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 WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK, FOURTH JUDICIAL DEPARTMENT

AMICUS CURIAE BRIEF OF THE BUCKEYE INSTITUTE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does the Public Use Clause require something more than minimal rational-basis review when the government takes land from one private owner to give it to a specifically identified private owner outside the context of a comprehensive economic redevelopment plan?

2. Should Kelo be overturned?

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INTEREST OF AMICUS CURIAE[1]

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute works to restrain governmental overreach at all levels of government. In fulfillment of that purpose, The Buckeye Institute files lawsuits and submits amicus briefs. The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. section 501(c)(3).

SUMMARY OF THE ARGUMENT AND INTRODUCTION

The Takings Clause "was designed 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." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). When determining that a taking of private property *could not occur* except for a "public use," the Framers incorporated Blackstone's observation that "the law of the land . . . postpone[s] even public necessity to the

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from amicus curiae made any monetary contribution toward the preparation or submission of this brief. Counsel timely provided the notice required by Rule 37.2.

sacred and inviolable rights of private property." *Kelo* v. *City of New London, Conn.*, 545 U.S. 469, 505 (2005) (Thomas, J., dissenting) (quoting 1 William Blackstone, *Commentaries on the Laws of England* 134–135 (1765)).

In *Kelo*, this Court reaffirmed that the government 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. Yet, the *Kelo* Court did not take this principle seriously. The Court reasoned that if—with great deference to the government—the government determined that there was an economic benefit to be had, private transfers satisfied the "public use" requirement. See, *e.g.*, *id.* at 480–483 (citing *Berman* v. *Parker*, 348 U.S. 26 (1954) (allowing taking where some "land would be leased or sold to private parties"); *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229 (1984) (allowing fee title to be "taken from lessors and transferred to lessees")).

Some states—like New York, here—have used *Kelo* to allow the redistribution of property without a second thought of the consequences. Other state courts and an overwhelming number of legislatures rejected *Kelo*, opting for a more property rights-friendly approach. This approach—while respecting private property rights—has not stunted economic development. The Court should follow the path of the states that have rejected *Kelo* by granting the petition and overruling *Kelo* once and for all.

ARGUMENT

I. Redistribution of private property is unjust and unconstitutional.

Justice O'Connor predicted that in the wake of *Kelo*, "[n]othing is to prevent the State from replacing any Motel 6 with a Ritz–Carlton, any home with a shopping mall, or any farm with a factory." *Kelo*, 545 U.S. at 503. In many ways, her predictions have come true. When property is taken for a "public use," it is often property that means more to the owner than just *any* bundle of sticks, it is *the owner's* bundle of sticks. Many owners fight condemnation actions not because the valuation is too low, but because their property has other value to them, value that cannot be monetized or bought.

Some of these injured property owners are familiar to the Court. Take, for instance, Susette Kelo, whose little pink, dream house was taken from her. When purchasing her Fort Trumbull home, Susette "knew that she couldn't buy an already perfect house on her own; she needed a home that she could afford . . . ." Amul Thapar, *The People's Justice* 2 (Regnery Gateway 2023). Susette had a vision for her house and poured her soul into improving the little pink "Kelo House." *Id.* at 2–3. When the pharmaceutical giant Pfizer and the city of New London came knocking—eventually banging—on Susette's door, she did not quietly—or willingly—give up the property that she had worked so hard for. See *id.* at 3–21.

While Susette Kelo receives much of the public's attention for her little pink house, she was not alone in bringing that case. She was joined by Wilhelmina

Dery, who was born in the house that the city of New London wanted to take and had lived there her entire life. *Kelo*, 545 U.S. at 475. Wilhelmina's husband Charles had also "lived in the house since they married some 60 years" prior. *Id.* Their son and his family lived in the house next door, which he received as a wedding gift, and which was also taken by the government. *Id.* at 494–495 (O'Connor, J., dissenting).

Yet, there are others who the Court may not be aware of who—much like Susette and the Derys—have had their property forcibly taken in the name of private economic growth.

Long before Pizer promised to revitalize New London, General Motors ("GM") made similar guarantees to Detroit. In 1980, GM promised an economically struggling Detroit a new automotive plant—so long as the city could provide an ideal location. This ideal location was Poletown, so named for the high concentration of Polish immigrants. To make room for the plant, 500 acres that contained 1,500 thousand homes, 144 businesses, 16 churches, three schools, and a hospital were condemned under Michigan's newly enacted Uniform Condemnation Procedures Act. Amy Crawford, *Can Poletown Come Back After a General Motors Shutdown?*, Bloomberg (Dec. 10 2018), https://tinyurl.com/3ren67kk. The Poletown Neighborhood Council fought against the condemnation, initially winning a temporary injunction against the city by challenging the Act's constitutionality.

