Supreme Court, U.S.
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No. 07-

IN THE

# Supreme Court of the United States

KAUFMANN'S CAROUSEL, INC., AND LORD & TAYLOR CAROUSEL, INC.,

*Petitioners*,

v.

CITY OF SYRACUSE INDUSTRIAL DEVELOPMENT AGENCY,

*Respondent.*

**On Petition for a Writ of Certiorari to the New York Supreme Court, Appellate Division, Fourth Department**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the government's use of its eminent domain power to "take" selected financial provisions of a contract between department stores and a private developer to reduce the private developer's cost and risk of expanding a retail shopping mall is an inappropriate transfer of wealth between two private parties prohibited by the public use provision of the Takings Clause of the Fifth Amendment of the United States Constitution.

## PARTIES TO THE PROCEEDING

The parties before this Court are Petitioners, Kaufmann's Carousel, Inc. and Lord & Taylor Carousel, Inc., and Respondent, The City of Syracuse Industrial Development Agency, a public benefit corporation organized and existing under the laws of New York and vested with the power of eminent domain. Carousel Center Company L.P. also was a party to this action before the state courts.

## RULE 29.6 DISCLOSURE STATEMENT

Petitioner Kaufmann's Carousel, Inc. is 100% owned by Federated Department Stores, Inc., a publicly traded corporation.

Petitioner Lord & Taylor Carousel, Inc. is not publicly traded and no publicly held company owns 10% or more of its stock.

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## PETITION FOR WRIT OF CERTIORARI

Petitioners, Kaufmann's Carousel, Inc. and Lord & Taylor Carousel, Inc., respectfully petition for a writ of certiorari to review the judgment of the New York Supreme Court, Appellate Division, Fourth Department.

## OPINIONS BELOW

The opinion of the New York State Supreme Court, Appellate Division, Fourth Department (Pet. App. 2a-8a) is reported at 32 A.D.3d 1332 (4th Dept. 2006). The decisions of the Supreme Court of the State of New York in and for the County of Onondaga are not reported. The decision regarding Kaufmann's Carousel, Inc. is reproduced at Pet. App. 9a-16a, and the decision regarding Lord & Taylor Carousel, Inc. is reproduced at Pet. App. 17a-24a. The order of the New York Court of Appeals denying Petitioners' motion for leave to appeal (Pet. App. 1a) is reported at 32 A.D.3d 1340 (2006).

## JURISDICTION

The judgment of the Appellate Division, Fourth Department was entered on September 20, 2006. Petitioner moved for leave to appeal to New York's Court of Appeals. By order dated October 24, 2006, the Court of Appeals denied such motion. On January 11, 2007, Justice Ginsburg signed an order extending the time for filing this petition for certorari to and including February 21, 2007. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the public use provision of the Takings Clause of the Fifth Amendment of the United States Constitution and also the Due Process Clause of the

Fourteenth Amendment of the United States Constitution. Pet. App. 41a.

## STATEMENT OF THE CASE

1. A leading treatise has already declared that this case "signaled what may be a new era in condemnation strategy when it authorized condemnation of only certain elements of the leases." MILTON R. FRIEDMAN, FRIEDMAN ON LEASES § 13:2.1, at 13-12 (2003). The government, in this case, using its eminent domain authority, re-wrote contracts between a private developer and anchor department stores of a thriving retail shopping mall. At the behest of the developer who sought to secure more favorable contract terms and less expensive financing to construct a new proposed retail shopping development, the government "took" selected contract rights from the stores and imposed new obligations on them and in favor of the private developer. The government engaged in such action even though it had previously signed a contract with the department stores expressly agreeing to be bound by the terms and conditions of the stores' contracts with the developer.

The government through its eminent domain power excised from the contract, on a paragraph-by-paragraph basis, many of the stores' rights and imposed upon the stores new duties and obligations. The government, for example, took the contract provision that capped the stores' payments in lieu of taxes ("PILOT"), which has caused the developer to attempt to increase the stores' obligations immediately by approximately 76%. The government also took the contract provisions subordinating the developer's interest to that of the stores and providing the stores the right to quiet enjoyment in their buildings. As a result, the developer's financiers now may interfere with the stores' management and their spaces in the mall.

These "taken" provisions did not stand in the way of any development or have any connection to a public use. The only purpose in taking these contractual rights was to give the developer, which as described by one treatise writer "goaded" the government into exercising its eminent domain power to re-write these contracts, a financial windfall. FRIEDMAN ON LEASES, *supra* § 13:2.1, at 13-12. By taking selected contract provisions from the stores, the government allowed the private developer to impose the cost of borrowing for and the economic risk of the proposed development on the stores, without the stores' consent and in direct contravention to the parties' contractual arrangements.

The use of the government's eminent domain authority to rearrange contractual obligations so that a private developer can reduce its cost of capital serves no public purpose and is not consistent with the Public Use Clause. The Court has long held that the government cannot use its eminent domain authority to transfer wealth between two private parties. *Mo. Pac. Ry. Co. v. Nebraska*, 164 U.S. 403, 417 (1896). Nor can the government single out individuals to bear the burden of public works. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The retroactive abrogation of the parties' settled contractual obligations—including the government's own assurances and guarantees—for the sole benefit of a private entity far exceeds constitutional limitation. If the government's action in this case is allowed to stand, the Public Use Clause is a dead letter.

