No. 10-402

In the
Supreme Court of the United States

TUCK-IT-AWAY, INC., et al.,

Petitioners,

v.

NEW YORK STATE URBAN DEVELOPMENT CORPORATION, d/b/a EMPIRE STATE DEVELOPMENT CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of New York

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under what circumstances does the higher scrutiny described in Justice Kennedy's concurring opinion in *Kelo v. City of New London*, 545 U.S. 469 (2005), apply, and what does such scrutiny encompass?

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INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) was founded over 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF has participated in numerous cases before this Court and many other state and federal courts both as counsel for parties and as amicus curiae, in cases involving private property and eminent domain.[1]

PLF represented property owners in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and participated as amicus curiae in *Kelo v. City of New London*, 545 U.S. 469 (2005), and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). PLF attorneys also have published scholarly works on the subject of eminent domain and property rights generally. *See* Timothy Sandefur, *Mine and Thine Distinct: What* Kelo *Says About Our Path*, 10 Chap. L. Rev. 1 (2006); James Burling, *The Latest Take on Background Principles and the States' Law of Property After* Lucas *and* Palazzolo, 24 Hawaii L. Rev. 497 (2002). Because of its history and experience with regard to private property and the power of eminent domain, PLF believes that its perspective will aid this Court in considering the petition.

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[1] In accordance with Rule 37.2(a), PLF provided ten days' notice to counsel of record of its intention to file this amicus brief. Counsel of record have consented to the filing of this brief. Letters evidencing this consent have been filed with the Clerk of the Court. In accordance with Rule 37.6, PLF states that no counsel for a party authored any portion of this brief and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief.

SUMMARY OF REASONS FOR GRANTING THE PETITION

In *Kelo v. City of New London*, this Court held that the condemnation of private property for "economic development" does not invariably violate the Public Use Clause of the Fifth Amendment. *See* 545 U.S. 469, 489 (2005). But while the Court approved the City of New London's condemnation of several homes, it nevertheless made clear that the Public Use Clause does limit the eminent domain power to some degree, and that "the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*." *Id.* at 477. The Court elaborated that, in the absence of certain procedural protections for private property owners, an apparent "one-to-one" transfer of property "would certainly raise a suspicion that a private purpose was afoot." *Id.* at 487. Yet the majority opinion did not identify the precise circumstances in which courts should be alert to the risk of impermissible "one-to-one" transfers. *Cf. id.* Justice Kennedy's concurring opinion, however, did offer a framework of degrees of scrutiny to determine whether condemnations, ostensibly for public use, are in fact pretextual private takings. *See id.* at 491-93 (Kennedy, J., concurring).

Unfortunately, many lower courts, including the New York Court of Appeals in this case, have failed to abide by *Kelo*'s direction that a property owner's allegations that a taking is for an impermissible private use should receive substantial consideration. Instead, these courts have used minimal scrutiny when adjudicating pretextual takings claims and have declined seriously to entertain pleas for heightened scrutiny. Even those courts that have been open to

pretext claims have not articulated a consistent and comprehensible scrutiny doctrine. The Court should therefore grant the petition to clarify when such heightened scrutiny should be applied, using Justice Kennedy's *Kelo* concurrence as a starting point.

REASONS FOR GRANTING THE PETITION

I

THE *KELO* MAJORITY AND JUSTICE KENNEDY'S CONCURRING OPINION MANDATE THAT PRETEXTUAL CLAIMS RECEIVE SERIOUS CONSIDERATION AND, DEPENDING ON THE CIRCUMSTANCES, WARRANT HEIGHTENED SCRUTINY

Prior to the Court's decision in *Kelo*, the law of pretextual takings was clear: if a rational basis existed to support the government's condemnation of the property as furthering a public use, then the condemnation was almost always constitutional. *See Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 243 (1984). But in *Kelo* Justice Stevens' majority opinion expressly cautioned that seeming "one-to-one" transfers accomplished without any serious protections for landowners "would certainly raise a suspicion that a private purpose was afoot."[2] 545 U.S. at 487. And in

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[2] *See* Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings after* Kelo, 15 S. Ct. Econ. Rev. 183, 189-90 (2007) ("*Kelo* actually represents a modest improvement on the Court's previous public use decisions, by holding out the possibility (continued...)

upholding the condemnations in that case, the Court relied on the fact that the condemnations were the result of procedures designed to protect against impermissible private takings.[3] *Id.* at 478 (noting that condemnations were pursuant to a " 'carefully considered' development plan" and that there was no evidence of pretext); *id.* at 483-84 (again noting the City's "carefully formulated . . . economic development plan" resulting from "thorough deliberation"); *id.* at 486-87 (discussing importance of an "integrated development plan"); *id.* at 488 (discussing importance of a "comprehensive redevelopment plan").

