No. ________

In The
Supreme Court of the United States

C & J COUPE FAMILY
LIMITED PARTNERSHIP,

Petitioner,

v.

COUNTY OF HAWAII;
1250 OCEANSIDE PARTNERS,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Hawaii

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Hawaii Supreme Court held that a one-to-one transfer of property to a private developer by eminent domain, instituted outside the confines of an integrated development plan, and while the condemnor was threatened by breach of a contract in which it promised to condemn the land for the developer, was not subject to a presumption of invalidity or even heightened scrutiny under the Fifth Amendment's Public Use Clause. The court concluded that even when "a contract that delegates a county's eminent domain powers raises well founded concerns that a private purpose is afoot" under *Kelo v. City of New London*, 545 U.S. 469 (2005), it is the property owner's burden to prove by "clear and palpable" evidence the asserted reason for taking property is "manifestly wrong."

Since *Kelo*, the lower courts have been unable to settle on consistent or clear standards for when the public purpose supporting an exercise of eminent domain is pretextual, or in what situations the "risk of undetected impermissible favoritism" is such that a presumption of invalidity or a heightened standard of review is warranted. *Id.* at 493 (Kennedy, J., concurring). The question presented is:

What category of takings are subject to heightened judicial scrutiny, and when is the risk of undetected favoritism so acute that an exercise of eminent domain can be presumed invalid?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner C & J Coupe Family Limited Partnership states that it is a Hawaii limited partnership. It is not owned by a parent corporation, and no publicly-held corporation owns any stock in Petitioner.

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PETITION FOR WRIT OF CERTIORARI

In *Kelo*, this Court recognized that an exercise of eminent domain "under the mere pretext of a public purpose, when its actual purpose [is] to bestow a private benefit," is unconstitutional. *Kelo v. City of New London*, 545 U.S. 469, 478 (2005). Justice Kennedy concurred, concluding that in some instances, "a more stringent standard of review than that announced in *Berman* [*v. Parker*, 348 U.S. 26 (1954)] and [*Hawaii Hous. Auth. v.*] *Midkiff*[, 467 U.S. 229 (1984)] might be appropriate for a more narrowly drawn category of takings." *Id.* at 493 (Kennedy, J., concurring). Justice Kennedy also concluded 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." *Id.* But the Court did not address the question directly, because "[s]uch a one-to-one transfer of property, executed outside the confines of an integrated development plan, [was] not presented in [that] case. While such an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot, the hypothetical cases posited by petitioners can be confronted if and when they arise." *Id.* at 487 (footnotes omitted).

This is that case. It offers the Court an opportunity to clarify whether there are any realistic limitations on government's power of eminent domain, or whether the standards set out in *Kelo* were mere *obiter dicta*, and not the framework to which the lower courts should adhere. The Hawaii Supreme

Court recognized that the facts surrounding the taking of Petitioner's property in the shadow of "a contract that delegates a county's eminent domain powers, raises well founded concerns that a private purpose is afoot," App. 26, *infra*, but refused to recognize a rule of invalidity because "[a] *per se* rule of pretext would threaten the established rule of deference given to the findings and declarations of the government in these cases." *Id.* The court held that the cloud cast by such a contract – illegal as a private taking, and as a delegation of governmental powers – is merely a "*factor* in determining pretext" which must be proven by the property owner by "clear and palpable" evidence. *Id*. (emphasis in original).

Kelo did not define "mere pretext," and following the decision, there was a "virtual blizzard of articles, treatises, law review articles, and the like" seeking clarification. *Mayor and City Council of Baltimore City v. Valsamaki*, 916 A.2d 324, 267 n.25 (Md. 2007). The judiciary has fared no better than legal scholars, and in the intervening years, the lower courts have vainly searched for a consistent approach for determining when, if ever, an allegedly pretextual taking will be subject to heightened scrutiny, or whether there are any circumstances in which the presumption in favor of validity should shift. *See* Ilya Somin, *The Judicial Reaction to* Kelo, 4 ALBANY GOV'T L. REV. 1, 35-36 (2011) ("As should be evident . . . there is no consensus among either state or federal judges on the criteria for determining what counts as a pretextual takings claim after *Kelo*. . . . It seems unlikely that

any consensus will emerge in this area any time soon, unless the Supreme Court decides to review a case that settles the dispute.”).

This case includes all of the factors identified by the *Kelo* majority and Justice Kennedy as indicators of pretext: a known private beneficiary that initiated, drove, and paid for the process; no integrated or independent development plan; little public benefit from the taking; and an exercise of eminent domain so unusual that it shows the true purpose of the taking was pursuant to and in furtherance of an illegal development agreement. Because the taking was such an aberrant exercise of government power, the Public Use Clause requires that a reviewing court view the evidence with more than the usual degree of deference, and should apply either a rule of invalidity, a presumption that the taking is for a private benefit, or at the very least heightened scrutiny. The Court can and should grant review.

OPINIONS BELOW

The opinion of the Hawaii Supreme Court (App. 1-83, *infra*) is reported at 242 P.3d 1136. The trial court’s Supplemental Findings of Fact and Conclusions of Law and Order to First Amended Findings of Fact, Conclusion of Law, and Order filed September 27, 2007 as to Condemnation 2 (App. 87-102) is unreported. The opinion of the Hawaii Supreme Court in an earlier part of this case (App. 103-242) is reported at 198 P.3d 615. The

trial court's First Amended Final Judgment (filed Sep. 27, 2007) (App. 243-249) is unreported.

JURISDICTION

The Hawaii Supreme Court issued the Judgment on Appeal (App. 84-86) on March 1, 2011. The time to file this Petition was extended to July 14, 2011 (No. 10A1141). This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides that no person shall be deprived of property without due process of law, "nor shall private property be taken for a public use without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any state deprive any person of life, liberty, or property, without due process of law."