This Court sought to clarify the boundaries of the Public Use Clause in *Kelo v. City of New London*, 545 U.S. 469 (2005). Courts, particularly the state courts which most often deal with this issue under state eminent domain laws, however, remain confused regarding the scope of the Clause and continue to issue inconsistent and contradictory decisions. This decision alone conflicts on numerous grounds with post-*Kelo* opinions across the country.

Although *Kelo* is a fairly recent decision, additional percolation is not necessary and will not resolve the confusion. Moreover, this issue, as demonstrated by the public interest in *Kelo*, is one of national importance that warrants this Court's immediate review.

2. In 1987, Respondent, the City of Syracuse Industrial Development Agency ("SIDA"), entered into a preferred developer agreement with the Pyramid Companies ("Pyramid") to build a shopping mall called Carousel Center in Syracuse, New York. SIDA, thereafter, used its eminent domain authority to condemn 800 acres of land, leased the land to Pyramid, and issued bonds to help Pyramid finance the initial construction of the mall. Pyramid agreed to pay SIDA PILOT payments to cover SIDA's bond costs and in lieu of paying realty taxes.

Pyramid, before beginning construction of the mall, approached Petitioners, Kaufmann's Carousel, Inc. ("Kaufmann's") and Lord & Taylor Carousel, Inc. ("Lord & Taylor"), to become anchor tenants in the proposed development. After months of negotiating, Petitioners in 1991, each entered into long-term (99-year with two 50-year options to renew), non-terminable fee leases with Pyramid. R. 1196, 1197[1] (Kaufmann's Lease, ¶¶ 1.1, and 1.3); R. 1160 (Lord & Taylor Lease, §§ 1.1 and 1.2). These leases collectively provided Petitioners virtual ownership of land well beyond the confines of their buildings, approximately 11.75 acres (or nearly 20% of the mall), and guaranteed that Petitioners could each purchase their land for $2. R. 1170-71, 1207-08. Petitioners put their names behind the project and invested tens of millions of dollars to build their stores. Only after Petitioners agreed to anchor Carousel Center did Pyramid begin building the rest of the mall.

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[1] Pages from the record filed with the New York Supreme Court, Appellate Division are herein designated as "R."

To secure Petitioners' involvement and investment, Pyramid committed to numerous contractual assurances designed to protect Petitioners' interests and to ensure that Petitioners would have a substantial say in the future development of Carousel Center. For example, Pyramid agreed it would not make any changes to the mall absent Petitioners' consent. *E.g.*, R. 916-18. Petitioners were granted exclusive possession of their buildings and the right of quiet enjoyment of their premises, and Petitioners were granted title to the buildings constructed at their expense, including any tax benefits associated with ownership of the buildings. R. 1165-66, 1202. Pyramid also agreed that its right to finance the mall would be subordinate to Petitioners' Leases. R. 1165, 1201-02.

One provision that was of utmost importance to Petitioners and Pyramid was the calculation of PILOT payments. Petitioners agreed to pay a fixed percentage of the PILOT payments based on the square footage of Carousel Center Mall as it existed at the time of contracting. These payment obligations specifically were capped by the contract: "Developer will not amend, modify or terminate provisions of the PILOT Agreement relating to payments due thereunder so as to increase [Petitioners'] obligations thereunder." R. 1125, 1149.

Petitioners, as a pre-condition to investing tens of millions of dollars to anchor Carousel Center, secured parallel commitments from SIDA. SIDA, as owner of the property upon which the mall was located, guaranteed that it would not interfere with Petitioners' operations of their stores. SIDA, thus, agreed to all of the terms, covenants, conditions, and requirements contained in Petitioners' contracts with Pyramid and agreed that it would "not disturb or in any way adversely affect" Petitioners' rights under their leases. *Kaufmann's Carousel, Inc. v. City of Syracuse Indus. Dev. Agency*, 301 A.D.2d 292, 295, 750 N.Y.S.2d 212, 215 (2002)

(reproduced in Pet. App. 25a-40a). SIDA further agreed "to subordinate its interest in Carousel Center to the terms, covenants, and conditions of the [other transaction documents] between Pyramid, Kaufmann's and Lord & Taylor." *Id.* at 297; Pet. App. 30a.

Pyramid, in 1993, shortly following the opening of Carousel Center, approached SIDA about building another project. Pyramid envisioned another retail shopping mall not far from Carousel Center that would be known as Carousel Landing Mall. SIDA agreed to assist Pyramid, and in 1995, issued a Determination and Findings of Fact to condemn 55.7 additional acres of land owned by various oil companies. *See Mobil Oil Corp. v. City of Syracuse Indus. Dev. Agency*, 224 A.D.2d 15, 645 N.Y.S.2d 741, *appeal dismissed*, 89 N.Y.2d 860, *leave denied*, 89 N.Y.2d 811 (1996).

Before the Carousel Landing condemnation proceeding was complete, Pyramid, in 1997, approached SIDA with an even bigger proposed development that combined Carousel Center and Carousel Landing. The new development would be three times the size of the present mall and would be known as DestiNY USA. This development as then advertised would include hotels, a golf course, a water park and a replica Tuscan Village.