Justice Kennedy, who provided the decisive fifth vote for the *Kelo* majority, elaborated in his concurring opinion on the types of circumstances that should raise the "suspicion" that a condemnation purportedly to be for the public's benefit is, in reality, an impermissible private taking. Specifically, Justice Kennedy offered a two-tiered approach. Most pretext claims should be adjudicated according to a "meaningful rational basis review," *id.* at 492 (Kennedy, J., concurring), under

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[2] (...continued)
of slightly greater judicial scrutiny than was available under [prior decisions].").

[3] It is interesting to note, however, that investigative reporting completed after the *Kelo* decision revealed a wealth of evidence indicating that the condemnations were motivated by illegitimate private purposes. *See* Somin, 15 S. Ct. Econ. Rev. at 236-38. *See, e.g.*, *id.* at 237 ("Evidence uncovered by an investigative reporter . . . shows that Pfizer 'ha[d] been intimately involved in the project since its inception' and that the . . . development plan and associated condemnations was 'a condition of Pfizer's move' to New London."). If anything, the true *Kelo* story underscores the importance of allowing for heightened scrutiny of prextextual takings claims.

which the property owner bears the burden of making a "clear showing" that the condemnation is intended to benefit a private party, and that the public benefits of the condemnation are "only incidental or pretextual," *id*. at 491. If the property owner can make such a "plausible accusation" of pretext, then a court must treat the claim as a "serious one," although the court's review of the record will be guided by a presumption in favor of the government. *Id*.

Yet at the same time, Justice Kennedy responded to the dissenters' criticisms that "meaningful rational basis review" would not be adequate to protect landowners against constitutional abuse, by observing that neither the Court's precedents nor the *Kelo* majority opinion categorically forecloses the imposition of heightened scrutiny to pretextual takings claims. *Id*. at 493. Indeed, "[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*. (emphasis added). Justice Kennedy went on to list the various aspects of the *Kelo* condemnation that led him to conclude that heightened scrutiny, and a presumption of invalidity, should not be applied in that case: the City had a "comprehensive development plan"; the identity of the private parties to be benefited by the condemnation was unknown at the time of the plan's drafting; and the condemnation was executed pursuant to "elaborate procedural requirements." *Id*. Justice Kennedy then listed three types of pretextual takings claims where heightened scrutiny, and a presumption of invalidity, should be applied: (1) transfers raising a high suspicion of pretext; (2) transfers resulting from procedures very prone to

abuse; and (3) transfers the benefits of which are "trivial or implausible." *See id*.

Because of various legislative safeguards, the taking in *Kelo* did not fall into any of these categories warranting heightened scrutiny. Yet questions remain. What kinds of claims *would* fall into these categories? What kinds of procedural protections would take a claim outside of heightened scrutiny and subject the claim to "meaningful" rational basis review? These questions have given rise to much confusion in the lower courts in the five years since *Kelo* was decided.

II

MANY LOWER COURTS HAVE FAILED TO FOLLOW *KELO*'S AUTHORIZATION OF HEIGHTENED SCRUTINY FOR PRETEXTUAL CLAIMS AND INSTEAD HAVE REFLEXIVELY APPLIED RATIONAL BASIS REVIEW

A. The New York Court of Appeals Below Entirely Ignored *Kelo*'s Multi-Level Scrutiny

In rejecting Petitioners' pretext claim, the New York Court of Appeals was content to identify two ostensible public purposes for the Columbia redevelopment project that had some measure of support in the record—namely, the remediation of blight and the pursuit of a "civic project" having "educational" and other benefits. Pet. App. at 18a-21a, 26a-27a. The court thus applied the paradigmatic rational basis standard of pre-*Kelo* pretext claims, *i.e.*, upholding the taking because it is "rationally related to a conceivable public purpose."

