

In The
Supreme Court of the United States

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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**

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REPLY BRIEF FOR THE PETITIONER
—◆—

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REPLY BRIEF FOR THE PETITIONER

After reviewing the Oceanside/County brief, it would be easy to forget why this case is here: they argue the Hawaii Supreme Court correctly applied the rational basis standard for pretext established in *Kelo v. City of New London*, 545 U.S. 469 (2005). However, pretext was not presented in *Kelo*, and this Court concluded that standards governing pretext claims “can be confronted if and when they arise.” *Id.* at 487 (footnote omitted). Thus, the petition is premised on the question that *Kelo* did not reach and this Court should now address, since there are cases where the rational relationship test is insufficient and stricter scrutiny or burden shifting is required.

The *Kelo* majority foretold of the case at bar when it noted “[n]or would the [government] be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit,” *id.* at 478, and that a “transfer of property, executed outside the confines of an integrated development plan . . . [would be] an unusual exercise of government power [and] would certainly raise a suspicion that a private purpose was afoot.” *Id.* at 487. Justice Kennedy also presaged 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.* at 493 (Kennedy, J., concurring). But in the intervening years, courts nationwide have been unable to decide

whether these standards actually govern pretext claims. Unable to address the petition’s central argument – that post-*Kelo*, courts have been unable to settle on a pretext standard and that “[i]t 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”¹ – the joint brief of Oceanside and its Development Agreement partner County of Hawaii instead wrongly assumes *Kelo* held that pretext claims are evaluated under the rational basis standard, and that the courts below properly examined the factual record. These claims are neither correct, nor relevant.

This Court’s intervention is plainly needed, and the petition should be granted.

I. *Kelo* Left Pretext For Future Cases

The erroneous foundational assumption in the Oceanside/County brief is that in *Kelo*, this Court held that claims the asserted public purpose for a taking is pretextual are evaluated under the rational basis standard of review. *See* Brief in Opposition (BIO) at 13 (“the decision below properly applied the analytical framework set forth in *Kelo* to reach the correct decision”); *id.* at 21 (“the Hawaii courts properly applied the pretext analysis this Court set forth in *Kelo*”). Consequently, the Oceanside/County

¹ Ilya Somin, *The Judicial Reaction to Kelo*, 4 ALBANY GOV’T L. REV. 1, 36 (2011).

brief focuses entirely on an issue not relevant to the petition – whether under the rational basis standard a road can qualify as a public use.² Having misstated the issue, they assert that the case is not appropriate for review because “[t]here is no split among the lower courts on the applicability of a rational-basis standard of review for public takings cases, and Petitioners do not even suggest one.” BIO at 14. They wrongly claim the petition urges “the Court to adopt new review standards for public takings which undermine well-established federal and state case precedent.” *Id.* at 13.

The petition, however, seeks nothing of the sort, and granting it will not disturb the established rule that if a court is presented with objective indicators that a taking is trustworthy, the condemnor’s assertion that it is for public use is entitled to judicial deference. This is not such a case, however, and the petition asks the Court to bring clarity to the issue explicitly left open in *Kelo*, an issue which the lower courts have been unable to resolve: in what circumstances will a taking be subject to more than rational basis review? While *Kelo* identified four possible factors, in that case the property owners raised none

² The Hawaii Supreme Court noted in its first opinion in this case (Pet. App. 188) that it was of little relevance to a pretext argument whether the claimed public use was a “classic” one such as a road. *County of Hawaii v. C & J Coupe Family Ltd. P’ship*, 198 P.3d 615, 647 (Haw. 2008) (“the Supreme Court in *Kelo* [did not] foreclose the possibility of pretext arguments merely because the stated purpose is a ‘classic’ one.”).

of them, so the Court was not presented with a situation in which determination of the governing standard of review for pretext was ripe.