Notwithstanding Pyramid's and SIDA's agreements with Petitioners, Pyramid "goaded" SIDA into instituting eminent domain proceedings against certain of Petitioners' interests in the mall. FRIEDMAN ON LEASES, *supra* § 13:31, at 13-12. These proceedings purportedly were necessary because the proposed DestiNY USA development would encompass Carousel Center. On April 30, 2002, SIDA held a public hearing where it announced that the proposed development "would serve public purposes, 'including, without limitation, advancing job opportunities, general prosperity and public welfare of the People of the State of New York and the City

of Syracuse and . . . advancing economic development and promoting tourism.'" *Kaufmann's Carousel, Inc.*, 301 A.D.2d at 295; Pet. App. 27a-28a.

SIDA announced that two categories of property interests were to be condemned to accomplish this expansion. The first category consisted of "right-of-way" interests. These interests, according to SIDA, were "needed," *inter alia*, to make infrastructure improvements, allow construction of roadways, permit pedestrian access, and improve aesthetic conditions. 301 A.D.2d at 295; Pet. App. 28a. The second category of interests was composed of, *inter alia*, "interests of tenants pursuant to leases or other agreements" that could restrict the use of the mall, for example, the expansion or demolition of certain parking lots or the alteration of interior decor. 301 A.D.2d at 296; Pet. App. 28a. SIDA concluded that the condemnation of these interests "will help achieve the public purposes, uses and benefits expected to be derived from the DestiNY USA Project . . . and will independently help achieve the public purposes, benefits and uses associated with the potential redevelopment." 301 A.D.2d at 296; Pet. App. 28a-29a (internal quotation marks omitted).

Petitioners thereafter filed an original proceeding in the New York appellate court challenging SIDA's Determination and Findings of Fact. Petitioners contended, in part, that the condemnation of particular lease provisions—lease provisions that SIDA and Pyramid agreed to as a necessary inducement to Petitioners' presence as anchor tenants—would leave Petitioners with materially different contract rights and that no public purpose would be served. The court denied the challenges, holding that SIDA may exercise its eminent domain authority so long as just compensation was paid. 301 A.D.2d at 299; Pet. App. 36a-38a. The New York Court of Appeals denied Petitioners' motion for leave to appeal.

In December 2005, SIDA instituted condemnation proceedings against certain of Petitioners' leasehold rights based on the April 30, 2002 Determination and Findings of Fact. SIDA enumerated interests that it sought to condemn, including (i) all rights to restrict, control, or impede the exterior or interior layout of that portion of the mall located outside of Petitioners' stores, (ii) all rights to restrict or control in any way the use or location of that portion of the mall located outside of Petitioners' stores, (iii) all rights to use or occupy that portion of the mall outside of Petitioners' stores, and (iv) all other rights Petitioners may have which either SIDA, Pyramid, the Court, or Petitioners may later decide constitutes a Carousel Center Interest. R. 16-17, 58-59; Pet. App. 13a-15a, 21a-23a.

SIDA also sought to condemn certain "financing" provisions. SIDA sought to take "any rights which restrict or otherwise adversely affect in any way any contemplated SIDA payment-in-lieu-of-tax ('PILOT') or financing structure for DestiNY USA, including without any limitation, any restriction on the amount required to be paid as a PILOT." R. 17, 59; Pet. App. 14a, 22a. In addition to the contractual cap on PILOT payments, SIDA specifically sought to take the following provisions which might interfere with any financing Pyramid ultimately might be able to obtain for its proposed development:

- "[Petitioners'] Leases: Article 12." R. 17, 59; Pet. App. 14a, 22a. Article 12 is a one-paragraph subordination provision that provides in relevant part in each lease: "This Lease shall at all times during the term hereof be prior to any financing of Landlord's interest in the Demised Premises. Landlord covenants and agrees that it shall not mortgage or otherwise finance its interest in the Demised Premises except in such a manner that it is and shall always remain subordinate to this Lease." R. 1165, 1201-02.

- Petitioners' Leases: "Section[s] 13.1." R. 17, 59; Pet. App. 14a, 22a. These sections provide Petitioners the right to construct, erect, modify or improve their stores. R. 1165, 1202.
- Petitioners' Leases: "Section 13.3." R. 17, 59; Pet. App. 14a, 22a. These sections grant Petitioners title to all buildings and improvements on their premises throughout the term of the leases, including all tax benefits accruing as a result of such ownership. R. 1166, 1202.
- "Construction, Operation and Reciprocal Easement Agreement: § 15.2." R. 17, 59; Pet. App. 14a, 22a. This section grants, *inter alia*, Petitioners the right to finance their interest in the mall through mortgage or other means. R. 919.
- Construction, Operation and Reciprocal Easement Agreement: "§ 15.3." R. 17, 59; Pet. App. 14a, 22a. Pyramid agreed in this section, *inter alia*, that if it transferred its interest "to a Person who does not have experience managing regional shopping centers reasonably satisfactory to the [Petitioners], such Person shall be obligated and shall agree as a condition of the transfer to engage a manager with management experience reasonably satisfactory to the [Petitioners] to manage and operate the Center on behalf of such Person." R. 921.
- Construction, Operation and Reciprocal Easement Agreement: "§ 25.23." R. 17, 59; Pet. App. 14a, 22a. This provision requires that the original parties shall remain parties to the agreement, even after one party has transferred its interest to another, unless and until it provides notice to the other parties and the successor in interest accepts the designation as the Party. R. 943.