Midkiff, 467 U.S. at 241. The decision does not explain why it chose not to apply the heightened scrutiny and presumption of invalidity sketched in the second half of Justice Kennedy's concurrence.

That failure is particularly significant, given the evidence in the record strongly indicating that this case falls into one of the three categories that the *Kelo* concurrence identifies as warranting heightened scrutiny. The plurality opinion of the intermediate appellate court below expressly noted the similarities between this case and those cases evincing an "improper motive in transfers to private parties with only discrete secondary benefits to the public," Pet. App. at 53a, a description that fits comfortably within Justice Kennedy's third category. *Cf. Kelo*, 545 U.S. at 493 (Kennedy, J., concurring) (transfers "the purported benefits [of which] are so trivial or implausible" that they warrant heightened scrutiny). The plurality opinion observed that the redevelopment area was not economically depressed when the redevelopment plan was initiated, Pet. App. at 54a-55a; the redevelopment plan was paid for by Columbia University, not a government agency, *id.* at 55a; the government gave no serious consideration to other competing plans, *id.* at 55a-56a; and Columbia already owns or controls many of the allegedly blighted properties, *id.* at 60a. These facts led the plurality to conclude that the "record overwhelmingly establishes that the true beneficiary of the scheme to redevelop . . . is . . . Columbia University," *id.* at 65a.

If a record this strong on pretextual evidence does not trigger heightened scrutiny, it is difficult to imagine what circumstances *would* trigger a more searching review. The *Kelo* majority made clear that

a closer review is warranted in some cases, and Justice Kennedy's concurrence strongly indicates that cases with a record like the one assembled here should warrant such scrutiny. The New York Court of Appeals' failure to cite *Kelo*, or seriously to consider the multi-level scrutiny analysis intimated by the *Kelo* majority and outlined in Justice Kennedy's concurrence, supports the need for this Court's clarification as to when heightened scrutiny is warranted.

B. The Second Circuit Effectively Ignored *Kelo*'s Multi-Level Scrutiny

In *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir.), *cert. denied*, 128 S. Ct. 2964 (2008), a group of landowners challenged the Atlantic Yards Arena and Redevelopment Project, a plan that would result in a new professional football stadium, parks, affordable housing, and the redevelopment of some blighted areas, but would require the transfer of private property to a private developer. *Id.* at 52-53. The landowners argued that a substantial motivation of the project was the government's desire to benefit the project's private developer. *Id.* at 54. The Second Circuit rejected the landowners' pretext claim, using (like the New York Court of Appeals below) a pre-*Kelo* rational basis test containing none of the "meaningful" review urged in Justice Kennedy's concurrence. *See id.* at 58 (employing the "palpably without reasonable foundation" standard in place of heightened scrutiny). The court was satisfied that the redevelopment project was on its face designed to produce public benefits. *Id.* at 58-59 ("[V]iewed objectively, the Project bears at least a rational relationship to several well-established categories of public uses . . . ."). It held that judges

should merely "discern a valid public use to which the project is rationally related," *id*. at 60, a lenient standard of review that conflicts with the "meaningful rational basis review" which, the *Kelo* concurrence states, is the minimum standard for *all* pretext claims, *see Kelo*, 545 U.S. at 491-92 (Kennedy, J., concurring).

Although the Second Circuit's application of a pre-*Kelo* rational basis review is troubling, far worse is the decision's effective elimination of heightened scrutiny and the presumption of invalidity for nearly all pretext claims. The Second Circuit acknowledged the landowners' allegations of pretext to concern "purported excesses in the costs of the plan as measured against its benefits," *Goldstein*, 516 F.3d at 62, allegations which also fall comfortably within one of Justice Kennedy's three categories warranting heightened scrutiny—namely, transfers the benefits of which are "trivial or implausible." *See Kelo*, 545 U.S. at 493 (Kennedy, J., concurring). Nevertheless, the court rejected the pretext claim on the pleadings because (1) the landowners had "already acknowledged the Project's rational relationship to numerous well-established public uses," *Goldstein*, 516 F.3d at 62; (2) heightened scrutiny "would add an unprecedented level of intrusion into the process" and would lead courts into "second-guessing every detail in search of some illicit improper motivation," *id*. at 62-63; and (3) the landowners had failed to allege specific instances of illegality or improper dealings concerning the project, *see id*. at 64.

