions would not countenance naked property transfers from A to B. *Id.* at 502-04 (O'Connor, J., dissenting).

The "real world" basis for fears that eminent domain can and will be abused for private gain in the post-*Kelo* "economic development" context persist as well. Despite the slowing economy, governments (and parties hoping to harness the eminent domain power), continue to take private land to give it to particular private parties for alleged economic reasons. 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, 729 (2011) ("Cities throughout the developed and developing world are undergoing intense redevelopment, most of it the result of extensive use of the tool of public-private partnerships, including the necessary ancillary use of eminent domain."). In fact, since *Kelo*, governments have used the "economic development" justification to

* take property from a family owned marina and seafood business to give it to a private marina developer, *Western Seafood Co. v. United States*, 202 Fed. Appx. 670, 671 (5th Cir. 2006); *see also* Carla T. Main, *Bulldozed: "*Kelo*," Eminent Domain, and the American Lust for Land* (2007);

* take a thriving cigar store to give the land to a hotel developer that wanted to build an L-shaped hotel, rather than a rectangular one. *Redevelopment Agency of San Diego v. Mesdaq*, 65 Cal. Rptr. 3d 372, 376 (Cal. Ct. App. 2007); *see also* Timothy Sandefur, *Property Rights in 21st Century America* 28-29 (2006);

* enter property owned by a motor freight company so as to conduct surveys in preparation for taking the property to give it to a shopping mall developer; *RLR Invs., LLC v. Town of Kearny*, 386 Fed. Appx. 84, 85 (3d Cir. 2010);

* take residential land to give it to a technology park developer known beforehand. *Whittaker v. County of Lawrence*, 674 F. Supp. 2d 668, 673-74 (W.D. Pa. 2009).

Without elucidation of a firmer barrier against pretextual takings, there is little to stop governments from using "economics" as a method to redistribute property from less-favored owners to more politically influential ones. Cohen, *Eminent Domain After* Kelo, 29 Harv. J.L. & Pub. Pol'y at 549 ("If the government can use the eminent domain power as a tool for revenue enhancement or job growth, the temptation and the opportunity to overuse the power [to transfer property to private interests] may be too great."). That is, as it stands now, governments face little constitutional disincentive to employing eminent domain to reward favored developers, donors, and other private parties by giving them land owned by others, for the transferee's private benefit.[5] *Kelo*, 545 U.S. at 502-04 (O'Connor, J., dissenting); *see also, Kaur v. New York State Urban Dev. Corp.*, 72 A.D.3d 1, 21 (N.Y. App. Div. 2009), *rev'd* 933 N.E.2d 721 (N.Y.

[5] States have failed to provide property owners with more protection against economic development takings after *Kelo*, despite a flurry of calls for such protections. Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 Minn. L. Rev. 2100, 2114 (2009). As a result, "[t]he federal constitutional standard enunciated in *Kelo* appears dominant throughout the states." Mihaly & Smith, Kelo*'s Trail*, 38 Ecology L.Q. at 729.

2010), *cert. denied*, *sub nom. Tuck-It-Away, Inc. v. New York State Urban Dev. Corp.*, 131 S. Ct. 822 (2010) (finding that a condemnor took land for the express and pre-determined purpose of giving it to Columbia University—which proposed the taking—after conducting a blight study "biased in Columbia's favor").

This case exemplifies this problem and provides an ideal vehicle for addressing the important issue—recognized but unresolved in *Kelo*—of whether heightened Public Use Clause scrutiny applies to, and forbids, an economically premised property transfer that appears intended to serve a private purpose. After all, this case contains all the factual criteria identified in *Kelo* as potentially relevant to whether a taking was "intended to favor a particular private party, with only incidental or pretextual public benefits." *Kelo,* 545 U.S. at 491 (Kennedy, J., concurring). The persons obtaining the Ilagans' land in this case—their neighbors, the Ungactas—were "picked out" before the taking. *Id.* at 492. In fact, the Ungactas, not the government, proposed and paid for the taking. Pet. App. at A-5, B-3. The private benefits are obvious and paramount—the Ungactas acquired access for their property. *Id.* at B-10.

On the other hand, the public benefit is incidental or *de minimis*. Certainly, the public has no direct use of the condemned property and there is no claim that the taking is expected to produce jobs or increased revenue. The Ungactas do contend the transfer of the Ilagans' land to them provided a benefit to the public by straightening a part of one lot line between their property and the Ilagans'. But it is unclear how this event benefits the public at all, particularly since it did not occur as part of a larger, active redevelopment plan

(*e.g.*, the Agana Plan), but as an isolated instance. Pet. App. at B-9. Indeed, the single lot taking here was inconsistent with the procedures, use, and intent of the Agana Plan. *Id.* at B-8; C-5.