STATEMENT

1. Respondent 1250 Oceanside Partners (Oceanside) is the developer of the hyperluxury "Hokulia" project on the Kona coast of the island of Hawaii. App. 5. The project is a 1500-plus unit Pebble Beach-style gated development that extends from the ocean

up the slopes of the Hualalai volcano to nearly the main artery, Mamalahoa Highway. *Id.* Hokulia was zoned for agricultural uses, so Oceanside needed a change in zoning and a subdivision before the project could go forward. *Id.* These governmental approvals would not be forthcoming because the existing road system could not accommodate the traffic impacts. *Id.*

In 1994, Respondent County of Hawaii (County) conditioned the change in zoning for Hokulia on Oceanside's agreement to construct a bypass between the towns of Keauhou and Captain Cook to alleviate the traffic conditions caused by the project. *Id.* As a condition of rezoning, Oceanside was required to acquire the land needed for the bypass on its own, with no help from the County, and to build the bypass at its own cost. *Id.* But some property owners whose property Oceanside needed for its road, including Petitioner C&J Coupe Family Limited Partnership (Petitioner), were unwilling to sell land that had been in their family for generations. *Id.*; App. 114. Until Oceanside accomplished that, Hokulia could not be developed. Oceanside also realized that it could not obtain financing for the tens of millions of dollars it needed without a guaranteed way to force property owners to part with their land, should they not be willing to sell.

2. Hawaii law permits county governments to enter into development agreements in order to vest a developer's land use entitlements. *See* HAW. REV. STAT. §§ 46-121-46-132 (1993) (development agreement enabling statute). Oceanside proposed, drafted and lobbied for the County to use this mechanism to relieve Oceanside of its existing obligations under

the rezoning ordinance by delegating the County's power of eminent domain to Oceanside to force acquisition of the properties it could not obtain by voluntary purchase, and to hold the County liable if it did not follow through (Oceanside's Hokulia project manager wrote "[s]hould the County breach the agreement and not condemn the [sic] would be potentially liable for the projects [sic] failure. I can't imagine they would ever take such a risk.").

In 1998, Oceanside and the County entered into a development agreement which provided that, if any landowner refused to sell their private land to Oceanside, the County's power of eminent domain would be used to acquire the parcel for Oceanside to construct the Mamalahoa Bypass Highway. App. 5. Further, Oceanside would be relieved of a material portion of its obligation to acquire and build the bypass at its sole expense through a "fair share" provision, which required neighboring landowners to pay Oceanside if they developed their land. App. 244. The Development Agreement also contained these requirements:

- Oceanside's consent was required before the County could adopt more restrictive land use regulations.
- Oceanside's written directive required the County to condemn.
- Oceanside's written directive "shall constitute a 'formal initiation of condemnation action.' "

- Oceanside would pay the County for expenses incurred in the taking of parcels which Oceanside determined "in its sole and absolute discretion that there is a need for possession."
- If a property owner donated its land to Oceanside for the road, the County would promise to not impose additional "fair share" exactions on that owner.
- The Development Agreement established the standards for the actual construction of the road.
- It permitted Oceanside, not the County, to determine the alignment of a highway, including intersections.
- It required Oceanside to dedicate the road and the County to accept the dedication.

App. 111-13.

Even before the Development Agreement was formally approved, Oceanside began threatening property owners that unless they agreed both to Oceanside's price, and the Development Agreement's attempted "fair share" shifting of the access road's expenses, the County would force acquisition by condemning their properties. For example, it invited a property owner to open discussions so "eminent domain proceedings will not be necessary." It informed another owner that if it did not convey its land, "Oceanside will be forced to rely on the condemnation provisions of the Development Agreement." It warned

another that "[b]y submitting this matter to the County for condemnation, Oceanside would be absolved from providing the [owners] any of the benefit it is offering to the owners. . . . [T]he County would offer only the fair market value of the parcel being condemned rather than the $17,000 per acre amount being offered by Oceanside." It thanked other owners for their anticipated cooperation "otherwise we must submit the matter to the County of Hawaii for its Eminent Domain/Condemnation processes." With the exception of two parcels – the Pearne family's and Petitioner's – Oceanside, not the County, acquired – and to this day owns – the property needed for the bypass. App. 113-14.

3. As the Development Agreement allowed, Oceanside instructed the County to condemn both properties. App. 6, 114. In 2000, after Oceanside's command that it do so, the County adopted Resolution 266-00 (Resolution 1), authorizing the taking of Petitioner's property. The County then filed the first of two condemnation actions to condemn 2.9 acres from Petitioner. *See County of Hawaii v. Richards, et al.*, Civil No. 00-1-181K (filed Oct. 9, 2000) (Condemnation 1). App. 114. In Condemnation 1, the County did not follow its usual practice of obtaining survey, title report, and appraisal. App. 110-11. Instead, Oceanside determined the property, the amount of compensation offered, and Oceanside's surveyor conducted the survey of Petitioner's property. Oceanside's attorneys acted as the County's lawyers in negotiations, as they had likewise done with the

Pearne property where they also filed the condemnations. App. 114.

On its face, Resolution 1 delegated the County's eminent domain power. Petitioners objected, asserting among other things that the Development Agreement illegally delegated the County's power of eminent domain to Oceanside, that the claimed public use in Resolution 1 and Condemnation 1 was a pretext, and that the taking was not for a public use or purpose. Over Petitioner's objections, the circuit court granted the County's motion for summary judgment on public use. Based on an order of immediate possession, Oceanside began blasting on the property. Two years passed while other issues were litigated.

