No. 24-670

In the Supreme Court of the United States

BOWERS DEVELOPMENT, LLC
Petitioner,

v.

ONEIDA COUNTY INDUSTRIAL DEVELOPMENT AGENCY ET AL.,
Respondents.

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

BRIEF OF COUNTY OF ONEIDA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

JOHN S. BALZANO
SPECIAL ASSISTANT COUNTY ATTORNEY
Counsel of Record
AMANDA L. CORTESE-KOLASZ
COUNTY ATTORNEY
ANDREW M. DEAN
DEPUTY COUNTY ATTORNEY
800 Park Avenue
Utica, New York 13501
(315) 798-5910
countyattorney@oneidacountyny.gov

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INTEREST OF *AMICUS CURIAE*[1]

The County of Oneida is a small county in Upstate New York. Its seat and largest city is the City of Utica. Like many industrial cities, Utica thrived in the nineteenth and early twentieth centuries, but experienced decades of decline after World War Two (R.840–841, 2360–2361). However, through strong government efforts, including by the County and the separate Oneida County Industrial Development Agency (OCIDA),[2] Utica's fortunes have changed (R.5217). For the first

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[1] All counsel of record received timely notice of *amicus curiae's* intention to file this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation of or submission of this brief. No one other than the *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

[2] Industrial Development Agencies are public benefit corporations established by the New York State Legislature. *See* N.Y. Gen. Mun. L. art. 18-A.They exist for the purposes of promoting industry, commerce, research and other endeavors. *See* N.Y. Gen. Mun. L. § 858. They enjoy the privileges of a corporation (perpetual existence and separateness), but are bodies politic possessing a share of the State's power of eminent domain. *See* N.Y. Gen. Mun. L. § 858(4). The State Legislature established OCIDA in 1970. *See* N.Y. Gen. Mun. L. § 901.

time in decades, cranes and scaffolding adorn its skyline (R.697, R.893).

The capstone of this revival is a new health campus in a once-blighted neighborhood (R.697). The County undertook one of the project's biggest components—the construction of a parking garage adjacent to the new Wynn Hospital (R.115). It used eminent domain to acquire several of the parcels.

This case concerns a different component of the health campus project, the construction of a medical office building with adjacent parking. OCIDA acquired the parking property by eminent domain, and still owns it (R.6029-6034). It leases the property to the medical office building owner (R.6487). However, the public retains the right to use the parking lot, both to visit the medical office building during business hours and to visit downtown Utica on nights and weekends (R.6042).

This parking lot is important. Utica's economic recovery, though welcome, has strained parking downtown. New development, including the integrated health campus, the NEXUS Center (a sports center), and the revitalized brewery and Baggs Square districts all create heavy demand for parking (R.176, R.4348). The lack of parking

strains existing businesses and constrains future growth. Consequently, a key feature of the health campus project is parking "co-utilization"—meaning that newly-constructed parking is shared with the public to visit area businesses (R. 4346).

The County has an interest in this case. Any change to the use of the medical office building parking lot will have spillover effects on the new County parking garage and on area businesses. And all governments' interests are implicated when this Court speaks to their power of eminent domain. A reversal of *Kelo v. City of New London*—which involved a more "private" taking than occurred here—would devastate the County's efforts to revitalize Utica and similar efforts nationwide.

SUMMARY OF ARGUMENT

This case is not about a "little pink house."[3] The Petitioner's home was not snatched to give to a pharmaceutical company. *See Kelo v. City of New London*, 545 U.S. 469, 494 (2005). Rather, beginning in

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[3] "Little Pink House" is the title of a book and film about the lead plaintiff in *Kelo v. City of New London*. *See* Jeff Benedict, *Little Pink House: A True Story of Defiance and Courage* (2009).

2018, local decision makers planned to build a health campus in a blighted area, including a medical office building supported by adjacent parking (R.7). This parking would be "public parking for the [medical office building] during the day and available nights and weekends for the general public" (R.6042). The Petitioner is a developer which lost its bid to develop the medical office building, and then surreptitiously contracted to buy the adjoining property (the land identified for parking), ostensibly to build a second medical office building (R.5301). This spiteful gambit would have deprived both properties of parking and shifted the parking burden to other components of the health campus. Thankfully, the public was not cowed and condemned the property (R.5880). Thus, these circumstances—involving little more than the bruised feelings of a jilted property development company—are far different than the "little pink house" scenario of *Kelo*.

What this case is about is judicial deference. Since the founding, the power to take property for public use has rested with the People, through their legislatures. Recognizing this, the Court has consistently deferred to the States in determining whether a use is "public." *See Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 159 (1896). *Kelo* is

but a recent example of this deference and urges an affirmance—to the extent it applies at all to this private-to-public takings case. *See Kelo*, 545 U.S. at 488–89.