In any event, the private benefit from the taking far outweighs any conceivable indirect public benefit. This is best illustrated by the fact that the government of Guam no longer defends the taking as a necessary public action, having declined to appeal the trial court's adverse decision. Only the benefitting private party—the Ungactas—defends the taking.

This is, in short, the case that the *Kelo* dissenters correctly foresaw would arise from the majority opinion: one where the government takes one person's property to give it to another private citizen for its own use and purposes, under the guise of a public economic purpose, and to which a court feels bound to turn a blind eye. It raises the very pretext situation that the majority and concurring justices in *Kelo* assured would not be tolerated. "[T]he risk of undetected impermissible favoritism of [the Ungactas] is so acute that a presumption" that the transfer of the Ilagans' land to their neighbors was for a private purpose is warranted in this case. *See Kelo,* 545 U.S. at 493 (Kennedy, J., concurring).

And yet, the Guam Supreme Court construed this Court's precedent to require extreme deference to the taking, permitting the transfer of the Ilagan's land to serve the Ungactas' private interests. The Court should grant the Petition to confirm that this was wrong, that neither *Kelo* nor the Public Use Clause allows the government to shift property from one person to another on the flimsiest economic rationale when all objective evidence shows the taking is really

being accomplished to assist a particular, known private person and his own purposes.

B. State Supreme Courts and Federal Courts Are in Conflict and Confusion on How To Identify a Pretextual Taking

Kelo suggested that heightened public use scrutiny would apply to, and void, a taking that transfers property to a private person under a pretextual economic purpose. But, deprived of any solid guidance on this issue from *Kelo*, lower courts have struggled to address and identify alleged pretextual economic development takings. Ilya Somin, *The Judicial Reaction to* Kelo, 4 Alb. Gov't L. Rev. 1, 3 (2011) ("[F]ederal and state courts have been all over the map in their efforts to apply *Kelo*'s restrictions on 'pretextual' takings. There is no consensus in sight on this crucial issue. It may be that none will develop unless and until the Supreme Court decides another case in this field."); Kelly, *Pretextual Takings*, 17 S. Ct. Econ. Rev. at 176 ("[T]he [*Kelo*] Court's lack of clarity, has created significant uncertainty for both litigants and lower courts.").

In general, courts faced with pretextual takings claims have focused on factual criteria highlighted in the *Kelo* opinions. But they draw sharply divergent conclusions as to which criteria are most relevant to determining whether a private taking is at hand. Several courts have concluded that the extent of the private benefit derived from an alleged economic development taking is the primary determinant of an impermissible and pretextual private taking. Others have held that only the actual motives of government officials are relevant to whether a taking can be found

to serve a private purpose. Still other courts focus on the nature and scope of the planning process; if extensive and careful, a pretextual taking is not a serious concern. Then there are courts, including the Guam Supreme Court in this case, that apply such a deferential standard of review to economic development takings that a pretextual taking will not be found despite multiple indications that one is present.

1. The Highest Courts of Hawaii and the District of Columbia, as Well as Some Federal Courts, Focus on the Benefits Derived from the Taking

A number of high courts have read *Kelo* as allowing (or even requiring) them to skeptically examine a purported economic development taking, as a potential pretext for a private taking, if the private benefit predominates over the public benefit. In *County of Hawai'i v. C&J Coupe Family Ltd. P'ship*, 198 P.3d 615 (Haw. 2008), the Hawaii Supreme Court concluded that "the *Kelo* majority opinion . . . allows courts to look behind an eminent domain plaintiff's asserted public purpose under certain circumstances." *Id.* at 638. In particular, the court held that "*Kelo* make[s] it apparent that, although the government's stated public purpose is subject to prima facie acceptance, it need not be taken at face value where there is evidence that the stated purpose might be pretextual." *Id.* at 644. The Court directed the lower court to engage in a "pretext" analysis, primarily by considering whether the taking "provided a predominantly private benefit." *Id.* at 647.

To the same effect is *Franco v. National Capital Revitalization Corp.*, 930 A.2d 160 (D.C. 2007). The issue in *Franco* was whether a taking that transferred private property to a shopping mall developer, for the alleged purpose of economic development, satisfied the Public Use Clause. The court stated: "*Kelo* makes clear that there is room for a landowner to claim that the legislature's declaration of a public purpose is a pretext designed to mask a taking for private purposes . . . ." *Id.* at 171. The court further concluded that when a property owner makes a serious allegation that a taking is designed to serve a private purpose, and that official declarations of a public purpose are pretextual, "a reviewing court must focus primarily on benefits the public hopes to realize from the proposed taking. 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." *Id.* at 173-74 (footnote omitted).