The Second Circuit's apparent reasons for not acknowledging a multi-level scrutiny approach to pretext claims are unconvincing. First, the Second Circuit thought it significant that the project, on its

face, pursued acknowledged public purposes. But this observation only proves that a person could rationally consider the project to be related to a public purpose, which is the definition of rational basis, not *heightened*, scrutiny. Second, the court's fears of judicial overreach are misplaced. By its very nature, heightened scrutiny implies *some degree* of searching review of the record that otherwise cannot be obtained with rational basis scrutiny. To hold that increased judicial scrutiny is to be avoided at all costs is tantamount to abandoning heightened scrutiny altogether, a result reconcilable with neither the *Kelo* majority, *see* 545 U.S. at 487, nor Justice Kennedy's concurrence, *see id.* at 493 (Kennedy, J., concurring). Third, the court demanded that pretext claimants allege specific examples of pretextual action (without the aid of discovery); but requiring that the *landowner* produce examples of impropriety turns heightened scrutiny on its head. After all, as Justice Kennedy's concurrence reveals, one of the hallmarks of heightened scrutiny is that it places the burden on the *government* to defend its actions, not on the landowner to prove the actions' illegality. *Cf.* 545 U.S. at 491, 493. Moreover, the Second Circuit's categorical assignment of the burden of production to landowners cannot be reconciled with the *Kelo* concurrence's assertion that certain types of private transfers are so fraught with the risk of abuse that the burden should be placed on the government to demonstrate that a transfer really benefits the public generally. *See id.* at 493.

The Second Circuit's discussion of Justice Kennedy's concurrence entirely ignores his analysis of when heightened scrutiny should be applied to pretextual claims of private transfers. In a footnote, the court, citing to that portion of Justice Kennedy's

opinion setting forth his "meaningful rational basis review," opined that the standard was likely intended to apply only to those private transfers the sole ground of which was economic development. *See Goldstein*, 516 F.3d at 64 n.10. The court explained that, because Justice Kennedy relied on Equal Protection Clause precedents to flesh out his rational basis standard, it therefore followed that he did not intend a more searching review. *See id.* But as noted above, neither the *Kelo* majority opinion nor Justice Kennedy's concurrence ends with rational basis. Rather, both opinions anticipate a higher standard of review for certain classes of pretext claims. Justice Kennedy's concurrence in particular provides an outline of when and how heightened scrutiny should apply. The Second Circuit's analysis cannot be reconciled with *Kelo*.

C. The Third Circuit Effectively Ignored *Kelo*'s Multi-Level Scrutiny

In *Carole Media, LLC v. N.J. Transit Co.*, 550 F.3d 302 (3d Cir. 2008), the Third Circuit Court of Appeals rejected a public use challenge to New Jersey's revamping of its billboard licensing rules. Carole Media had obtained three billboard permits with New Jersey Transit. Shortly thereafter a scandal erupted: two high-placed aides to the governor had been discovered using their influence to obtain lucrative billboard permits for others, even where local regulation would have forbidden the billboards. *See id.* at 305. In response, the state legislature enacted a number of anticorruption protections for the billboard licensing system, among them requiring state agencies to employ competitive bid programs for billboard licenses. *Id.* To that end, New Jersey Transit hired All

Vision, LLC, to be its managing agent. *Id*. The agency then embarked upon its licensing reform program, which required that all existing licenses be terminated and then rebid competitively. All Vision, as the facilitator of this process, would receive management fees. When New Jersey Transit demanded that Carole Media surrender its licenses, Carole Media filed suit, claiming that the license rebidding program was a pretextual taking designed to enrich All Vision. *See id*. at 306. Specifically, Carole Media argued that the billboard program "'merely replac[ed] one long-term relationship with an incumbent billboard operator with another long-term relationship with a new incumbent,'" an arrangement that " 'solely . . . benefit[ed] . . . All Vision' through the payment of disproportionate management fees on the large, up-front payments bidders w[ould] be required to make under the Program." *Id*. (citation omitted).