When the County filed Condemnation 1 in 2000, there was little legal authority providing guidance about when the government's asserted public use was unconstitutional pretext under the Fifth Amendment. However, in a series of cases after Condemnation 1 was filed, courts nationwide began addressing the issue. *See*, *e.g.*, *99 Cents Only Stores v. Lancaster Redev. Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001); *Cottonwood Christian Center v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002). On September 5, 2002, the circuit court *sua sponte* reversed its prior order granting summary judgment on the issue of public use, then denied the

County's request for reconsideration. Shortly thereafter, the court stayed its earlier order allowing the County to take possession of Petitioner's land, halting Oceanside's construction in its tracks. App. 116.[1]

4. A little more than a month after these events, on January 23, 2003, a second resolution to condemn Petitioner's property was introduced in the County Council. At the same time, Oceanside was seeking to remove the circuit judge from further consideration of Condemnation 1, alleging that he was biased, and in April 2003, it sought a writ of mandamus in the Hawaii Supreme Court directing the trial judge to rescind the *sua sponte* order, and to disqualify him. The Hawaii Supreme Court denied the writ. App. 116.

On February 5, 2003, on the heels of the reopening of the public use issue, the stay of possession, and Oceanside's failed efforts to remove the judge, the County Council, without specific notice to Petitioner, adopted "a second resolution" authorizing the initiation of a second condemnation action to take Petitioner's property. App. 117. The second condemnation resolution, Resolution 31-03 (Resolution 2), was

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[1] Despite this order, neither the County nor Oceanside actually relinquished control of the land and did not remedy the damage done during possession, including the County's subdivision of the parcel.

virtually the same as Resolution 1, except that it sought an additional half-acre of land Oceanside discovered it wanted in the course of Condemnation 1, and made reference to "the Kona Regional Plan" (a plan that envisioned the two parallel traffic corridors that Oceanside was required to build at its sole expense in the 1994 rezoning ordinance, and not the single diagonal Development Agreement bypass which effectively crossed and eliminated the two traffic corridors called for by the County's regional plan). Resolution 2 omitted every direct reference to the Development Agreement and Oceanside. Instead, it stated that the bypass was planned "and is being developed," and "the Bypass would provide 'a regional benefit for the public purpose and use which will benefit the [County].'" App. 117. The references to a "Bypass," however, indirectly incorporates the Development Agreement into Resolution 2, for without the Development Agreement, there was no "Bypass" and the County had no right to the right-of-way or improvements, and admitted that it had no money to acquire, and would not have otherwise built a Bypass.

Although it adopted a second eminent domain resolution to take Petitioner's land, the County did not abandon or amend Condemnation 1. The County never explained why it needed a second condemnation which sought to take the same property already being taken, while it continued to prosecute the first. App. 117 ("For unstated reasons, during the pendency of Condemnation 1, [the County] for a second time

initiated procedures to condemn [Petitioner]'s property."). The public hearing preceding adoption of the resolution also provided no explanation; when the County Council began discussion of Resolution 2, it went into executive session to discuss its "strategy."

The County waited nearly two years to file a second lawsuit authorized by Resolution 2, *County of Hawaii v. Richards, et al.*, Civ. No. 05-1-015K (filed Jan. 28, 2005) (Condemnation 2). It did not explain the two year delay since the adoption of Resolution 2. App. 117. As in Condemnation 1, the County did not follow its usual eminent domain procedures, but used Oceanside's survey and description developed during its possession under Condemnation 1. Neither County nor Oceanside sought a new valuation of the land, despite the passage of five years between condemnations and the appreciation of the property in the interim, as testified to by all of the County's and Petitioner's appraisers at trial. Nor did the County provide any deposit in support of Condemnation 2, presumably relying on the deposit it had submitted in Condemnation 1 to do double duty. The County did not dismiss or amend Condemnation 1, but continued to prosecute both eminent domain actions simultaneously. The County did not notify Petitioner of its subdivision of the property, the County's adoption of a second condemnation resolution, or

the filing of Condemnation 2. Petitioner discovered the filing of Condemnation 2 in a newspaper and promptly moved to dismiss this cloud on its title. App. 117-18.

5. Petitioner sought dismissal on the grounds of abatement,[2] or if not dismissed, to consolidate it with Condemnation 1. The court denied the motion to dismiss, but consolidated the cases for trial in August 2007. App. 118. During the trial, the County did not reveal its reasons for filing two condemnations; it asserted *both* condemnations were supported by a valid public purpose, and that it could take Petitioner's property in Condemnation 1 *and* Condemnation 2. Only when the circuit court invalidated Condemnation 1 after trial was the County forced to solely rely on Condemnation 2. App 117.

As to Condemnation 1, the circuit court ruled that the taking was invalid because the County had unlawfully delegated its eminent domain power to Oceanside in the Development Agreement. The court also concluded the Development Agreement's attempt to force non-signatories to financially alleviate Oceanside's obligation to acquire and construct

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[2] Hawaii law provides that a second lawsuit involving the same parties, the same facts, and seeking the same relief cannot be prosecuted. *Shelton Engineering Contractors, Ltd. v. Hawaiian Pacific Indus. Inc.*, 456 P.2d 222, 226 (Haw. 1969).

the bypass was also illegal. App. 244. As to Condemnation 2, the court held that the case was not abated, and that Condemnation 2 was not pretextual but was supported by a valid public purpose because Resolution 2 said so. The court entered its First Amended Final Judgment against the County with respect to Condemnation 1, in favor of the County with respect to Condemnation 2, and determined just compensation for Petitioner's property in Condemnation 2. App. 247.

Hawaii law requires a condemning authority pay damages to a landowner when eminent domain actions "are abandoned or discontinued before reaching a final judgment, or if, for any cause, the property concerned is not *finally taken* for public use." HAW. REV. STAT. § 101-27 (1993) (emphasis added). Petitioner sought such damages from the County, which argued that even though it was not able to take the property in Condemnation 1, it was "finally taken" in Condemnation 2. The trial court did not rule on Petitioner's request for damages within the required time, and it was deemed denied. App. 139.