The court found that the property owner's allegations that the government selected the benefitting developer before the taking, that the developer guided the condemnation process, and that there was no comprehensive development plan gave rise to a potential pretextual taking. Thus, as in *C&J Coupe*, the *Franco* court remanded the case for the lower court to more closely consider whether the taking primarily produced private, rather than public, benefits. *Id.* at 173.

MHC Financing, Ltd. v. City of San Rafael, No., 2006 U.S. Dist. LEXIS 89195 (N.D. Cal., Dec. 5, 2006); *MHC Financing, Ltd. v. City of San Rafael*, No. C-00-03785 VRW, 2008 U.S. Dist. LEXIS 119655 (N.D. Cal. Jan. 29, 2008), adds to this line of cases. In an initial opinion, a federal district court held that *Kelo* required "careful and extensive inquiry into whether, in fact, the development plan is of primary benefit to the developer . . . [and] only incidental benefit to the City." 2006 U.S. Dist. LEXIS 89195, at *43. In a post-trial opinion, the court held that the Ordinance at issue did not provide the asserted public benefits, but instead primarily worked to provide economic benefits to private parties. *Id.* at *63-64. The court held that the economic evidence confirmed "that the City imposed the Ordinance under the mere pretext of a public purpose." *Id.* at *64.

2. Other Courts Seek To Identify Pretextual and Impermissible Private Takings by Inquiring into the Actual Motivations of the Condemning Authority

In contrast to those courts focusing on the scope of private and public benefits, other courts considering whether a condemnation masks a taking for private purposes focus on the actual motives of the condemnor. For instance, in *Middletown Township v. Lands of Stone*, 39 A.2d 331 (Pa. 2007), the Pennsylvania Supreme Court held that it had to consider "the real or fundamental purpose behind the taking . . . [and] the true purpose must primarily benefit the public." *Id.* at 337. The appellate court in *Kaur v. New York State Urban Development Corp.* also honed in on intent, finding that evidence that the condemnor

had deliberately favored Columbia University demonstrated the redevelopment taking was pretextual under *Kelo*. 72 A.D.3d at 12-16.

A number of pre-*Kelo* decisions also hold that evidence going to the subjective intent of the officials taking (and transferring) property for alleged economic reasons determines whether the proffered purpose was pretextual or legitimate. *See, e.g.*, *99 Cents Only Stores*, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001) (holding that "no judicial deference is required . . . where the ostensible public use is demonstrably pretextual" and that the condemnation was invalid because "Lancaster's condemnation efforts rest on nothing more than the desire to achieve the naked transfer of property from one private party to another"); *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.").

3. The Third Circuit Focuses on Whether the Private Beneficiary of a Taking and Property Transfer Was Known Beforehand

Standing alone for the moment, the Third Circuit appears to focus on whether the private beneficiary of a taking was identified beforehand to determine if a taking really serves a private, rather than public, purpose. *Carole Media LLC v. New Jersey Transit Corp.*, 550 F.3d 302, 311 (3d Cir. 2008).

In *Carole Media*, the Third Circuit considered the constitutionality of a policy that sought to take a business's licenses to post advertisements on billboards

owned by the New Jersey Transit Corporation so as to bid them out to other advertising companies. The court upheld the taking in substantial part because "there is no allegation that NJ Transit, at the time it terminated Carole Media's existing licenses, knew the identity of the successful bidder for the long-term licenses at those locations." *Id.* Given the absence of foreknowledge about the private beneficiary of the taking, the court ruled that "this case cannot be the textbook private taking involving a naked transfer of property from private party *A* to *B* solely for *B's* private use." *Id.*

4. The Supreme Courts of Rhode Island and Maryland Hinge the Pretext Question on the Nature and Scope of Planning

Several state supreme courts consider the nature and extent of public planning to be the prime indicator of whether a transfer of property to a private party is for a private purpose. In *Mayor of Baltimore City v. Valsamaki*, 916 A.2d 324 (Md. 2007), the Maryland Supreme Court rejected the alleged public need to take a "three story building which houses a bar and package goods store known as the Magnet," for ultimate transfer to a private developer, largely due to the lack of careful, *Kelo*-like comprehensive public planning. *Id.* at 326.