The effect of taking these "financing" provisions would be to remove all restrictions on Pyramid's ability to sell or use Carousel Center Mall to finance other projects. These provisions do not preclude any developer, including Pyramid, from proceeding with DestiNY USA; they only restrict Pyramid's ability to use Petitioners' interests as collateral or other means to finance its proposed venture. SIDA, nonetheless, did not provide any justification in addition to its April 2002 Determination and Findings of Fact for condemning these interests, notwithstanding that the 2002 Determination never mentioned these financial provisions.[2]

Petitioners challenged SIDA's authority to condemn their contract rights. Petitioners contended that no public purpose was served and that no authority justified the excision of many rights, while preserving and increasing their obligations to Pyramid. *See* R. 322 ("How can a public purpose necessitate subjecting [Petitioners] to any PILOT arrangement the developer might choose to negotiate at any time in the future?"); R. 328 ("[Petitioners have] not been able to unearth any case addressing any effort to use eminent domain to parse leasehold rights and obligations in this manner, and it can find no authority addressing a circumstance where a condemnor has sought to use eminent domain to segment the obligations of a leasehold interest from its benefits."); R. 652 (a condemnor's "power to take is not the power to rewrite the documents"). The trial court granted SIDA's condemnation petition, stating, without explanation, that SIDA "is [not] taking any more than is necessary for the DestiNY USA project." Pet. App. 15a,

[2] Although all of these provisions were essential to Petitioners' original agreements with Pyramid, they are inherently difficult to value and are subject to severe undervaluation. SIDA only offered Kaufmann's $20,500 and Lord & Taylor $27,500, as compensation for the acquisition of *all* of their respective interests, including the financing provisions. R. 326, 352-61.

23a. Petitioners appealed to the Appellate Division, which affirmed in a short, divided opinion. Pet. App. 2a-8a.

Petitioners, thereafter, filed a motion for leave to appeal in the New York Court of Appeals. Petitioners reasserted constitutional arguments that the Court of Appeals declined to review in the 2003 motion for leave to appeal. Petitioners, in their 2006 motion for leave, cited *Kelo v. City of New London*, 545 U.S. 469, contending the taking at issue here is far more novel and breath-taking. The New York Court of Appeals denied Petitioners' motion for leave to appeal in a one-line order. Pet. App. 1a.

## REASONS FOR GRANTING THE PETITION

This case presents an extraordinary exercise of the sovereign power of eminent domain. At the behest of a private developer who had contracted with Petitioners, the government exercised that power to impose greater contractual obligations on Petitioners through a paragraph-by-paragraph alteration of the contracts with the developer. SIDA, contrary to its own agreement with Petitioners, re-arranged the existing economic rights between private parties, eliminated Petitioners' consent rights, and, in effect, compelled Petitioners to bear the financial burdens and risks of the proposed redevelopment. Petitioners are now bound by the re-written contracts that the government forced upon them, with greatly diminished rights, but with no reduction in their obligations. In short, SIDA used eminent domain to foist upon the existing anchor mall tenants the financial burdens associated with the developer's proposed expansion solely for the developer's private benefit.

First, such an overreaching use of eminent domain cannot be squared with the Constitution's Public Use Clause. In *Kelo*, the government had a public purpose for the taking—condemning the affected property was needed to create a development that served the public interest. Here, in

contrast, no public purpose is served by the exercise of eminent domain because there is no justification for taking Petitioners' *financial* rights, as such takings are wholly unnecessary to build DestiNY USA. These rights did not preclude or restrict further development; the developer's proposed mega-mall could be built in exactly the same way whether or not these provisions were excised. The only purpose served by taking provisions such as the cap on PILOT payments or the subordination clause was to reduce the developer's costs, by forcing Petitioners to assume the financial risks of the developer's proposed expansion. Increasing a corporation's ability to *finance* new development by re-writing existing contracts to enhance the developer's coffers is simply a naked wealth transfer between well-heeled entities. Robbing Peter to pay Paul inherently cannot constitute a *public* purpose under any conception of that term.

Second, unlike the carefully crafted and considered development plan in *Kelo* where this Court held that a public-private venture did not raise any concerns of illegitimacy or favoritism, the takings at issue here were proposed by the private developer and required the government to abrogate its own agreements with Petitioners. Even if reducing the developer's cost of capital and spreading its financial risk could constitute a public use in some circumstances, the government, by providing such financial benefits in this case at the behest of a specific private developer, overstepped its constitutional authority.

The courts, following *Kelo*, remain confused over the scope of the Public Use Clause, issuing inconsistent decisions and reaching inconsistent results. This case provides a good vehicle for the Court to alleviate the confusion and provide a clear doctrinal basis to determine compliance with the Public Use Clause. Moreover, as demonstrated by the public reaction following *Kelo*, the

scope and correct application of the Public Use Clause is a matter of national importance that warrants this Court's immediate review.