6. Petitioner appealed to the Hawaii Supreme Court, which held that the County could simultaneously maintain two condemnation actions to take Petitioner's property, and Condemnation 2 was not abated by the County's refusal to abandon Condemnation 1. App. 153. But the court reversed the judgment in favor of the County in Condemnation 2,

concluding that "where there is evidence that the asserted [public] purpose is pretextual, courts should consider a landowner's defense of pretext[.]" App. 108. The court held the County's stated purpose should not be accepted at "face value," and the "single fact that a project is a road does not *per se* make it a *public* road." App. 176 (emphasis in original). The court determined that "it [was] unclear from the entirety of the [circuit] court's findings and conclusions regarding Condemnation 2 whether the court did in fact consider and reject [Petitioner's] pretext argument." App. 180.

The court remanded the case, and instructed the trial court to review the record for the County's "actual reason" and its "motive" underlying Resolution 2. App. 174 (quoting *99 Cents Only Stores v. Lancaster Redev. Agency*, 237 F. Supp. 2d 1123, 1130 (C.D. Cal. 2001))."[T]he court was obligated to consider any and all evidence that [Petitioner] argued indicating that the private benefit to Oceanside predominated." App. 195. The court instructed the trial court to determine whether Condemnation 2 was motivated by factors other than an established plan to benefit the public, including whether the Development Agreement continued to limit the County's eminent domain discretion when it adopted Resolution 2:

> Despite the lack of reference to the Development Agreement in Resolution [2], it is not apparent from the record whether any or all of the same provisions in the Agreement that

> led the court invalidate Condemnation 1 were still in effect and underlay Condemnation 2, or whether other conditions existed such that the private character predominated. Those issues may be relevant to the pretext issue.

App. 183. The court concluded:

> [T]he ultimate question for the [circuit] court [on remand] is whether the "actual purpose [of Condemnation 2] was to bestow a private benefit[,]" *Kelo*, 545 U.S. at 478, or whether the taking was "clearly and palpably of a private character."

App. 200-01.

In May 2009, without accepting further evidence, the trial court made additional findings. App. 87-102. The court concluded the record contained "no evidence" the Development Agreement drove Condemnation 2 as it had Condemnation 1. The court did not reference any analysis of the evidence or examination of whether, as the Hawaii Supreme Court had directed, the Development Agreement was in effect when the County made its decision to adopt Resolution 2. The only evidence the circuit court referred to in support of this conclusion was Resolution 2 itself, and the transcript of the public hearing at which the County Council adopted the resolution. The court's findings listed traffic studies conducted by the County and the State, which noted "the public need for a roadway to bypass the Mamalahoa Highway and that an arterial highway in the area of the [bypass]

would relieve unacceptable traffic congestion of the Mamalahoa Highway." App. 90-91. The court did not recognize that Oceanside's access contradicted the County's regional plan, which provided for two parallel traffic corridors, rather than the single diagonal bypass of the Development Agreement. The court conceded that "the County's predominant purpose in entering into the Development Agreement with Oceanside as referred in Condemnation 1 is the construction of the Bypass for public use," App. 97-98, tacitly admitting that the illegal Development Agreement is the only "plan" upon which the County relied to counter the pretext claim. The court concluded that the bypass, as opposed to the purpose of the taking, "was not of a predominantly private character[,]" the County's "public purpose [was] not 'irrational' with 'only incidental or pretextual' public purpose benefits[,]" the "adoption of Resolution [2] was rationally related to the need for the Bypass[,]" and therefore the Resolution "was not pretextual." App. 101 & 102.

7. On Petitioner's appeal, the Hawaii Supreme Court expressly rejected the argument that Condemnation 2 should have been viewed as presumptively invalid because it was instituted while the Development Agreement delegating the County's power of eminent domain to Oceanside remained in effect. App. 23-28. The Hawaii Supreme Court rejected Petitioner's call for a rule that any taking is invalid if it is instituted while the government has delegated its authority to a particular private party, or at least

warrants closer judicial scrutiny than takings accomplished pursuant to a comprehensive *Kelo*-qualifying plan, which the illegal Development Agreement was not. The Hawaii Supreme Court held that the cloud cast by such a contract is merely a "*factor* in determining pretext," and does not warrant heightened judicial scrutiny. *Id*. (emphasis in original).

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW TO CLARIFY THE STANDARDS FOR EMINENT DOMAIN PRETEXT AND THE TRIGGERS FOR MORE STRINGENT JUDICIAL REVIEW

This case presents the opportunity to firmly establish what the *Kelo* majority and Justice Kennedy's concurring opinions strongly suggested, but did not need to squarely address: that "unusual" exercises of eminent domain power will trigger a presumption of invalidity, or at least require heightened scrutiny. These independent triggers include when (1) a taking is accomplished outside of an integrated and comprehensive plan; (2) the factual context reveals suspect motivations such as a contractual restraint on sovereign powers; (3) the taking benefits a particular private party selected beforehand; or (4) private benefits outweigh incidental public benefits. Governments and property owners will benefit from the establishment of clear standards, because condemning authorities will understand that when they utilize

eminent domain in a neutral, transparent, and well-considered process, the result will be entitled to judicial deference, and property owners will be assured that in the absence of these indicators of pretext, the need to surrender their property for the greater good is genuine. While any single indicator is enough to trigger reversal of the presumption of validity, this case has all four.