The Third Circuit rejected Carole Media's public use claim, relying expressly on the *Midkiff* "rationally related to a conceivable public purpose" standard. *See id*. at 309. Quoting from Justice Kennedy's concurrence, the Third Circuit ruled that a pretext claim cannot be maintained when the property owner has failed to make "'a plausible accusation of impermissible favoritism.'" *Id*. at 311 (quoting *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring)). The quoted phrase, however, comes from Justice Kennedy's discussion of his "meaningful rational basis" standard, *not* from his discussion of when and how to apply heightened scrutiny and the presumption of invalidity. *Compare Kelo*, 545 U.S. at 491-92 *with id*. at 493.

Again citing Justice Kennedy's concurrence, the Third Circuit held that Carole Media's pretext claim

was barred because there was no allegation that the government "knew the identity of the successful bidder for the long-term licenses at those locations." 550 F.3d at 311 (citing *Kelo*, 545 U.S. at 493) (Kennedy, J., concurring)). The court misconstrued and misapplied the categories of cases that, according to Justice Kennedy, warrant heightened scrutiny. After all, New Jersey Transit *did* know who would benefit from the relicensing program—All Vision—before it demanded that Carole Media surrender its licenses. Such knowledge surely raises a "suspicion" that a private taking is afoot.

The Third Circuit concluded its analysis holding that the mere assertion that a private party "will receive an excessive payment for its role as management agent" cannot support a pretext claim. Such an allegation "simply fails to demonstrate that [the government's] alleged taking was not 'rationally related to a conceivable public purpose.'"[4] *Id*. at 311-12 (quoting *Midkiff*, 467 U.S. at 241). But the degree to which a private party is "overpaid" as a result of a private taking *is* relevant to whether the taking is "so suspicious" as to warrant heightened scrutiny. *See Kelo*, 545 U.S. at 493 (Kennedy, J., concurring). The

[4] The Texas Court of Appeals reached a similar conclusion in *Cascott, L.L.C. v. City of Arlington*, 278 S.W.3d. 523 (Tex. Ct. App. 2009), in rejecting the plaintiff property owners' challenge to the City of Arlington's condemnation of their land to facilitate a 30-year lease with the Dallas Cowboys. The court, citing *Goldstein*, reasoned that, because "the Lease furthers and promotes the public purpose of the venue project for which the condemnation proceedings were instituted," it does not matter that "the Dallas Cowboys stand to reap substantial benefits from the project, including the Lease." *Id*. at 529. The court did not cite or discuss Justice Kennedy's three categories of pretext cases for which heightened scrutiny is warranted.

Third Circuit's holding that such a consideration does not survive rational basis scrutiny entirely ignores whether that consideration is relevant to heightened scrutiny. The Third Circuit's analysis cannot be squared with *Kelo*.

III

EVEN THOSE COURTS THAT HAVE ALLOWED PRETEXT CLAIMS TO GO FORWARD DO NOT RECOGNIZE A MULTI-LEVEL SCRUTINY, AND REACH THEIR RESULTS BY INCONSISTENT MEANS, FURTHER REINFORCING THE LOWER COURTS' CONFUSION

Several appellate decisions after *Kelo* have allowed pretext claims to go forward, but these decisions have not recognized a multi-level scrutiny analysis. Instead, they have merely concluded that the particular record assembled before them supported a finding of pretext, without identifying the standard of scrutiny being applied, or whether more than one level of scrutiny may be warranted.

A. The District of Columbia Court of Appeals Allowed a Pretext Claim To Go Forward, but Provided No Guidance on What Scrutiny To Apply

In *Franco v. National Capital Revitalization Corp.*, 930 A.2d 160 (D.C. 2007), the District of Columbia Court of Appeals reversed a trial court's dismissal of a landowner's pretext claim, specifically rejecting the lower court's conclusion that "an owner is foreclosed as a matter of law from demonstrating that

the stated reason [for the condemnation] is a pretext."[5] *Id*. at 168. The court of appeals cited the *Kelo* majority opinion for the proposition that "a property owner must in some circumstances be allowed to allege and to demonstrate that the stated public purpose for the condemnation is pretextual," while acknowledging that "[i]t may be difficult to make this showing." *Id*. at 169.

