No. 07-1247

In The
Supreme Court of the United States

DANIEL GOLDSTEIN, ET AL.,
Petitioners,

v.

GEORGE E. PATAKI, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY BRIEF

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As the petition demonstrated, the Second Circuit's decision to foreclose petitioners' pretext-based Public Use Clause claim – as a matter of law on a motion to dismiss – warrants this Court's review: (1) because it is directly at odds with the decisions of other courts, notably the opinion of the court of last resort for the District of Columbia reinstating a pretext-based pleading, *see Franco v. Nat'l Capital Revitalization Corp.*, 930 A.2d 160 (D.C. 2007); and (2) because the conflict reflects the confusion created by this Court's assurance that the Public Use Clause "no doubt" prohibits the taking of "property under the mere pretext of a public purpose, when [the] actual purpose [is] to bestow a private benefit," while at the same time adhering to the principle that near absolute deference must be paid to legislative public use determinations, *see Kelo v. City of New London*, 545 U.S. 469, 478 (2005).

I. The Conflict And Confusion Over The Scope Of Pretext-Based Public Use Clause Claims Is Real And Important

This case presents – squarely and cleanly – an important long-standing doctrinal question that has confounded lower courts both before[1] and after *Kelo*:

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[1] For pre-*Kelo* pretext cases in the state courts, *see* Pet. 21, n.11. For pre-*Kelo* pretext cases in the federal courts, *see* Pet. 36-38; *see also* Brief of *Amicus Curiae* Institute for Justice at 6-7 (citing cases).

> How should a pretext-based Public Use Clause claim be evaluated given that condemnors can *always* posit a conceivable public benefit to justify a taking?

The decisions of the Second Circuit here and the highest court for the District of Columbia in *Franco* starkly illustrate the problem.

A. This Case. Relying on *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984), and *Berman v. Parker*, 348 U.S. 26 (1954), the Second Circuit in this case held that *no* Public Use Clause claim can survive dismissal at the pleading stage when the taking is justified on blight grounds because addressing blight is a "classic public use" justification. Pet. App. 27a-28a. By the Second Circuit's lights, it did not matter that petitioners alleged (and indeed it is beyond dispute) that vague concerns about blight were raised for the first time as a justifying public purpose nearly three years *after* the decision to seize petitioners' homes. Pet. 9-11.[2] Nor did it matter that the complaint in this action contested respondents' *post-hoc* blight finding on the merits because it defined blight as the existence of "weeds" or "underutilization." *Id.; see also id.* 19-20.

B. *Franco*. Faced with the same question as the Second Circuit below, the court of last resort for the District of Columbia held that "*Kelo* makes clear that there is room for a landowner to claim that the legislature's declaration of public purpose is a pretext designed to mask a taking for private purposes."

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[2] *See also* Pet. App. 187a-190a, 197a-198a, 207a.

Franco, 930 A.2d at 169. The court in *Franco* reinstated the property owner's pleading and reversed the trial court's conclusion that "once the legislature has declared a public purpose for a condemnation, an owner is foreclosed as a matter of law from demonstrating that the stated reason is a pretext." *Id.* at 168. The court recognized that the "government will rarely acknowledge that it is acting for a forbidden reason, so a property owner must in some circumstances be allowed to allege and demonstrate that the stated public purpose for the condemnation is pretextual." *Id.* at 169.[3]

C. Conflict. Respondents cannot seriously deny the direct conflict between this case and *Franco*, as well as other post-*Kelo* cases involving pretext-based Public Use Clause claims. Respondents try anyway. Opp. at 17. They note that the draft legislation authorizing condemnation in *Franco* did not mention blight, but that blight was inserted as a justification in a subsequent draft of the bill. *Id.* Here, respondents did not mention blight as a justification until nearly three years *after* petitioners' homes were slated for condemnation and then commissioned a bizarre, self-serving blight analysis that examined *only* the properties Ratner selected for his Project years earlier. Pet. 9-11, 19-20. Respondents do not explain why factual allegations containing strong

[3] Defendants who are "of a mind to act contrary to law seldom note such a motive" in writing. *Dister v. Continental Group, Inc*. 859 F.2d 1108, 1112 (2d Cir. 1988). Indeed, direct evidence of an illegal purpose or intent "is difficult to find precisely because [defendants] deliberately try to hide it." *Id.*

circumstantial evidence that blight was an afterthought warranted upholding a pleading alleging pretext in *Franco*, but not here.[4]

Respondents go so far as to claim that "*Franco* is in accord with the decision below." Opp. 17. This is false. No honest reading of the two decisions can conclude otherwise. Had petitioners had the fortune to own homes and businesses in the District of Columbia, they, like Mr. Franco, would now be conducting civil discovery in advance of presenting their case to a fact finder.