In grappling with the issues left open by *Kelo*, the lower courts have been unable to settle on clear or consistent guidelines for how to evaluate takings cases, what constitutes pretext, or what situations present such unusual exercises of eminent domain that a court should apply a more stringent standard of review. In *Kelo*, this Court held that takings supported only by claims of "economic development" are not so unusual that a *per se* rule of invalidity is warranted. When an economic development plan, like other exercises of police power, is facially neutral, well-considered, and adopted via a transparent process, a reviewing court should defer, even if the plan includes an eminent domain component. New London's economic development plan met those criteria: it was "carefully considered," *Kelo*, 545 U.S. at 478, "comprehensive," was adopted after "thorough deliberation," and thus "unquestionably served a public purpose." *Id.* at 484. Consequently, "it [was] appropriate for [the Court], as it was in *Berman*, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan." *Id.* The Court favorably compared New London's development plan with comprehensive

Euclidean zoning and "other exercises in urban planning and development . . . [in which] the City is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts." *Kelo*, 545 U.S. at 483 & n.12 (citing *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (sustaining comprehensive zoning against a substantive due process challenge)).

However, the Court also concluded that a taking would not survive scrutiny if the asserted public purpose is a pretext to hide private benefit. *Kelo*, 545 U.S. at 478. That issue was not presented in *Kelo*, but the majority and Justice Kennedy's concurring opinions set out a number of factors to evaluate when an asserted public purpose is, in fact, a pretext hiding private benefit, and a trigger to more intense judicial review. Perhaps recognizing that it would be difficult for property owners to ferret out hidden private motivations,[3] these factors focus on the lack of objective indicia of trustworthiness, by asking whether the taking was the result of a procedure that was facially neutral, was well-considered, and afforded affected parties opportunities for input.

[3] As Justice Scalia correctly observed, legislative bodies should not be presumed to employ "stupid staffs" who do not understand how to avoid judicial scrutiny by tailoring the record. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1025 n.12 (1992).

The first indicator of private purpose is the lack of a carefully considered and comprehensive development plan. *Kelo*, 545 U.S. at 487 (footnotes omitted) (a taking "executed outside the confines of an integrated development plan" is suspect). Another element to examine is the condemnor's actual motivation to determine whether a purpose was to confer a private benefit. *Id.* at 478 ("Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit."). The third is the use of eminent domain to accomplish a "one-to-one transfer of property" to an identified private party. *Id.* at 477 ("the City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party") (citing *Midkiff*, 467 U.S. at 245); *see also Kelo*, 545 U.S. at 478 n.6. The fourth is whether the taking results in primary benefit to a private party "with only incidental or pretextual public benefits." *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring).

The Court concluded that such proof would indicate a taking was an "unusual exercise of government power" and that consequently, "a private purpose was afoot." *Kelo*, 545 U.S. at 487 (footnotes omitted). Justice Kennedy added that such an exercise of eminent domain may be so suspect that a reviewing court should examine it with more than rational basis scrutiny, or even by reversing the presumption of validity. *Kelo*, 545 U.S. at 493 (Kennedy, J., concurring). But since none of these factors

were present in *Kelo*, they could be "confronted if and when they arise." *Id.*

A. This Case Is A Good Vehicle To Address The Issues

The case at bar presents the Court with an excellent opportunity to provide that desperately needed guidances and is an appropriate vehicle to address the issues presented. First, all four criteria identified by *Kelo* as important are present: Oceanside was the known private beneficiary, identified well before the taking in fact it, not the county, drove and paid for the taking; the County had no comprehensive or integrated *Kelo*-qualifying plan of which the taking was a part (indeed, it had no plan at all apart from the illegal Development Agreement, and no financial ability to take Petitioner's property); the taking had minimal public benefits, particularly when weighed against the overwhelming private benefit by relieving Oceanside of its obligation to acquire and build at its own expense, as it contravened the County's own plans and attempted to transfer Oceanside's cost obligations to non-parties;[4]

[4] Just as the presence of some private benefit will not automatically invalidate a taking, *see Kelo*, 545 U.S. at 486 ("Quite simply, the government's pursuit of a public purpose will often benefit private parties"), the presence of some public benefit will not automatically insulate a taking from a finding of predominant private purpose because it is the knowing bestowal of a private benefit on an identifiable private party that results in the constitutional wrong. *Id*. at 491 (Kennedy, J., concurring).

and the County's actual motivation was so suspicious that the Hawaii Supreme Court acknowledged it "raises well founded concerns that a private purpose is afoot." App. 26. Second, the facts supporting these criteria are either undisputed, or have already been resolved by final judgment. Third, the court below addressed the legal issues squarely under federal law, and state law would not provide independent grounds for affirmance. Finally, the issues presented were fully briefed and argued below and the Hawaii Supreme Court conclusively decided the federal issues.

B. The Lower Courts Disagree Over What Constitutes An "Unusual" Taking Justifying More Exacting Judicial Review

Lacking definitive guidance from this Court the lower courts have been unable to settle on which of the *Kelo* criteria are applicable and controlling in any given case, or whether any of them is more or less critical than the rest, and the decisions are a patchwork of results and rationales.

Some courts read *Kelo* to say that the lack of a comprehensive plan means the asserted public use is pretextual. In *Middleship Township v. Lands of Stone*, 939 A.2d 331 (Pa. 2007), the court concluded that "evidence of a well-developed plan of proper scope is significant proof that an authorized purpose truly motivates a taking." *Id.* at 338. Similarly, in *Rhode Island Econ. Dev. Corp. v. The Parking Co.*, 892 A.2d 87 (R.I. 2006), the court contrasted the

"exhaustive preparatory efforts that preceded the takings in *Kelo*" to conclude that the government has a higher burden in quick-take condemnations than it has in "regular" takings. *Id.* at 104. The court concluded that the lack of a *Kelo* plan showed that the condemnor's "principal purpose" for the taking was to achieve by way of condemnation that which it could not achieve by agreement. *Id.* at 106. In *Mayor and City Council of Baltimore v. Valsamaki*, 916 A.2d 324 (Md. 2007), the court shifted the burden to the condemnor to show "concrete, immediate necessity" with "specific and compelling evidence" when it uses quick-take procedures, and to show what plans it had for the property beyond future "mixed-use development." *Id.* at 352-53 (citing *Kelo*, 545 U.S. at 473-74).