In particular, it is important to clarify that there are some cognizable limits on government's potentially tyrannical power to take one's property and retroactively abrogate settled contractual rights. As the leading treatise in this area has already noted, this case heralds a "new era in condemnation strategy." FRIEDMAN ON LEASES, *supra* § 13.2.1, at 13-12. Since the Constitution plainly does not permit pursuing the illegitimate end of naked economic favoritism, particularly when done through the illegitimate means of selectively re-writing contracts, the Court should ensure that this "new era" never takes root.

### A. The Government's Taking Of Petitioners' Financial Contractual Rights Bestowed A Purely Private Benefit On A Private Developer And Was Unconnected To Any Public Purpose.

The public use requirement promotes security of property as well as "[t]he concepts of 'fairness and justice'" underlying the Takings Clause. *See Kelo*, 545 U.S. at 497 (O'Connor, J., dissenting) (citing *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 (2002)). As this Court emphasized in *Kelo*, "it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation." *Id.* at 477; *see also Mo. Pac. Ry. Co.*, 164 U.S. at 417 (holding that the government may not take a corporation's land for the erection of a grain elevator for a selected number of individuals). The Court further explained, "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." *Kelo*, 454 U.S. at 477.

Justice Kennedy, who provided the fifth vote in *Kelo*, expressly stated in his concurrence that the courts were not to rubberstamp the decisions of government agencies. He noted "that a rational-basis standard of review is appropriate does not . . . alter the fact that transfers intended to confer benefits on particular, favored entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause." *Id.* at 490; *see also City of Cincinnati v. Vester*, 281 U.S. 439, 446 (1930) ("It is well established that . . . the question [of] what is a public use is a judicial one."). The government simply cannot take an individual's property by asserting some general public purpose if that taking is unrelated or peripheral to any legitimate public purpose. *Cf. Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987) (holding "the lack of a nexus" between the exaction of an easement and the stated public purpose of retaining a view of the beaches "converts that purpose to something other than what it was").

Indeed, in all contexts relating to the various constitutional provisions protecting property rights, the Court has consistently made clear that retroactively undoing settled contract rights for the purpose of aiding one contracting party is, by definition, not a legitimate public purpose. For example, the Court in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), held that the Constitution precluded the government from singling out and abrogating an individual contract between two private entities. There, the Minnesota legislature retroactively imposed new obligations on employers' pension funding requirements that instantly rendered the petitioner's plan underfunded. The Court struck down "the statute in question [as it] nullifie[d] express terms of the company's contractual obligations and impose[d] a completely unexpected liability in potentially disabling amounts." *Id.* at 247. Relying on decisions in *W. B. Worthen Co. v. Thomas*, 292 U.S. 426 (1934); *W. B.*

*Worthen Co. v. Kavanaugh*, 295 U.S. 56 (1935); and *Treigle v. Acme Homestead Ass'n*, 297 U.S. 189 (1936),[3] this Court held that the retroactive alteration did not "meet an important general social problem," particularly since it had an "extremely narrow focus" on a handful of companies. 438 U.S. at 243, 247-48. Similarly, in *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55 (1937), the Court struck down Texas' effort to curtail natural gas production by certain wells in order to benefit owners of other wells. Emphasizing that the Court "has many times warned that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid," the Court struck down this attempted wealth transfer because the "use of the [plaintiff] pipe line owner's wells and reserves is curtailed solely for the benefit of other private well owners." *Id.* at 80, 78.

As these cases reflect, government actions that impair vested rights or impose new duties on past transactions—particularly when focused on specific individuals—raise serious concerns under "several provisions of our Constitution," including the Takings Clause, the Ex Post Facto Clause, the Contracts Clause, and prohibitions of "Bills of Attainder." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994). These general anti-retroactivity concerns are heightened when the government's actions "affect[]

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[3] In *Treigle*, the Court invalidated a Louisiana law that restricted the existing withdrawal rights of the members of a building and loan association: "The statute merely attempts, for no discernable public purpose, the abrogation of contracts between members and the association lawful when made." 297 U.S. at 196. In *Thomas*, the Court invalidated an Arkansas law that exempted the proceeds of life insurance policies from collection by the beneficiary's judgment creditors, 292 U.S. at 429-30, 434, and, in *Kavanaugh*, the Court struck down another Arkansas law that retroactively eliminated the value of mortgage benefit securities, 295 U.S. at 57-58, 62-63.

contractual or property rights, matters in which predictability and stability are of prime importance." *Id.* at 271.

Such selective, retroactive government action "presents problems of unfairness . . . because it can deprive citizens of legitimate expectations and upset settled transactions." *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992); *see also E. Enters. v. Apfel*, 524 U.S. 498, 548 (1998) (Kennedy, J., concurring in the judgment) (retroactivity is of "particular concern" because of the "'tempt[ation] to use retroactive legislation as a means of retribution against unpopular groups or individuals.'" (quoting *Landgraf*, 511 U.S. at 266)). The Court, accordingly, has required any retroactive effect to be proportional to the individual's past conduct and to have a "connection" to that past conduct. *Kelo*, 545 U.S. at 491-93 (Kennedy, J., concurring). Thus, the Court in *Eastern Enterprises* struck down a statute (a plurality on Takings Clause grounds, with Justice Kennedy concurring on substantive due process grounds) that would have retroactively imposed disproportional liability on a company that had long exited the industry. This Court has not allowed the government to foist new obligations upon a party and to impair a party's existing rights unless justified by an overriding public interest or the party's own conduct. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 18 (1976). Indeed, singling out individuals to sacrifice contractual or other property rights is directly at odds with the basic purpose of the Takings Clause, which is to "prevent[] the public from loading upon one individual more than his just share of the burdens of government." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893); *see also Armstrong*, 364 U.S. at 49 (The fundamental purpose of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