This case is also about *stare decisis*. Petitioner fails to identify a conflict among the State high courts on an important issue of federal law, the typical avenue to Supreme Court review. *See* Sup. Ct. R. 10. Rather, it tries to manufacture a "conflict" by arguing that New York has been more lax than other states in reviewing private-to-private transfers under *Kelo*. *See* Petition at 7–16. But this "conflict" is imaginary, and the cases that Petitioner cites merely demonstrate that State courts apply the same rule and achieve different results when confronted with more egregious takings.

And if Petitioner's concern were genuine, why does it ask to overrule *Kelo*, rather than ask that it be applied more faithfully? The truth is that there is no conflict. The Petitioner simply dislikes *Kelo*—and the two centuries of precedent it embodies—and is hoping to reverse it now that the Court's composition has changed. The Court should reject this cynical request out-of-hand. *See Michell v. W. T. Grant Co.*, 416 U.S. 600, 634–35 (1974) (Stewart, J., dissenting).

ARGUMENT

Certiorari jurisdiction exists only to clarify the law. *City & Cty. of S.F. v. Sheehan*, 575 U.S. 600, 610 (2015). Consequently, this Court will review a case if (as applicable here) a State high court decides an important federal question in a manner in conflict with other State high courts or if a State high court decides an important question of federal law that has not been settled by this Court. *See* Sup. Ct. R. 10. Here, the Petition "meets none of the tests." *Thomas v. Am. Home Prods.*, 519 U.S. 913, 916 (1996) (Rehnquist, J., dissenting).

Sovereignty, to exist at all, requires that the sovereign have dominion over its subjects, including the right to take private property "for public benefit." Hugo Grotius, The Rights of War and Peace, Book III, Ch. XX, Par. VII (1625) (Liberty Fund ed. 2005). In England, this power came to reside with Parliament. *See* Blackstone Commentaries on the Laws of England, at 135 (1765) ("the legislature alone, can, and indeed frequently does, interpose, and compel the individual to acquiesce"). In America, the People hold and exercise this power through their legislatures. *See Munn v People of State of Illinois*, 94 US 113, 124 (1876).

The United States Constitution speaks to the power of eminent domain only once. It provides that "nor shall private property be taken for public use, without just compensation." U.S. Const. am. V. To the extent that the "public use" language can be read as prescriptive—which would require a liberal use of brackets and alterations to rewrite the text (*see, e.g.*, *Kelo,* 545 U.S. at 496 (O'Connor, J., dissenting)—the courts, recognizing the legislatures' prerogative, have uniformly deferred to them to say what uses are "public." *See, e.g.*, *United States ex rel. Tenn. Valley Auth. v. Welch*, 327 U.S. 546, 551 (1946).

For example, in *Berman v. Parker* this Court deferred to Congress' adoption of a law authorizing the taking of blighted land in Washington, D.C. and its transfer to private developers. *See Berman v. Parker*, 348 U.S. 26, 30 (1954). And in 1984, this Court deferred to the Hawaii Legislature's adoption of a law forcing the transfer of tens of thousands of acres of land from owners to tenants, a bid to end the oligopoly that had persisted since Hawaii's pre-statehood monarchy. *See Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 242 (1984). Finally, in *Kelo*, this Court approved the taking of the plaintiff's land to give to a

pharmaceutical company. *See generally Kelo*, 545 U.S. 469.

To be sure, these cases recognized a need for limits to the unfettered use of eminent domain. Justice Chase, in *Calder v. Bull*, explained that the social compact bars legislatures from enacting a law that "takes property from A. and gives it to B." *Calder v. Bull*, 3 U.S. 386 (1798). Thus, the majority in *Kelo* cautioned that economic development takings must either keep the property open to "all comers" or, if property is transferred into private hands (which did not occur here), the transfer must not be motivated solely to confer a private benefit. *See Kelo*, 545 U.S. at 477–79. One way to satisfy this test is if the taking is part of an "integrated development plan." *See id.* at 487.

New York's cases are consistent with these precedents. In 1831, New York's Chancellor deferred to the State Legislature in adopting a law authorizing private railroad companies to take property for railroads—and acknowledged that such takings were already common at the time for roads, ferries, and other uses. *See Beekman v. Saratoga & Schenectady R. R. Co.*, 3 Paige Ch. 45, 73 (N.Y. 1831).

In 2009, the New York Court of Appeals, applying the New York State Constitution[4] upheld the condemnation of property to develop the Atlantic Yards project in Brooklyn, reasoning that it was the Legislature's province to determine that the taking served the public use of rehabilitating blight. *See Matter of Goldstein v. N.Y. State Urban Dev. Corp.,* 921 N.E.2d 164, 172 (2009). The federal courts also upheld the taking, and this Court denied *certiorari. See Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008), *lv denied* 554 US 930 (2008).

A year later, the New York Court of Appeals upheld the taking of blighted property for an urban campus for Columbia University. *See Kaur*, 933 N.E.2d at 733. The court deferred to the condemning body's determination that the public use was served by such a "land use improvement project"—a finding only semantically different than the "integrated development plan" of *Kelo. See id.* at 731. This Court denied *certiorari. See Tuck-it Away, Inc., v. New York State Urban Development Corp.*, 562 U.S. 1108 (2010).