Indeed, if petitioners lived in any state *but* New York, the state condemnation process would afford them an opportunity to present evidence and cross-examine witnesses.[5] Where property owners have

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[4] Insofar as the distinguishing factor identified by respondents is that blight was inserted as a justifying purpose *after* the council held public hearings, Opp. 17, it is important to note that the hearings in *Franco* were *legislative* hearings. The bill that contained the blight finding was voted on by elected representatives and signed into law by the mayor. Here, of course, no legislative body ever considered, much less approved, the forced transfer of petitioners' properties to Ratner.

[5] Under New York's Eminent Domain Procedure Law (N.Y. Em. Dom. Proc. Law or EDPL), a homeowner has a single circumscribed opportunity to challenge a taking on Public Use grounds. "The EDPL establishes a short, exclusive period [of 30 days] to challenge the public use determination." *Brody v. Village of Port Chester*, 434 F.3d 121, 132 (2d Cir. 2005). "[R]eview is limited to the record before the condemnor . . . and the reviewing

successfully challenged the taking of their property in recent years, it has been done based on an adversarial fact-finding. *See, e.g., Norwood v. Horney*, 853 N.E.2d 1115, 1126 (Ohio 2006) (citing trial court findings after "a hearing that lasted several days").[6]

D. Pretext. A pretext is an "[o]stensible reason or motive assigned or assumed as a color or cover for the real reason or motive." *Black's Law Dictionary* 1187 (6th ed. 1990). Despite the plain meaning of "pretext," respondents maintain that a pretext-based Public Use Clause claim, if it exists at all, must be limited to an "objective, on the record" inquiry of a proffered public purpose. Opp. 25-26 (citing decision below at Pet. App. 27a ("closer *objective* scrutiny of the justification being offered" may be required)). This makes no sense.

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court either confirms or rejects the condemnor's determination." *Id.* at 134. The court's on-the-record review is strictly limited to whether the taking is constitutional, is within the condemnor's jurisdiction, is procedurally proper, and will serve a public use, benefit or purpose. EDPL § 207. No discovery is permitted. No evidentiary hearing is allowed. Witnesses cannot be called or cross-examined. *Vill. Auto Body Works, Inc. v. Vill. of Westbury*, 454 N.Y.S.2d 741, 743 (App. Div. 1982).

[6] *See also Bailey v. Myers*, 76 P.3d 898, 904 (Ariz. App. 2003); *City and County of Denver v. Block 173 Associates*, 814 P.2d 824, 829 (Colo. 1991); *Pequonnock Yacht Club, Inc. v. City of Bridgeport*, 790 A.2d 1178, 1182-83 (Conn. 2002); *SWIDA v. National City Env.*, 768 N.E.2d 1, 9-11 (Ill. 2001); *City of Springfield v. Dreison Inv., Inc.*, 2000 WL 1015857 (Mass. Super. Feb. 25, 2000); *Mississippi Power and Light Co. v. Conerly*, 460 So.2d 107, 109-10 (Miss. 1984); *Chimney Rock Irr. Dist. v. Fawcus Springs Irr. Dist.*, 359 N.W.2d 100, 102 (Neb. 1984); *Casino Reinv. Dev. Auth. v. Banin*, 727 A.2d 102 (N.J. Super. 1998).

Respondents do not explain how a court screening for pretext could do so on an "objective" basis. Virtually all pretexts, after all, have some degree of "objective" facial legitimacy. Otherwise, they would not be pretexts. As respondents would have it, it would not matter if petitioners produced a video of former Governor Pataki making a deal with his old law school friend and top political supporter,[7] Bruce Ratner, to seize and transfer petitioners' properties in exchange for Ratner's fundraising support for Pataki's presidential campaign. The tape would be irrelevant because, as an "objective" matter, the pretext of "addressing blight" would benefit the public.