“Pretext,” by definition, is a “false or weak reason or motive advanced to hide the actual or strong reason or motive.” BLACK’S LAW DICTIONARY 1225 (8th ed. 2004). Thus, absent a dose of self-destructive candor on the government’s part, without a more exacting standard of review than rational basis or a shifting of the burden, the promise of a pretext inquiry will be as illusory as it was in the case at bar. In other contexts, this Court has held that a local government’s professed reasons for adopting legislation need not be taken at face value. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (government’s intent may be determined by “both direct and circumstantial evidence,” which includes the factual context leading up to the legislation); *Vill. of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (when a “clear pattern” unexplainable on other than illegal grounds emerges, the court may look beyond the government’s professed and apparently neutral reasons). Similar rules should apply when a local government takes property in circumstances such as those presented here.

The Oceanside/County brief does not address – much less dispute – the “clear pattern” that Condemnation 2 was instituted only after Condemnation 1 was on the brink of failure because the trial court had *sua sponte* re-opened the question of whether Condemnation 1 was for a public use (Pet. App. 116);

Oceanside's efforts to disqualify the trial judge had been rejected (*id.*); 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 in Condemnation 1; and the illegal Development Agreement continued in full force and effect and clouded the County's free exercise of its eminent domain authority. By wrongly claiming that the Court in *Kelo* addressed the pretext standard and settled on rational basis review when it expressly did neither, Respondents avoid addressing the import of these undisputed facts and the Hawaii Supreme Court's conclusion when examined under the rational basis standard, there was "no evidence" of pretext. Only on the final page of their brief do Oceanside and the County acknowledge the petition asks the Court to determine the standard of review applicable to pretext claims left open in *Kelo*. BIO at 21 ("Unable to carry its burden of proof under the rational-basis standard of review, the Coupes assert, without any support and contrary to well-settled precedent, that this Court should heighten the standard of scrutiny for public takings to the point where certain types of takings are entirely disallowed (*per se* invalidity) or the burden is improperly shifted onto the government to prove the validity of the taking.").

But the *Kelo* majority did not establish that pretext claims are subject to rational basis review. The 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,” would violate the Public Use Clause, *Kelo*, 545 U.S. at 478, but the Court left the applicable standard to a future case because “[s]uch a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this 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). Justice Kennedy suggested 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.* at 493 (Kennedy, J., concurring).

The petition presents the Court with the opportunity to provide much needed guidance that was only hinted at in *Kelo*, as each of the indicators of pretext is present: Oceanside was identified as the private beneficiary before the taking; the County had no comprehensive or integrated plan of which Condemnation 2 was a part, and had no plan whatsoever except the illegal Development Agreement;³ the

³ The Oceanside/Country brief continues to demonstrate that the Development Agreement is the only “plan” of which the taking of Petitioner’s property is a part. In response to the petition’s argument that the County had no plan with which the bypass was compatible except the Development Agreement, their brief argues that the courts below did not determine the entire Development Agreement was illegal, implying that apart

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taking will result in little public benefit since the location of the bypass contravenes the County's General Plan, and the taking contravened the 1994 rezoning under which Oceanside was required to acquire and build the bypass at no cost to the public. The situation was so questionable the Hawaii Supreme Court recognized it "raises well founded concerns that a private purpose is afoot."⁴

from the delegation and "fair share" provisions, the remainder of the Development Agreement is valid. BIO at 5. The courts below never resolved that issue, even though Petitioner sought a declaration that the entire Development Agreement was illegal and the Hawaii Supreme Court in its first opinion (Pet. App. 103-203) remanded the case for such a determination. The County and Oceanside are not without remedy, as nothing stops them from removing the cloud over the County's exercise of its eminent domain discretion by rescinding the Development Agreement, and then instituting yet another condemnation action. But as long as there is some question that the Development Agreement remains valid, any taking instituted by the County will be highly questionable.