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[4] The New York Constitution is more prescriptive than the United States Constitution, providing "Private property shall not be taken for public use without just compensation." N.Y. Const. art. I, § 7.

Here, in 2018, lawmakers began reviewing plans for an integrated health campus in a blighted area of Utica (*see* R.90, R.697). Parking "co-utilization" was a key feature—with any new parking to be used for both the health campus and for area venues (R. 4346, 5218, 5249). The Petitioner bid to develop the medical office building component of the project, but failed to put forward a feasible plan, prompting decisionmakers to select a different developer (*see* R.5499, R.5893). Petitioner then surreptitiously contracted to buy the adjacent property—a plumbing store—which the plans had identified to be razed for a parking lot (R.5282). Unfazed by this attempt to frustrate the project, OCIDA condemned (and still owns) the property, which is now leased to the medical office building but open to the general public on nights and weekends and to visit the medical office building (*see* R.6042).

The Petitioner sued, but the New York Appellate Division affirmed the acquisition, holding that it "will serve the public use of mitigating parking and traffic congestion, notwithstanding the fact that the need for the parking facility is, at least in part, due to the construction of a private medical facility." *Matter of Bowers Dev., LLC v.*

Oneida Cty. Indus. Dev. Agency, 205 N.Y.S.3d 606, 608 (App. Div. 4th Dept.).

The founders would not have batted an eyelash at this result. The taking of property for parking (public and private) provides just as much "public use" as the thousands of early nineteenth century takings for private roads, railroads, and ferries. *See Beekman*, 3 Paige Ch. at 74. The taking also satisfies *Kelo*, because it does not accomplish a purely private transfer (the lot is publicly owned and although leased to a private company, remains open to the public for parking). Even if it did, the condemnation was pursuant to an integrated development plan (the health campus project). *See Kelo*, 545 U.S. at 477. And putting aside *Kelo*, the Appellate Division's decision comports with the two centuries of precedent, outlined above, where both State and federal courts defer to the Legislature's determination of which uses are "public"

What basis, then, does Petitioner have to invoke this Court's *certiorari* jurisdiction? The case does not involve a decision of a United States court of appeals. *See* Sup. Ct. R. 10(a). It did not decide a novel federal question—the question was decided 70 years ago in *Berman*. *See* Sup. Ct. R. 10(c); *Berman*, 348 U.S. at 30. All that's left is a "conflict"

between the State high courts on an important federal question. *See* S. Ct. R. 10(b).

But Petitioner's proffered cases fail to show any such conflict in the application of *Kelo*. Rather, they show different State courts applying the same general rule of deference to the legislatures, but overturning condemnations in egregious circumstances. *See Middletown Twp. v. Lands of Stone*, 939 A.2d 331, 338 (P.A. 2007); *Rhode Island Econ. Dev. Corp. v. The Parking Co., L.P.*, 892 A.2d 87, 103 (R.I. 2006); *Cnty. of Hawaii v. C & J Coupe Fam. Ltd. P'ship,* 198 P.3d 615, 642 (Haw. 2008). In other words, the rule applied in *Kelo*, which has existed for centuries, is working and does not require reexamination.

Petitioner believes that the New York court misapplied the law in Petitioner's case (it did not), but this is not a reason to grant review. *See* S. Ct. R. 10(c) ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law"). This court is "not, and for well over a century ha[s] not been, a court of error correction." *Sheehan*, 575 U.S. at 620–21 (Scalia, J., dissenting); *see also Fallbrook*, 164 U.S. at 157 ("It never was intended that the court should, as the effect of the [Fourteenth]

amendment, be transformed into a court of appeal, where all decisions of state courts involving merely questions of general justice and equitable considerations in the taking of property should be submitted to this court for its determination . . . .").

And if Petitioner were truly concerned about lax enforcement of *Kelo*, why ask that it be overturned, and not simply request a reversal here? The truth is that Petitioner simply dislikes *Kelo* and is hoping for a different result now that the Court's composition has changed.

But "[a]dherence to precedent is the norm, and *stare decisis* imposes a high bar before this Court may overrule a precedent" *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 341 (2022) (Thomas, J., concurring). "A basic change in the law upon a ground no firmer than a change in [this Court's] membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court . . . ." *Michell v. W. T. Grant Co.*, 416 U.S. 600, 634–35 (1974) (Stewart, J., dissenting).

CONCLUSION

The County of Oneida respectfully asks that the Court deny the Petition.

Respectfully submitted.

JOHN S. BALZANO
SPECIAL ASSISTANT COUNTY ATTORNEY
Counsel of Record
AMANDA L. CORTESE-KOLASZ
COUNTY ATTORNEY
ANDREW M. DEAN
DEPUTY COUNTY ATTORNEY
800 Park Avenue
Utica, New York 13501
(315) 798-5910
countyattorney@oneidacountyny.gov

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