The court discussed Justice Kennedy's concurrence in a footnote, concluding that, although the concurrence's analysis was not part of *Kelo*'s holding, it "may accurately predict what the Court will hold when the record before it does not resolve the pretext issue." *Franco*, 930 A.2d at 169 n.8. The court's analysis focused solely on whether the landowner had alleged facts that, if true, would establish an impermissible pretext. *See id*. at 170-71.

Noting the lack of guidance from this Court on what constitutes pretext, *see id*. at 172, *Franco* nevertheless concluded that, where the public benefits of a private taking are "incidental" or "pretextual," a pretext claim "may well succeed," but where the private taking serves an "overriding public purpose" providing "substantial" public benefits, a pretext claim must fail. *See id*. at 173-74. The court further explained that the particular facts of *Kelo*—the existence of a development plan and other procedural safeguards—are not "constitutional standards"

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[5] On remand, the trial court granted summary judgment to the government on the grounds that the property owner's pretext claim was barred by collateral estoppel. The Court of Appeals reversed and remanded, holding that collateral estoppel did not apply and declining to address the government's alternative basis for affirmance. *See Franco v. District of Columbia*, 3 A.3d 300 (D.C. 2010).

according to which a pretext claim stands or falls based on the absence or presence of those facts in other cases. *See id*. at 175.

Franco's pretext analysis is unhelpful because it does not reveal whether the court applied rational basis or heightened scrutiny. The court was concerned about (1) whether the public benefits of a private taking are "incidental," (2) whether the public benefits of a private taking are "substantial," and (3) whether the taking's public purpose is "overriding." *See id*. at 173-74. Yet all these considerations are relevant to *both* scrutiny standards. The main difference between the two standards is in the degree of deference given the government when the court reviews the record. As Justice Kennedy's concurrence notes, with "meaningful rational basis review" the presumption lies with the government, while the reverse is true with heightened scrutiny. *See Kelo*, 545 U.S. at 491. But to declare, as *Franco* does, that the legislature enjoys deference when the private taking serves an overriding public purpose is merely to state a legal conclusion, not to provide a reason for that conclusion. *Franco* fails to clarify the post-*Kelo* confusion.

B. The Rhode Island Supreme Court Ruled in Favor of a Pretext Claim, but Provided No Guidance on the Scrutiny Applied

A similar lack of clarity occurs in the Rhode Island Supreme Court's decision in *Rhode Island Economic Development Corp. v. The Parking Company, L.P.*, 892 A.2d 87 (R.I. 2006). There, the government attempted to condemn the lease of the defendant parking company to operate an airport parking facility. The company objected to the condemnation as a pretextual

private taking. The court agreed but its agreement was based only on the record developed for that case, and without any specific discussion of the standard of review to be employed, or the burden of production necessary, for pretext claims.[6]

The government had argued that the primary purpose of the taking was to increase airport parking. *Id*. at 105. The court rejected the assertion, finding that the record revealed that the government's "motivation . . . was to increase revenue and not create additional airport parking." *Id*. at 106. But nowhere does the decision state what standard of scrutiny should be applied, or when the burden should be on the government to establish the taking's nonpretextual motivation. Instead, its discussion of legislative deference further confuses the issue.

For example, the court's opinion ostensibly adopts the *Midkiff* standard, *see id*. at 103, and notes that the court "accord[s] deference to the findings of the condemning authority," *id*. at 104. These standards are consistent with rational basis scrutiny. But the decision then states that the determination of a public use "must be decided on a case by case basis," *id*., and faults the condemning authority for "fail[ing] to make any findings that the taking would serve the public," *id*. at 105. These criticisms presuppose that something more than a *Midkiff* rational basis scrutiny is being applied. Adding to the confusion is the importance the

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[6] On remand, the trial court declined to award the parking company damages for the period of the government's wrongful possession. The state supreme court, on appeal, again reversed the trial court, holding that the parking company was so entitled. *See Rhode Island Econ. Dev. Corp. v. The Parking Company, L.P.*, 909 A.2d 943 (R.I. 2006).

decision places on the factual differences between the procedures governing the Rhode Island Economic Development Corporation's condemnation and the City of New London's condemnation in *Kelo*, *see id*. at 104, 106, differences that *Franco* considered *irrelevant*, *see* 930 A.2d at 175. *The Parking Company*, like *Franco*, fails to clarify the post-*Kelo* confusion.