Along the same lines are the decisions in *Middletown Township v. Lands of Stone*, 939 A.2d at 338 (stating that "evidence of a well-developed plan of proper scope is significant proof that an authorized purpose truly motivates a taking"), and *Rhode Island Economic Development Corp. v. The Parking Co.*, 892 A.2d 87, 104 (R.I. 2006) (emphasizing that "the City of 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").

5. Some Courts, Including the Court Below, Defer to an "Economic Development" Justification to Such a Degree That a Pretextual Taking Is Virtually Impossible

Finally, a few courts—primarily the Second Circuit and the court below—have concluded that this Court's jurisprudence requires such deference to an economic development takings rationale that a pretextual or private taking will not be found even when the facts indicate that a condemnation is primarily designed to give property to a private party for its own gain.

The leading decisions in this regard come from the Second Circuit in *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008), and *Didden v. Village of Port Chester*, 173 Fed. Appx. 931 (2d Cir. 2006). *Goldstein* concerned the taking of private property to make way for a new basketball stadium, and related amenities, for a private team. The property owners asserted "that the project's public benefits are serving as a 'pretext' that masks its actual raison d'etre: enriching the private individual who proposed it and stands to profit most

from its completion." 516 F.3d at 52-53. The district court concluded that the claim was viable because "*Kelo* opened up a separate avenue for a takings challenge under which a plaintiff could claim a taking had been effectuated "'under the mere pretext of a public purpose, when [the] actual purpose was to bestow a private benefit.'"" *Id.* at 60 (quoting *Goldstein v. Pataki*, 488 F. Supp. 2d 254, 282 (E.D.N.Y. 2007) (quoting *Kelo*, 545 U.S. at 478)).

But the Second Circuit reversed. The Second Circuit held that *Kelo* did not allow courts to consider whether the proffered economic development justification was a pretext for giving land to a private party for private purposes even when the facts showed a real risk of this occurrence. *Id.* at 52-53, 62-64.

Didden similarly concluded that, under *Kelo*, the Public Use Clause required deference to the government's stated economic purposes for a taking, despite evidence that the taking was actually designed to serve a private party. *Didden* arose when a New York Village created a redevelopment area for a particular, known developer, granting that developer authority to designate property for condemnation. 173 Fed. Appx. at 933. When the owners of land in the area sought to build a CVS store, the developer threatened them with condemnation if they did not give him an interest in the store. After the owners refused, the Village condemned their land so the developer could set up its own pharmacy store chain. *Didden v. Vill. of Port Chester*, 304 F. Supp. 2d 548, 553-57 (S.D.N.Y. 2004). "[A]ll four conceivably relevant factors [private vs. public benefits, property transferee known beforehand, planning process, and true intent] militated in favor of a ruling that a

pretextual taking had occurred." Somin, *The Judicial Reaction to* Kelo, 4 Alb. Gov't L. Rev. at 32. Nevertheless, the Second Circuit stated that "the recent Supreme Court decision in *Kelo v. City of New London*, obliges us to conclude that they have articulated no basis upon which relief can be granted." *Didden*, 173 Fed. Appx. at 933.

Like the courts in *Goldstein* and *Didden*, the Guam Supreme Court concluded it had to defer to the government's (actually, the Ungactas') assertion that the transfer of the Ilagans' property served public economic purposes, despite the presence of multiple facts indicating that it actually served the Ungactas' private purposes. In particular, as previously noted, the evidence shows that (1) the taking was designed from the start to transfer the Ilagans' property to a known private party, the Ungactas; (2) so they could have access to a road; (3) the taking did not occur as one part of an active redevelopment plan, but as a single transaction unrelated to any plan, with compensation provided by money from the Ungactas; and (4) only the private party benefitting from the taking defends it on appeal. Pet. App. at A-22, *id.* at C-3.

In ignoring the heightened risk of a private taking created by these facts, in favor of a "hands off" approach, the decision below adds to the confusion among the courts as to whether, when, and how they can strike down an alleged economic development condemnation as a pretext for a constitutionally prohibited private taking. As shown above,

> lower courts have relied on a number of different analytical frameworks and reached a number of different substantive

> conclusions [on this issue]. There are disagreements about . . . what the Supreme Court's 'test' for pretext actually requires; and whether, and to what extent, the various factors in Justice Kennedy's [*Kelo*] concurrence should be utilized as persuasive authority.

Kelly, *Pretextual Takings*, 17 S. Ct. Econ. Rev. at 176. The Court should take this case to resolve the disagreements among the courts on these issues.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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