In its first opinion in the case at bar (App. 103-242), the Hawaii Supreme Court joined Pennsylvania and a New York intermediate appellate court in holding that *Kelo* requires a reviewing court to look for the actual motivation of the condemnor. *See* App. 161, 172, 174, 194, 200 (courts must "thoroughly consider" evidence of pretext and private benefit by examining the "actual purposes," and the government's "veracity," by "look[ing] behind the government's stated public purpose" with a "closer objective scrutiny of the justification being offered"). Similarly, in *Middleship Township v. Lands of Stone*, 939 A.2d 331 (Pa. 2007), the court held that a reviewing court must look for "the real or fundamental purpose behind a taking" (and, as noted above, the purpose must "primarily benefit the public"). *Id.* at 337. In *Kaur v.*

New York State Urban Dev. Corp., 892 N.Y.S. 2d 8 (App. Div. 2009), *rev'd*, 933 N.E.2d 721 (N.Y. 2010), *cert. denied*, 2010 WL 3712673, at *1 (U.S. Dec. 13, 2010) (No. 10-402), an intermediate appellate court concluded that under *Kelo*, a taking was pretextual because the actual motivation of the condemnation was to benefit a private party, and the condemnor's blight finding was "mere sophistry." *Kaur*, 892 N.Y.S. 2d at 10.

"Only one post-*Kelo* pretext decision seems to have turned on the fact that the identity of the new private owner was not known in advance by condemning authorities." Somin, *The Judicial Reaction to* Kelo, 4 ALBANY GOV'T L. REV. at 28 (citing *Carole Media LLC v. New Jersey Transit Corp.*, 550 F.3d 302 (3d Cir. 2008)). In that case, the court rejected the claim that a taking was pretextual 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." *Carole Media LLC*, 550 F.3d at 311.

Other courts require a comparison of the private benefits with the expected public benefits. *See*, *e.g.*, *Franco v. Nat'l Capital Revitalization Corp.*, 930 A.2d 160, 169 (D.C. 2007). In that case, the court concluded a pretext defense may succeed "[i]f the property is being transferred to another private party, and the benefits to the public are only 'incidental' or 'pretextual[.]'" *Accord In re O'Reilly*, 5 A.3d 246, 258 (Pa. 2010) ("[T]he public must be the primary and

paramount beneficiary of the taking."). Other courts apply this same analysis, but rely on Justice Kennedy's concurring opinion. *See, e.g., MHC Financing Ltd. P'ship v. City of San Rafael*, No. C00-3785VRW, 2006 WL 3507937 (N.D. Cal. Dec. 5, 2006) (*Kelo* requires a "careful and extensive inquiry" into "whether, in fact, the development plan is of primary benefit to the developer" with only incidental public benefits) (quoting *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring)).

Finally, some courts seem to ignore all of the *Kelo* factors, and take "an extremely deferential approach to pretext issues, falling just short of defining the pretext cause of action out of existence." Somin, *The Judicial Reaction to* Kelo, 4 ALBANY GOV'T L. REV. at 30. Professor Somin is referring to the Second Circuit, which concluded in *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir.), *cert. denied*, 554 U.S. 930 (2008), that it need not "give close scrutiny to the mechanics of a taking," and to the New York Court of Appeals, which held in *Goldstein v. New York State Urban Dev. Corp.*, 921 N.E.2d 164 (N.Y. 2009) that a finding of "blight," no matter how ludicrous, is virtually unassailable.

In sum, this Court's guidance is desperately needed. As Professor Somin recently wrote:

> federal 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.

Somin, *The Judicial Reaction to* Kelo, 4 ALBANY GOV'T L. REV. at 3. The extent of government's power of eminent domain when it is part of a larger plan has been settled for more than half a century since *Berman v. Parker*, 348 U.S. 26 (1954) (establishing the rational basis standard of review for most takings). *See also Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) (the legislature's condemnation power is coterminous with the police power). Similarly, regulatory takings have been guided by a discernable framework for analysis for more than thirty years. *See Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) (establishing three-part test for most regulatory takings); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) (affirming the *Penn Central* test). The lower courts, condemning authorities, and property owners deserve similarly established guidelines for pretext and the standards applicable when a taking is accomplished outside of a *Kelo*-qualifying plan.

II. "UNUSUAL" EXERCISES OF EMINENT DOMAIN LACKING OBJECTIVE INDICIA OF TRUSTWORTHINESS ARE NOT ENTITLED TO A PRESUMPTION OF VALIDITY

As the Hawaii Supreme Court recognized, "a contract that delegates a county's eminent domain powers, raises well founded concerns that a private

purpose is afoot." App. 26. The Development Agreement delegated the County's eminent domain power to a single distinct, pre-selected private party, Oceanside, and the County was threatened with breach if it did not take Petitioner's property. In 2003, when the County adopted Resolution 2, Condemnation 1 was in jeopardy because the County expressly admitted on the face of Resolution 1 that it had delegated its eminent domain power to Oceanside and the trial court *sua sponte* vacated the public use summary judgment. The County had no comprehensive plan pursuant to which Petitioner's property was to be taken except for the Oceanside Development Agreement (indeed, the location of the bypass was not where the County's general plan located it). In the Development Agreement, the County also intentionally and not incidentally agreed to relieve Oceanside of its preexisting obligation to acquire the property needed for the bypass without County assistance, and agreed to shift the economic burden of the bypass to non-parties.