Respondents contend that every court that has considered a pretext claim in the wake of *Kelo* has rejected the proposition that the analysis is subjective. Opp. 26 (citing *Franco*, *MHC Fin. Ltd. P'ship v. San Rafael*, No. C 00-3785, 2006 WL 3507937 (N.D. Cal. Dec. 5, 2006), and *49 WB, LLC v. Village of Haverstraw*, 839 N.Y.S.2d 127, 130 (N.Y. App. Div. 2007). Respondents are wrong.[8]

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[7] *See* "*For Brooklyn, a Celebration or a Curse*?", WASHINGTON POST, Jan. 26, 2004, at A1 ("Ratner is [a] top political contributor and law school friend of Pataki.").

[8] In *MHC,* not only did the court deny summary judgment and order a trial to determine whether affordable housing was merely a pretext to justify a private taking, 2006 WL 3507937, at *13-14, it later made a post-trial factual finding that the government's asserted public purpose was a pretext to conceal a private taking in violation of the Pubic Use Clause. *See MHC Fin. Ltd. v. San Rafael*, No. C-00-03785, 2008 WL 440282, at *25 (N.D. Cal. Jan. 29, 2008); *see also id.* at *17-25.

In *Franco*, the court held that, in evaluating the merits of the pretext claim on remand, the subjective "intent of the legislators" *is* part of the inquiry. To be sure, the court began its analysis by asserting that Justice Kennedy's use of the word "pretext" in *Kelo* did, to *some* degree, suggest something akin to an objective analysis, but went on to clarify that "[n]evertheless, *the same sentence refers to intent* ('transfers intended to confer benefits'), presumably *the intent of the legislators*." 930 A.2d at 173 (emphasis supplied). Weighing what it viewed as the tension between these two concepts of pretext, *Franco* concluded, rather vaguely, that courts "must focus *primarily* on benefits the public hopes to realize from the proposed taking." *Id*. (emphasis supplied). Thus, according to *Franco*, the existence of public benefits may be somewhat more important to the pretext inquiry than the subjective intent of the condemnors, but the word "primarily" confirms unmistakably that subjective intent *is* part of the inquiry.

Although the court in *Franco* ordered the trial court on remand to consider subjective intent, it was somewhat hesitant to do so, because of "formidable barriers to discovering the motives and intentions of individual legislators." *Id*. As the court observed, legislators enjoy both statutory and common law

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And, as explained *supra* n.5, New York's condemnation procedures prohibit anything more than review of the record created by the condemning authority (and here the record was essentially created by Ratner, the private beneficiary of the mass condemnations). Thus, it is no surprise that the court in *49 WB* did not hear testimony or make findings concerning the subjective purpose underlying the takings decision. 839 N.Y.S.2d 127.

privileges and immunities from disclosing their subjective motives and intentions in considering and/or acting on legislation. *Id*. n.12.

Here there is no such privilege or immunity and thus no reason for hesitancy. Ratner's and Pataki's decision to condemn respondents' properties was rubber-stamped by the ESDC, an unelected, quasi-governmental corporation. Indeed, the ESDC is so removed from state government that the Eleventh Amendment does not protect it from suit. *See* Pet. at 30, n.16.

Respondents' objective/subjective argument illustrates the confusion caused by *Kelo* and the need for this Court's guidance. As demonstrated in the petition, *Kelo*'s reference to "pretext," "purpose," "motive" and "intent" in describing why the taking there was justified by a public purpose is difficult to reconcile with the rational basis-like review that *Kelo* reiterated must be applied to legislative public purpose determinations.[9] The tension is undeniable. No court

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[9] Respondents belittle petitioners' and *amicus*'s position as a "curious[ ] argu[ment] that *Kelo expanded* rather than *constricted* the degree of constitutional scrutiny under the Public Use Clause." Opp. 25 (emphasis in original). This misses the point. The problem created (or exacerbated) by *Kelo* is how to harmonize the principle of near absolute deference to legislative public purpose determinations with the common sense understanding that such deference invites unprincipled decision-makers to take a citizen's home "under the mere pretext of a public purpose, when [the] actual purpose [is] to bestow a private benefit." 545 U.S. at 478. As set forth in Justice O'Connor's dissent in *Kelo,* "it is difficult to

has resolved it.[10] Petitioners have offered a solution that harmonizes and gives effect to both concepts in this Court's precedents. Pet. 31-38. Respondents ignore it.