The government's interference with vested contractual rights here is particularly indefensible because it undoes the government's *own* agreements with Petitioners. "There is a clear distinction between the power of the [government] to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority and the power of the [government] to alter or repudiate the substance of its own engagements." *Perry v. United States*, 294 U.S. 330, 350-51 (1935). In *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 (1977), for example, the Court concluded that the State could not constitutionally take security provisions of a contract that "limited the [government's] deficits and thus protected the general reserve fund from depletion." *Id.* at 19. Although the government's reneging on its commitments indisputably served important public goals involving "[m]ass transportation, energy conservation, and environmental protection," the government's ability to abrogate contracts does not turn on "a utilitarian comparison of public benefit and private loss." *Id.* at 28. Rather, the government was required to show that its action was "both reasonable and necessary to serve the admittedly important purposes claimed by the States." *Id.* at 29; *see also Lynch v. United States*, 292 U.S. 571, 580 (1934) ("To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation."); *Perry*, 294 U.S. at 351 ("[I]f [governments] repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been . . . a citizen." (internal quotation marks omitted)).

Here, the State's action plainly singled out Petitioners and retroactively abolished their contractual rights in order to benefit another private entity, so it plainly could not further a "*public* use" absent some overriding public interest or special justification. The New York courts nevertheless

refused to even examine the public purpose served by the *taking*—*i.e.*, the condemnation of Petitioners' contract rights—but only looked at whether the proposed development, writ large, served such a purpose. This is the wrong question and necessarily yields the wrong answer. There is an obvious and fundamental difference between takings which aid *development* and takings which simply aid a *developer*. Here, the taking served no purpose other than assisting SIDA's previously-selected developer by coercing the developer's current contracting partners into providing greater financial and other support than they had bargained for.

This is plainly contrary to the Public Use Clause and not remotely justified by *Kelo*. The fact that condemning private property in New London served a public purpose, because it was needed for Pfizer's proposed development, in no way suggests that the town could have re-written Pfizer's contracts with others in order to enhance Pfizer's fiscal situation. For the same reason, rearranging Pyramid's contractual relations with Petitioners to enhance its financial position cannot serve a public purpose under *Kelo*.

Specifically, SIDA took "financing" provisions that on their face have no conceivable nexus to a legitimate public use. For example, SIDA took the subordination clause, which subordinated Pyramid's right to mortgage the property to Petitioners' agreements; SIDA took the contractual section requiring the original parties to these agreements to remain parties following a transfer of their interests unless the successor accepts the role of a party; and SIDA took the contractual provision which required Pyramid to sell its interest to an experienced shopping mall manager or at least engage a manager with significant management experience. None of these provisions stood in the way of Pyramid or any other developer from proceeding with DestiNY USA; they

simply increased Pyramid's costs and required Pyramid to bear the economic risk of its proposed development.

SIDA, by taking these provisions, thus conscripted Petitioners to be Pyramid's junior partners, and forced Petitioners to assume the risk in Pyramid's proposed expansion by helping underwrite it with, among other things, increased PILOT payments. Petitioners are still bound by their contracts and required to stay in Carousel Center Mall. But, instead of assisting with Pyramid's initial financing of the Carousel Center Mall—which Petitioners agreed to do provided their obligations never exceeded the pre-determined cap—SIDA seeks to force Petitioners to underwrite Pyramid's proposed development of a gargantuan tourist center. Pyramid has attempted to increase Petitioners' PILOT payments by approximately 76% to finance the proposed development, which has yet to even begin. Nor do Petitioners have any clear ability to reduce their risk or exposure from Pyramid's risky and substantial development. SIDA's imposed contractual arrangement threatens the very economic viability of the stores. Petitioners' business models, assumptions, and projections were all based upon the contracts that they had with Pyramid and SIDA. The end result is that Petitioners are obligated to a long-term contract to which they never agreed or ever would have agreed and are forced to bear the uncertainty and risk imposed upon them while Pyramid, insulated from such risks, stands to receive any and all rewards from the project.

In short, this Court should grant certiorari to reaffirm that the Constitution requires a nexus between the asserted legitimate public purpose and the specific property right. Following *Kelo*, the broad-based perception that the Court gave unwarranted leeway to benefit private developers has prompted widespread amendments to state eminent domain laws, and many states have sought to amend their statutes to assure that the sovereign power of eminent domain is not

exploited to transfer property from one private party for the benefit of another private party.[4] This Court should grant certiorari to make clear that the government cannot abuse the wide-ranging discretion that *Kelo* provides by taking property or rights that are not legitimately connected to a public use. If the taking of certain contract rights to reduce a specific private developer's cost of capital and economic risk qualifies as a public use, then it is hard to imagine a public-private venture that would violate the Public Use Clause. These issues are of fundamental importance and warrant immediate review.