Yet, by applying a highly deferential standard of review and refusing to recognize either a *per se* rule of invalidity or even a presumption of private purpose, the Hawaii Supreme Court blindly affirmed the trial court's conclusion there was "no evidence" of pretext. The court held that "a *per se* rule of pretext would threaten the established rule of deference given to the findings and declarations of the government in these cases." App. 26. This rationale which is simply "rational basis" by another name, underscores the

need for heightened scrutiny or a shifting of the presumption of valid purpose in this situation, because a property owner's evidence of government's motivations or actual reasons will almost always be based on context, since the government is rarely careless, or self-destructively candid. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1025 n.12 (1992) (legislative bodies should not be presumed to employ "stupid staffs"). This Court has recognized in similar situations that a reviewing court must look to context to determine the motivations of government officials. *See*, *e.g*., *Vill. of Arlington Heights v. Metropolitan Hous. Dev. Corp*., 429 U.S. 252, 266 (1977) ("Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face."); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) ("[W]e may determine the city council's object from both direct and circumstantial evidence," which includes "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body."). Although these cases involved equal protection and the free exercise of religion, the inquiry is no different when property is involved, since private property is also a fundamental constitutional right that must be respected. *Dolan v. City of Tigard*, 512 U.S. 374, 393 (1992) ("We see no reason why the Takings Clause of the Fifth Amendment, as

much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.”).

A. Strict Scrutiny Of Delegations

The threat of millions of dollars in liability for breach of contract for killing Oceanside’s luxury 1500-unit gated community were the County not to condemn Petitioner’s property loomed large over Resolution 2. A *per se* rule or heightened scrutiny would guard the process against the obvious risks inherent in instituting a condemnation action for supposedly neutral reasons while an agreement exists in which the government has sold its eminent domain discretion to a private party. This is the type of private transfer “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.” *See Kelo*, 545 U.S. at 493 (Kennedy, J., concurring) (retroactive legislation triggers a presumption of invalidity). This concern is particularly acute where, as here, a delegation of governmental powers is involved. Thomas Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 87-90 (1986) (higher judicial scrutiny when government delegates power of eminent domain to private party). In other words, the “giving” of condemnation powers in the Development Agreement tainted any taking instituted while the Development Agreement could be said to be in effect.

Condemnations expressly instituted pursuant to a contract delegating the power of eminent domain to a private party are invalid as a matter of law, without inquiry into motivation, or any public benefits that may result. *See*, *e.g.*, *In re Condemnation of 110 Washington Street*, 767 A.2d 1154, 1160 (Pa. Commw. Ct. 2001) (invalidating a taking without asking whether the stated purpose of blight abatement was genuine because it was instituted pursuant to agreements which delegated condemnation power) (citation omitted); *Evans v. Smyth-Wythe Airport Comm'n*, 495 S.E.2d 825 (Va. 1998) (judgment entered pursuant to settlement agreement void because it limited commission's ability to take property). Condemnation 2 was not *expressly* based on the Development Agreement, but purported to be based only on the County's independent desire for a road. Yet the circumstances tell a different story. Condemnation 1 was on the brink of failure because the trial court had re-opened the question of whether Condemnation 1 was for a public use; Oceanside's efforts to disqualify the trial judge had been rebuffed; and the County was facing liability to Oceanside for breach of the Development Agreement and liability to Petitioner under Hawaii's damages statute if it did not take the property. The same rationale that supports a bright line rule that condemnations admittedly resulting from agreements delegating eminent domain power are invalid also supports a rule that takings commenced while such an agreement could be controlling are subject to a more skeptical judicial eye.

B. Heightened Scrutiny Protects The Appearance Of Government Independence

When a contract that controls government's eminent domain power is reasonably believed to be in effect and the government condemns property, the risk of hidden improper purpose is at its zenith. There is no way to determine whether the process has been captured by private parties and private involvement increases the risk of corruption and "rent seeking" (capture of the process by private interests). *See* Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. at 86 (1986) ("rent seeking" is competitive lobbying for government favors).

Heightened scrutiny or a shifting of the usual presumption of validity protects the public against the danger of unrevealed private purchase and control of public processes, strengthens public confidence that the condemnation power is being exercised impartially and free of insider influence, and protects individual property owners by preserving meaningful judicial review if government is tempted to use private agreements as a substitute for true public consideration and condemnation procedures. *Cf.* 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, 549 (2006) (arguing for a *per se* rule by state courts or legislatures prohibiting all economic development takings to preserve "respect for the legal system and political process, as most citizens would intuitively (and correctly) conclude that the beneficiaries of [an

economic development taking] would be rich and powerful interests profiting at the expense of ordinary property owners"). This rationale is even more pronounced in the present situation, since the Oceanside Development Agreement unquestionably sold the County's eminent domain power and authorized a private insider to exercise it, as the trial court held when it invalidated Condemnation 1. Thus, even if Resolution 2 was somehow free of the Development Agreement's private influence – despite all appearances otherwise – the risk of appearing that a powerful private interest continued to control the machinery of eminent domain for its own enrichment was simply too great.

When the probability of private influence is too risky in similar circumstances, courts impose bright line prohibitions. For example, this Court recently determined an elected state judge must recuse himself when the circumstances would lead to the "objective or reasonable perception" that the judge might be influenced by campaign contributions. There was no indication the judge had actually demonstrated any bias in favor of the contributor, yet the Court adopted a blanket rule designed to avoid the appearance of bias:

> [T]here are objective standards that require recusal when "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable."

Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252, 2257 (2009) (citation omitted). As in the case of

eminent domain pretext, exposing undue influence in campaign contributions in judicial elections is nearly impossible because the evidence necessary to prove influence cannot be accessed by third parties. As the Court recognized in *Nixon v. Shrink Mo. Gov't Pac*, 528 U.S. 377 (2000), private influence is most often exercised in ways other than "quid pro quo." *Id.* at 389 (quoting *Buckley v. Valeo*, 421 U.S. 1, 28 (1976)). Consequently, the Court adopted a prophylactic rule based on objective criteria. "The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules. Otherwise there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case." *Caperton*, 129 S. Ct. at 2263. Similarly, in a taking instituted under the cloud of a delegation contract, "[t]he government will rarely acknowledge that it is acting for a forbidden reason," *Franco v. Nat'l Capital Revitalization Corp.*, 930 A.2d 160, 169 (D.C. 2007), and a similar rule should apply. Heightened scrutiny will help preserve the public's confidence that the government is acting independently and free from private influence.

C. Heightened Judicial Scrutiny Protects Meaningful Judicial Review

In the absence of a bright line rule or heightened scrutiny, serial takings such as Condemnation 2 would render judicial review futile:

> Futility refers to a court's inability to prevent governmental actions that are based on impermissible motivations because of the government's ability to circumvent judicial scrutiny. For example, government officials can hide their actual motivations, including pretextual ones. Moreover, even if a court detects an impermissible motivation and invalidates a governmental action on that basis, officials may decide to take the same action without disclosing their actual motivation, thereby circumventing the judicial test.

Daniel B. Kelly, *Pretextual Takings: Of Private Developers, Local Government, and Impermissible Favoritism*, 17 S. CT. ECON. REV. 173, 182-83 (2009). Condemnation 2 could be the paradigmatic example of futility. The County adopted Resolution 2 only after Condemnation 1 was in jeopardy, and without any explanation of why a second condemnation was necessary when it continued to prosecute the first. App. 117 (noting the County adopted Resolution 2 only "[f]or unstated reasons").This is an example of how condemnors seeking to avoid a repeat claim of private influence can simply say nothing on the second attempt, as the County did in Resolution 2 (particularly where Petitioner's successful arguments in Condemnation 1 provided a clear blueprint to the County about how to hide the Development Agreement's control).

The only way to mitigate the overwhelming likelihood that the County altered Resolution 2's form, but did not change the substance of its purpose from

Resolution 1 and Condemnation 1, is by requiring a reviewing court to take a harder look at the factual context, or by putting the burden on the condemnor to show that it has not been influenced to favor a private party. A presumption of invalidity or heightened scrutiny would have required the trial court to closely consider the circumstances surrounding the adoption of Resolution 2 and the filing of Condemnation 2, and not avoid the issue by concluding there was "no evidence" to support pretext. The County should have been required to show that its actual purpose for adopting Resolution 2 was not to avoid liability to Oceanside for breach of the Development Agreement, and liability to Petitioner for section 101-27 damages for Condemnation 1. The undisputed factual context surrounding Resolution 2 and Condemnation 2 shows a "clear pattern" that they were not simply "unusual," they were aberrations. *See Vill. of Arlington Heights*, 429 U.S. at 266 ("Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face."). In 2003 at the time of Resolution 2, the County had no discretion to refuse Oceanside's directive to take Petitioner's property, as it had already bound itself to do so. Most importantly, as the trial court had not yet invalidated the condemnation-on-demand provision in the Development Agreement, the County reasonably believed the Development Agreement tied its hands. The elephant in the room that the courts below ignored was the Development Agreement's

continuing cloud over the County's eminent domain discretion.

The County's arguments in the first appeal to the Hawaii Supreme Court also confirm its ulterior motives. It argued it was not liable to Petitioner for damages for the failed Condemnation 1 under HAW. REV. STAT. § 101-27 (1993), because it "finally took" the property in Condemnation 2. App. 124. Section 101-27 requires a condemnor to pay damages if "the property concerned is not finally taken for public use," and throughout the appeal, the County argued the existence of Condemnation 2 insulated it from liability because even if Condemnation 1 did not succeed, the property would be "finally taken" in Condemnation 2. *Id*. The Hawaii Supreme Court rejected the argument, holding that section 101-27 is designed to prevent "serial eminent domain abuse." App. 128-29. Given the total redundancy of Resolution 2 and Condemnation 2, the second conclusion that heightened scrutiny would require the court to draw from the "circumstances of the approval process" is that they were instituted to avoid the County's strict statutory obligation to make Petitioner whole under section 101-27 if Condemnation 1 failed.

Finally, heightened scrutiny would require a harder look at the trial court's findings which do not reflect that it examined the circumstances and the timing of Resolution 2 and the fact it was adopted only after Condemnation 1 was foundering. The "specific series of events leading to the enactment or official policy in question" show that the County could

not point to a rational reason why Resolution 2 was needed. *See Church of Lukumi Babalu Aye*, 508 U.S. at 540; *Vill. of Arlington Heights*, 429 U.S. at 267. The property was already being taken "for a regional road" in Condemnation 1, and nothing relevant to that issue had changed between 2000 and 2003. In Condemnation 2 (like Condemnation 1) the County followed none of its normal condemnation procedures. It was Oceanside-driven in all respects. Oceanside determined the land needed, it subdivided the land, and it supplied the property description. It sought no new valuation. It conducted no title search or survey. It continued to rely upon the Oceanside-provided deposit in Condemnation 1. It did not even notify Petitioner of its subdivision of its property, its adoption of a second condemnation resolution, or the filing of Condemnation 2. Petitioner discovered the filing of Condemnation 2 in a newspaper and promptly moved to dismiss the cloud on title.

Nothing had changed between Condemnation 1 and Condemnation 2, except the surgical removal of direct, but not indirect references to the Development Agreement in Resolution 2, the looming failure of Condemnation 1, and the resultant obligation to pay section 101-27 damages.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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