The case ultimately arrived at the Michigan Supreme Court. In March of 1981, the court determined that the city's project did fall within

acceptable bounds of the Fifth Amendment as the plant, though owned by a private party, would be built with a "public purpose." *Poletown Council* v. *Detroit*, 304 N.W.2d 455, 459 (Mich. 1981), *overruled by Cnty. of Wayne* v. *Hathcock*, 684 N.W.2d 765 (Mich. 2004). Much like the reasoning in *Kelo*, The Michigan Supreme Court determined that "the benefit to a private interest is merely incidental" since eminent domain was an "inherent power of the sovereign." *Id.* at 631. The court was satisfied that Detroit had shown that the condemnations were within its proper exercise of that power. The benefit to be reaped by the public was "clear and significant." *Id.* at 634.

Poletown's residents disagreed—vehemently. They attended city council meetings and staged protests and rallies in a final attempt to save their community. One woman's plight exemplified the impact on each and every resident: The government was evicting Mary Poholsky, 73, and a 53-year resident of Poletown, for the benefit of General Motors and its international shareholders. Protesters carried signs decrying the city's and GM's actions: "Detroit is *our* city, NOT GM's"; "City says 'get back' we say 'fight back.'" Two women carried a large coin fashioned from tin foil that read "Thirty Pieces of Silver," a biblical allusion to the reward Judas Iscariot received for turning over Christ. *Poletown, the Detroit neighborhood demolished for GM Plant*, Detroit Free Press (Nov. 26, 2018), https://tinyurl.com/279uy9bt.

Despite the protests, the city council, union officials, and even religious leaders all stood behind the decision to take the property. In July of 1981, the Detroit SWAT team removed twelve individuals from the basement of the Immaculate Conception Church after a near month-long sit-in, which was a final attempt to save the building that had been a pillar of their community. Wrecking balls destroyed the church two days after the protesters were removed. Crawford, *supra*. Widespread demolition of Poletown began at the end of the summer of 1981. By November of 1981, Poletown had two remaining residents, John Saber, 68, and his sister Helen, 73. Bruce Babiarz, *Last Poletown resident holds his ground*, UPI Archives (Nov. 4, 1981), https://tinyurl.com/37rv3md3. Saber had started building an eight-foot concrete wall around his home of 46 years and often sat on his porch with his rifle to dissuade looters. In March of 1982, over a year after the Michigan Supreme Court's decision, police lead Saber from his home in handcuffs, also escorting his sister out: "'I don't want to go,' she sobbed as police helped her down the stairs. 'Don't make me go,' she cried." '*Don't make me go*', UPI

Archives (Mar. 23, 1982), https://www.upi.com/Archives/1982/03/23/Dont-make-me-go/1892385707600/.

An estimated 4,200 people were "relocated." Crawford, *supra*. The city spent $300 million (1.2 billion in 2025 dollars) on the efforts to prepare the land and on incentives for GM. Aaron Foley, *In retrospect, GM's Poletwon plant was a pretty terrible idea if we're being honest*, The Neighborhood, https://tinyurl.com/5f7ke36s (last visited Jan. 17, 2025). Only around 3,000 of the 6,000 jobs promised ever actually materialized. Crawford, *supra*. What was left of the surrounding area continued to decline. In November 2018, GM announced that it planned to close the plant, spurring conversations as to whether the human cost was worth the project. "In retrospect GM's Poletown plant was a pretty terrible idea if we're being honest. Use of eminent domain led to the destruction of a vibrant, ethnic, neighborhood. . . . As Detroit moves forward, we can't forget the shame of Poletown, nor can we allow it to happen again." Foley, *supra*. The Michigan Supreme Court had a similar view of its own part in the demise of Poletown and overturned the "public purpose" framework in 2004:

> *Poletown*'s "economic benefit" rationale would validate practically *any* exercise of the power of eminent domain on behalf of a private entity. After all, if one's ownership of private property is forever subject to the government's determination that another private party would put one's land to better use, then the ownership of real property is

> perpetually threatened by the expansion plans of any large discount retailer, "megastore," or the like.

Cnty. of Wayne, 684 N.W.2d at 786.

Cnty. of Wayne v. *Hathcock* corrected the error of *Poletown* v. *Detroit* but 20 years too late for Poletown and its residents.