Respondents, like the Second Circuit below and many other courts confronted with this dilemma, pretend that pretext-based Public Use Clause claims are non cognizable notwithstanding *Kelo*. Other courts, like *Franco,* choose to ignore *Midkiff* and *Berman,* thus allowing discovery and fact-finding into legislative motives. Only this Court can reconcile and harmonize the conflicting cases, providing much

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envision anyone but the stupid staffer failing" to manufacture a minimally plausible public purpose pretext. *Id.* at 502.

[10] The confusion concerning the nature and scope of pretext-based Public Use Clause claims has only deepened since this petition was filed. On April 22, 2008, a divided Pennsylvania appellate court sustained a taking over the objections of a homeowner proceeding *pro se*. *In re Condemnation of Land for the Southeast Central Business District Redevelopment Area #1*, No. 651 C.D.2007 (Pa. Commw. Ct., Apr. 22, 2008). The two dissenting judges observed that *Kelo* "emphasized that property may not be taken under the pretext of a public purpose when the actual purpose is to bestow private benefits and that a taking is less likely to be pretextual when the ultimate owner of property is not known at the time of the taking." *Id.* at *5-7. The dissenters concluded that the "entire history of the transaction here shows favoritism and taking of one person's private property for pretextual public benefit" in part because the private beneficiary of the taking was known before the takings decision was made. *Id.* "This record unequivocally supports the conclusion that the 'true' purpose of the taking was primarily to benefit" the private landlord, not the public. *Id.*

needed guidance to courts, and consistency and predictability for property owners, private developers and all others affected by the use (and abuse) of eminent domain.

II. Petitioners Do Not Concede Public Purpose

Respondents' next gambit is to claim – falsely – that petitioners concede that the Project will benefit the public. Their supposed support for this false statement comes from two sources.

First, as explained in the petition, Pet. 23-24, while the complaint acknowledges that respondents have claimed a variety of public benefit justifications to justify their conduct over the years, it does not concede that the Project actually will actually serve those pretextual purposes. Quite the opposite. The complaint expressly avers that the public will not benefit. Pet. App. 172a, 204a. Acknowledging respondents' *contention* is not the same as conceding its *truth*, or as the Second Circuit put it, "effectively" acknowledging a public benefit. Pet. App. 24a.

The district court made the same mistake, but less opaquely. The district court forthrightly dismissed petitioners' pretext-based Public Use Clause claim because the facts alleged in the complaint were "as consistent with lawful behavior as with unlawful behavior." Pet. App. 112a (citing *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007)). This tactic – construing the factual allegations in the light most favorable to *defendants-respondents* – turns Fed. R. Civ. P. 12(b)(6) on its head.

Second, and relatedly, respondents and the court of appeals liberally reference the self-serving record created by respondents to support their conclusion that petitioners "effectively" acknowledge a public benefit. This is improper. On a motion to dismiss, a court may not consider documents outside of the complaint unless they are "incorporated by reference" – and the complaint in this case plainly does not incorporate respondents' voluminous materials by reference. A court may only consider those documents "upon which the complaint *solely* relies and which [are] *integral to the complaint*." *Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007) (emphasis in original) (quotation omitted). Moreover, even if this standard were met in this case, it could never justify crediting *the truth* of the assertions made in respondents' own documents. *Id*. A court can note that the documents exist, and it can "determine *what* the documents stated," but it cannot consider the documents "*to prove the truth of their contents*." *Id*.

III. There Is No Reason To Withhold Review

Finally, respondents urge that this case is not a good vehicle for considering the viability and scope of pretext-based Public Use Clause claims because they may argue – as they did unsuccessfully before the district court and the court of appeals – that abstention is warranted under the doctrine announced in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Respondents are mistaken.

In an exhaustive opinion, Pet. App. 43a-85a, the district judge rejected respondents' *Burford* argument. And, while the magistrate judge initially recommended

dismissal on *Burford* grounds (157a-167a), that recommendation was clear error as recognized by the district judge (70a n.8). Respondents' *Burford* argument was also presented to, and rejected by, the court of appeals. Abstention is simply not warranted in this case.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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June 2008