### B. The Government's Actions Demonstrate Impermissible Favoritism Contrary To *Kelo*.

SIDA's symbiotic and pre-existing relationship with Pyramid independently demonstrates that no part of its taking was for a public purpose. The taking at issue in *Kelo* was affirmed because it was "executed pursuant to a 'carefully considered' development plan and there was no evidence of an illegitimate purpose." 545 U.S. at 478. In such limited circumstances, the Court held that the public use requirement did not preclude the government from using its eminent domain authority to condemn land pursuant to a comprehensive redevelopment, even if that land was transferred to a private entity. As this Court noted, where the redevelopment plan exists before a private developer enters the picture, "[i]t is, of course, difficult to accuse the

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[4] *E.g.*, Ala. Code § 11-47-170; Alaska Stat. § 09.55.240; Colo. Rev. Stat. § 38-1-101; 29 Del. Code Ann. § 9505; Fla. Stat. § 73.014; Ga. Code Ann. § 22-1-1; Idaho Code Ann. § 7-701A; Ill. Comp. Stat. § 3/5-5-5; Ind. Code § 22-13-2-1.5; Iowa Code §§ A.21 & 6A.22; Kan. Stat. Ann. §§ 12-306, 24-438, 24-467, 26-501, 26-507, and 72-8212(a); Ky. Rev. Stat. Ann. § 416.540; La. Const. Article 1, § 4(G); Me. Rev. Stat. Ann. § 816; Minn. Stat. §§ 117.025 & 117.027; Mo. Rev. Stat. § 523.271.1; Neb. Rev. Stat. § 76-701; N.H. Rev. Stat. Ann. § 162-K:2; N.C. Gen. Stat. § 40A-1; Ohio Const. Art. § 19; 26 Pa. Cons. Stat. § 204; Vt. Stat. Ann. tit. 12, § 1041.

government of having taken *A*'s property to benefit the private interests of *B* when the identity of *B* was unknown." *Id.* at 478 n.6.

The Court, however, made clear that the government was strictly prohibited from transferring citizen A's property to citizen B because citizen B will put the property to better use. "Such a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case." *Id.* at 487. The Court held that "such an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot." *Id.*

The unusual exercise of government power in this case leaves no doubt that a private purpose was afoot. SIDA did not create a "carefully considered redevelopment plan," designed to help the citizens of New York through the construction of DestiNY USA. Indeed, SIDA, in its contracts with Petitioners, expressly agreed that Carousel Center would not be expanded without Petitioners' consent and that further expansion was not part of some larger plan. As SIDA has admitted, Pyramid, not SIDA, came up with the ideas for both the Carousel Landing and the DestiNY USA projects, and Pyramid approached SIDA to ask for its assistance in developing the projects. And, SIDA, in exercising its eminent domain authority, did not condemn Petitioners' contractual rights to allow just any redevelopment to take place. SIDA specifically exercised its authority to take "any rights which restrict or otherwise adversely affect in any way any contemplated SIDA payment-in-lieu-of-tax ('PILOT') or financing structure for *DestiNY USA*," thereby assuring that only Pyramid, the force behind and developer of DestiNY USA, could profit from its actions. R. 17, 59 (emphasis added); Pet. App. 14a, 22a. SIDA unsurprisingly refers to Pyramid as "its private developer." R. 252, ¶ 8.

In short, SIDA did not form a task force to investigate redevelopment alternatives, it did not generate a plan based on community inputs other than from a specific developer, and it never sought to implement any plan by recruiting multiple potential developers. Rather, in flagrant abuse of its governmental power, SIDA used its eminent domain authority to excuse itself and Pyramid from contractual obligations to which they had previously agreed so that Pyramid could create its mega-plex mall.

Given the suspicious circumstances under which SIDA exercised its eminent domain authority and the obvious private financial benefit to Pyramid, the entire condemnation—even those provisions that might otherwise arguably be related to a public purpose or necessary for the construction of DestiNY USA—should be subjected to heightened scrutiny. This is precisely the type of case that Justice Kennedy warned of when he said "[t]here may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause." *Kelo*, 545 U.S. at 493 (Kennedy, J., concurring) (citing *E. Enters.*, 524 U.S. 498 (Kennedy, J., concurring in judgment)).

### C. There Is Confusion And Conflict Among The Courts Regarding How To Define And Analyze Public Use In These Circumstances.

The decision by the New York appellate court exacerbates the inconsistent application of the Public Use Clause that continues to exist following *Kelo*. In jurisdictions around the country, courts are reaching inconsistent, irreconcilable results based on similar facts. Some courts, like the New York courts here, have dismissed any concern about the possibility of self-dealing and have allowed the government free rein to use its eminent domain authority, so long as the government purports to advance some public interest. *See,*

*e.g.*, *HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth.*, 121 P.3d 1166, 1176-77 (Wash. 2005).