Johnnie Stevens is another victim of *Kelo*. In 2004, in city of Carteret, New Jersey came to an agreement with a developer to "build 400 Victorian-style luxury townhouses and condominiums, luxury apartments and almost 40,000 square feet of retail and commercial space." Sue Epstein, *Forrester takes up Carteret man's fight*, The Star-Ledger (July 17, 2005), https://tinyurl.com/3j5xwxc7. The developer made offers to homeowners to buy their properties outright and those who did not accept were condemned by the city. The mayor stated that the project was necessary to "combat, crime and violence, drug abuse, poverty and despair." *Id*. This included a home owned by Stevens, who was not a criminal or a drug addict, but an 86-year-old World War II veteran. Stevens fought at the Battle of the Bulge in the 761st Tank Battalion, the first black tank battalion in the then-still segregated army. Angelica Juliani, *World War II Oral History Interview Summary*, Militia Museum of New Jersey (Apr. 5, 2002), https://tinyurl.com/mm9an9tr. Following that battle, he helped liberate concentration camps. *Id.* The 761st received the Presidential Unit Citation for its service, and Stevens individually was awarded a Bronze Star, the European Theater medal, and a Purple Heart. *Id.* After returning home, he became the first African American bus driver for New

Jersey Public Service Transport. *Johnnie Stevens Obituary*, The Star-Ledger (July 16, 2007), https://obits.nj.com/us/obituaries/starledger/name/johnnie-stevens-obituary?id=13791916.

In 2005, Stevens was battling cancer and had been given a prognosis of two years. He simply wanted to spend the short time he had left with his wife in his own home. The developer in charge of the project offered him $153,000 for his home of 10 years. He refused. The city commenced eminent domain actions, marking his home for demolition. "After what I've given to this country. I think I've earned my little piece of land. I just want to have my little garden and sit in my own back yard," Stevens said. Epstein, *supra*. "The mayor and council are taking my whole life away from me. . . . If they were building a road, I'd understand. . . . If it were a hospital, I would understand. But it's condos. It's wrong." *Id*. (internal quotation marks omitted). Stevens ultimately came to an agreement with the city that allowed him to stay in his home until he passed away in 2007, but the city only relented after a candidate for governor of New Jersey and a national news outlet amplified his story.

The disastrous effects of *Kelo* are still being felt to this day. In 2023, the Sandersville Railroad sought to add a four-and-a-half mile expansion to an existing rail line. This "spur" would not service or benefit the general public but would be added for the sole commercial benefit of several private businesses. The project cut through 18 parcels of land and had a large impact on the small community of Sparta, in Handcock County, Georgia. Owners of nine of the 18 parcels negotiated with Sandersville. The other nine

refused to sell. In written testimony before the Georgia Public Service Commission ("GPSC"), the public body able to authorize the railroad's use of eminent domain, Donald Garret Sr. stated, "Sandersville Railroad does not care about the destruction of my family's property or our way of life . . . . They just care about their own plans for my property, which won't serve the public, but will just help them expand their business and the quarry's business." Jeff Amy, *Eminent domain case involving Georgia railroad could have widespread property law implications*, The Associated Press (Nov. 27, 2023), https://tinyurl.com/nhdzxtz3. Garret's property will be bisected by the planned expansion. Sandersville Railroad stated that the spur would be a $1.5 million annual boon to the Sparta economy. Much like Poletown, the opponents of the so-called "public benefit" were the individual property owners—the public. In addition to the landowners affected, other Sparta residents created the No Railroad in Our Community Coalition ("NROCC") to oppose the spur.

The quarry that the spur plans to service already causes issues in Sparta. Rather than economic prosperity, the spur instead promises an escalation of problems that currently plague Sparta's residents, as the founder of the No Railroad in Our Community Coalition stated, "we already suffer from traffic, air pollution, noise, debris, trash, and more from the Heidelberg Quarry, but this project would make everything worse." *Id*. The President of Sandersville Railroad, Ben Tarbutton III, testified that "railroads in America are private companies operating in the public interest." *Id*. The property owners and community at large fail to see the benefit of the project