C. The Hawaii Supreme Court Allowed a Pretext Claim To Go Forward, but Provided No Guidance on What Scrutiny To Apply

Perhaps most confusing among the lower court cases decided since *Kelo* that have ruled in favor of pretext claims is *County of Hawai'i v. C&J Coupe Family Limited Partnership*, 198 P.3d 615 (Haw. 2008). There, the landowner challenged the condemnation of its land to allow for a public road to be built, contending that the road, although public, was being constructed to satisfy the needs of a private development. The trial court dismissed the claim on its face, concluding that the articulation of a "classic" public purpose (like road construction) made the condemnation absolutely immune from a pretext challenge. The Hawaii Supreme Court reversed and remanded, holding, as in *Franco*, that the landowner could advance a pretext claim. *See id*. at 652-53. In reaching that conclusion, the court expressly rejected an invitation to adopt Justice Kennedy's "meaningful rational basis" scrutiny, concluding that "the majority opinion in *Kelo*, as well as our own cases, provide ample authority to require the [lower] court to reach the issue of pretext." *Id*. at 642. Such a refusal would imply that the court could adjudicate the matter in favor of the property owner using a *less rigorous*

standard of review. Yet the court's subsequent analysis is not wholly consistent with that standard of review.

For example, the court explained that, under the *Kelo* majority opinion, "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. That statement implies a high standard of scrutiny, rather than rational basis. Yet, the court then observed that a presumption in favor of the government could be overturned by clear and palpable evidence of a taking, *id*. at 644 n.33, which recalls the rational basis standard of *Midkiff*. But the court next rejected the contention that a pretext claim challenging a "classic" public use, such as road building, must necessarily fail, *see id*. at 647-48, even though such a "classic" use limitation is fully consistent with the *Midkiff* "rationally related to a conceivable public purpose" standard. *See* 467 U.S. at 241. Thus, the court appeared in just a few paragraphs both to approve and to dispense with the same scrutiny standard.

The court then, quoting the *Kelo* majority, noted that "even where the government's stated purpose is a 'classic' one, where the actual purpose is to 'confer[] a private benefit on a particular private party[,]' the condemnation is forbidden," *County of Hawai'i*, 198 P.3d at 648 (quoting *Kelo*, 545 U.S. at 477). Nevertheless, the court disclaimed "call[ing] for a 'close[] scrutiny [of] the motives of the City Council' or the 'subjective motivation of every official,'" *County of Hawai'i*, 198 P.3d at 649 n.37. A property owner would presumably be required to establish these factors in

order to prove a pretext in the face of a "classic" public use. The court distinguished *Goldstein* on precisely this ground: there the landowners invited an investigation of subjective motivations, whereas here no such inquiry would be required. *See id.* at 649. Yet the court went on to hold that a pretext claimant's allegation of a "predominantly private benefit" could invalidate a condemnation notwithstanding "the stated public purpose." *See id.* That *was* the argument the *Goldstein* property owners made. *See Goldstein*, 516 F.3d at 59 ("[P]laintiffs . . . expend considerable effort explaining why these proffered public uses should nonetheless be rejected as 'pretextual,' not because they are false, but because they are not the real reason for the Project's approval.").

Thus, the court ruled in favor of a pretext claimant while disclaiming reliance on Justice Kennedy's *Kelo* concurrence, and yet applying a standard of review that at times appears to reject the traditional rational basis review antedating *Kelo*. Like *Franco* and *The Parking Company*, *C&J Coupe Family Trust* augments rather than dispels the post-*Kelo* confusion.

CONCLUSION

Confusion reigns among the lower courts over when and how to apply heightened scrutiny to claims of pretextual private takings. Although property owners' pretext claims have fared well in some courts, it is far from clear whether these outcomes were the result of the scrutiny the courts applied, or the strength of the allegations made and the record collected, or some combination of all these factors. In other courts, pretext claims have been tossed out with little thought to whether heightened scrutiny might be

merited. Neither the courts ruling against pretext claims, nor the courts ruling in favor of such claims, have any consistent, thorough, and rigorous doctrine governing their adjudication and the scrutiny to be applied. Review is merited to dispel the confusion and provide guidance. The writ should be granted.

DATED: October, 2010.

Respectfully submitted,

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