Other courts, both before and after *Kelo*, have required the government to demonstrate a causal connection between the taking and the alleged public use, particularly where, as here, it condemned existing contract rights. The Rhode Island Supreme Court, in *Rhode Island Economic Development Corp. v. Parking Co.*, 892 A.2d 87 (R.I. 2006), for example, held that an attempt by a state economic development corporation to selectively re-write contract terms in its own favor—condemning an easement in a parking garage instead of exercising its option to purchase that easement—did not qualify as a public use. The court held that the government had "altered the balance of bargaining power in its favor and was able to achieve in Superior Court the concessions it was unable to obtain from [the corporation]." *Id.* at 106. This opinion by the Rhode Island Supreme Court simply cannot be squared with the New York courts' decisions in this case. *See also MHC Fin. Ltd. P'ship v. City of San Rafael*, No. 00-3785, 2006 WL 3507937, *14 (N.D. Cal. Dec. 5, 2006) (denying City's motion for summary judgment because the City proffered no evidence that its rent control statute was in the public interest, "thereby inviting the court's inference that the ordinance simply confers a private benefit on the incumbent tenants").

Moreover, the courts, following *Kelo*, evidence considerable confusion on just how selective private favoritism should be discerned and analyzed. *See, e.g.*, *W. Seafood Co. v. United States*, No. 04-41196, 2006 WL 2920809, *5 (5th Cir. Oct. 11, 2006) (declining to address whether a heightened standard of review is necessary in cases where favoritism is present because the facts of the instant case did not warrant it). In *Didden v. Village of Port Chester*, 173 F. App'x 931, 933 (2d Cir. 2006), *cert. denied*, 75 U.S.L.W. 3267 (U.S. Jan. 16, 2007) (No. 06-652), the

Second Circuit affirmed the taking of property located within a redevelopment area because the location within a redevelopment district purportedly insulated transfers—even transfers for admittedly private use—from constitutional infirmities. In contrast, the court in *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), *appeal dismissed as moot*, 60 F. App'x 123 (9th Cir. 2003), rejected an attempted taking (although within the physical limits of a redevelopment area) because "the evidence is clear beyond dispute that [the redevelopment agency's] condemnation efforts rest on nothing more than the desire to achieve the naked transfer of property from one private party to another." *Id.* at 1129. *Kelo* itself favorably cited the *99 Cents* case as an example of where courts have struck down the "unusual" and "suspicio[us]" use of government power to effect a "one-to-one transfer of property." *Kelo*, 545 U.S. at 487 & n.17. Similarly, a Pennsylvania court recently struck down a taking within a "blighted" area because the specific parcel of land was taken at the request of a private school and "nothing in the Constitution authorizes a taking of private property for a private use." *In re Redevelopment Auth. of City of Philadelphia*, 891 A.2d 820, 828 (Pa. Commw. Ct.), *appeal granted*, 903 A.2d 539 (Pa. 2006). Again, these cases' invalidation of takings done at the behest of, and in order to benefit, certain private parties cannot be squared with the approval here of a condemnation to benefit Pyramid.

Finally, and most generally, courts are divided on the related question of the extent to which government needs to provide a reasoned justification for its takings. Here, as in *Didden*, the courts did not require the government to provide any justification or explanation of the precise taking at issue,

but only to establish that the development as a whole serves a general public interest.[5]

This generic explanation is plainly insufficient under the precedent this Court cited in *Kelo*, as well as lower court decisions that require a specific and meaningful justification for a taking. *See Kelo*, 545 U.S. at 487 n.17 (citing *Vester*, 281 U.S. 349 ("taking invalid under state eminent domain statute for lack of a reasoned explanation")); *Daniels v. Area Plan Comm'n*, 306 F.3d 445, 463 (7th Cir. 2002) (holding that exercise of eminent domain was unconstitutional where claim of economic development was "conclusory and largely unsupported"); *S.W. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C.*, 768 N.E.2d 1, 10-11 (Ill. 2002) (holding that condemnation for racetrack expansion was not a public use, even though it would contribute to economic growth in the region); *see also MHC Fin. Ltd. P'ship*, 2006 WL 3507937, at *14 (requiring the government to present evidence of public purpose).

This Court should grant certiorari to clarify the circumstances in which the government's proffered public use is legitimate or warrants a more searching standard of review. This issue is recurring and is the subject of inconsistent application in the state and lower federal courts.

[5] Other courts have placed impossible burdens of proof on plaintiff to demonstrate the absence of a public purpose, requiring, for example, clear and convincing evidence of arbitrariness. *See, e.g., C/S12th Ave. LLC v. City of New York*, 32 A.D.3d 1, 11, 815 N.Y.S.2d 516, 525 (2006) ("[O]ur review is limited to ascertain whether the project is *rationally related* to a conceiveable public purpose." (emphasis in original)); *Norfolk Redevelopment & Hous. Auth. v. C & C Real Estate, Inc.*, 630 S.E.2d 505, 509 (Va. 2006) (requiring plaintiff to present clear and convincing evidence that locality acted arbitrary in determining public purpose); *City of Long Branch v. Brower*, Nos. Mon-L-4996-05, *et al.*, 2006 WL 1746120, *10 (N.J. Super. Ct. June 22, 2006) ("A challenger can overcome a presumption of validity only by proofs that there could be no set of facts that would rationally support a conclusion that the enactment is in the public interest.").

This case, in which the favoritism is clear and no development plan is present, provides a good vehicle for the Court to establish a constitutional baseline for government behavior.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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