⁴ The Oceanside/County brief assumes the ultimate question in the case or misstates the record in a number of places, and Petitioner disagrees with many of these assertions. *See, e.g.*, BIO at 1 (the County's purpose was "to alleviate unacceptable and unsafe traffic conditions in the South Kona region"); *id.* at 3 ("In light of the clear public need for a bypass highway. . ."); *id.* at 13 (claiming the County "had the ability to acquire the right of ways"); *id.* at 17 ("As the Circuit Court concluded and the Hawaii Supreme Court affirmed, the condemnation of property to build a public roadway is a clear public purpose. . ."). These disagreements do not make this case an unworthy vehicle to address the pretext issue since the courts below only viewed these factual disagreements through the lens of rational basis review and not heightened scrutiny. The only direct evidence the

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II. The Court Should Clarify That When The Case “Raises Well Founded Concerns That A Private Purpose Is Afoot,” A Claim Of Public Use Is Subject To Heightened Scrutiny

The Oceanside/County brief suggests that the only relevant proof is the County’s *professed* motivation. *See* BIO at 6 (“Concerned about the protracted litigation and uncertainty of Resolution [1] and the first condemnation, the County Council concluded that a second condemnation action was necessary in order to move forward with constructing the bypass highway, even if it required the County to condemn and pay for the property itself.”). Their brief argues that the only evidence regarding motivation are “[s]tatements made by various County Council members at the public hearing,” and their “resolve to construct the Bypass.” *Id.* This argument actually reinforces Petitioner’s point that the pretext analysis in this case turns on the true intent of the Council including whether it was influenced by the twin Damocles Swords of liability to Oceanside for breaching the Development Agreement, and to Petitioner for

Hawaii courts allowed in the record of the County’s intent is the language of Resolution 2 and the statements of two council members, one of whom voted against the resolution. *See* BIO at 6. But even this evidence is not relevant under rational basis review, and because the courts below placed the burden on Petitioner, and neither the County nor Oceanside had to offer any evidence at all, and did not. The decision of the court below that the County’s professed reason for Condemnation 2 was not pretextual was based solely on the burden of proof being on Petitioner.

a failed taking under HAW. REV. STAT. § 101-27 (1993), an inquiry the trial court refused beyond the Council's own statements. Indeed, the Oceanside/County brief admits that Condemnation 2 was instituted because Condemnation 1 was failing and needed rescue. BIO at 18 (“[R]ecognizing the potential of a failed Condemnation 1 (because the trial court had earlier stayed the order of possession until final judgment on the grounds that there was a genuine issue of material fact as to the public purpose related to the validity of the Development Agreement), the County filed Condemnation 2.”). But the Hawaii court disregarded such evidence, concluding that under rational basis review, Petitioner had not shown that Condemnation 2 was “clearly and palpably” of a private nature. The County should have the burden of justifying any taking instituted while the Development Agreement continued to cloud its eminent domain discretion.

Ultimately, the Oceanside/County opposition offers no rejoinder to the petition's key points: the Hawaii Supreme Court did not adequately review Petitioner's pretext claims because (i) *Kelo* did not establish rational basis as the standard of review in cases where the record reflects that a “private purpose is afoot,” (ii) the *Kelo* majority and Justice Kennedy suggested that when such a case was presented, a more intense standard of review, or even a shifting of the burden to the government would be appropriate, (iii) the Hawaii court did not evaluate any of the factors identified in *Kelo* as possible indicators of pretext, because applying the rational basis

standard and putting the burden on Petitioner, the court concluded that there was “no evidence” of pretext, and (iv) heightened scrutiny is especially called for in cases where a taking is instituted under the cloud of an admittedly illegal contract that delegates the power of eminent domain to a specifically-identified private party. Courts, governments, and property owners nationwide will benefit from establishment of pretext standards when triggers to heightened review like those in the case at bar are present.



CONCLUSION

The petition for writ of certiorari should be granted.

AUGUST 2011.

Respectfully submitted,

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