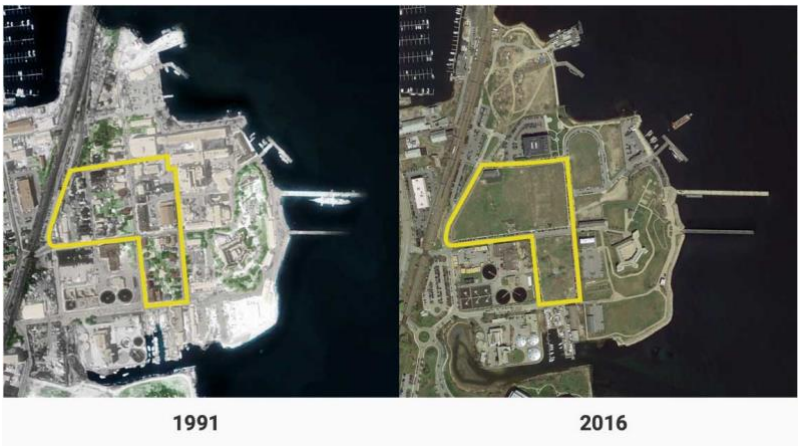
and instead feel exploited rather than assisted: "They're just trying to push it over on us. . . . The only body that's gonna benefit is Mr. Tarbutton and the man that owns that quarry out there." Esther Schrader, *Railroaded: Residents of Predominantly Black Georgia Community Fight Back against Train Proposal*, Southern Poverty Law Center (Feb. 24, 2023), https://tinyurl.com/7mehndxp. In September 2024, the GPSC issued a decision to allow Sandersville's use of eminent domain. Dave Williams, *Property owners appeal Sandersville Railroad condemnation order*, Capitol Beat News Service (Sept. 24, 2024), https://tinyurl.com/a5kzp88u. The decision is currently being appealed by the landowners and NROCC. Seventy percent of Handcock County's population is black, and one-third of its residents live in poverty., *QuickFacts: Hancock County, Georgia*, U.S. Census Bureau, https://tinyurl.com/mrxr3vu5 (last visited Jan. 10, 2025).

It is not surprising that all three of these examples affected predominantly minority and impoverished communities. The dissents in *Kelo* predicted who would bear the brunt of eminent domain actions in favor of private entities. "Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities." *Kelo*, 545 U.S. at 521 (Thomas, J., dissenting). Justice O'Connor also noted this fact: "As for the victims, the government now has license to transfer property from those with fewer resources to those with more." *Id.* at 468 (O'Connor, J., dissenting).

Time, as well as statistics, have vindicated these predictions. Individuals who live in "project areas" are 13% more likely to be minority, have an income less than the median income, and 9% more likely to live below the poverty line when compared to the surrounding area. Dick M. Carpenter & John K. Ross, *Testing O'Connor and Thomas: Does the Use of Eminent Domain Target Poor and Minority Communities?*, 46 Urb. Studies 2447, 2455 (2009). This connection is not lost on the residents of Handcock County. "They didn't expect us to push back because we're poor and Black. But this property is all that we've got to leave to our sons[—]it's the disrespect of it all." Nina Lakhani, *Majority-Black town fights to stop land being seized for gravel quarry rail link* (Apr. 3, 2024), https://tinyurl.com/34k5cfk2. It is here that, as Justice Holmes warned, "a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349 (1921). It took the Michigan Supreme Court 20 years to recognize the error of *Poletown*. As the same anniversary for *Kelo* approaches, this Court should come to the same realization.

As sad as it is that Justices O'Connor's and Thomas's predictions are coming true, it is even more distressing that some of these takings have resulted in a waste of property. See, *e.g.*, Tom Perkins, *'They demolished my house for this?' Residents outraged by the Foxconn factory that fizzled in Wisconsin*, The Guardian (Dec. 8, 2020), https://tinyurl.com/foxconn-factory; Michael Farren, *Opinion: Ghost of Poletown hangs Over GM's closing plant*, The Detroit News (Dec. 31, 2018), https://tinyurl.com/Ghost-of-Poletown; Castle Coalition, *Redevelopment Wrecks: 20 Failed Projects Involving Eminent Domain Abuse* (2006).

A decade after *Kelo*, the Fort Trumble neighborhood remained an empty lot.



Robert Steuteville, *Legacy of the Little Pink House*, Public Square (Oct. 6, 2021), https://tinyurl.com/legacy-little-pink-house (*Kelo's* Fort Trumbull neighborhood 25 years apart).

Such wastefulness not only adds insult to injury for the people whose property was taken, but it also undermines the justification for taking the property in the first place. See, *e.g.*, Kevin Landers, *'It's a big mess': How eminent domain took land against a war veteran's will*, WBNS (Apr. 26, 2024), https://tinyurl.com/4n5jf328 ("In 1960, the Akron Innerbelt was designed by the Ohio Department of Transportation to connect downtown with the growing suburbs. Highway planners chose a route that cut straight through a predominantly Black community and wiped out more than 100 businesses and more than 700 homes. The project was never completed and became a 'highway to nowhere.'"). These so-called economic development takings all turn on the erroneous claim that turning property over to someone

else will spur a better, more financially prosperous use of property than the original owner. Yet when the developers' grandiose assertions of community benefits do not grow to fruition or even deliver any economic benefit, the divested property owners are left knowing that they lost their cherished property for nothing. All this could be avoided if corporations and developers were denied the benefits of eminent domain to further enrich themselves at the expense of lawful property owners exercising their constitutional right to own property.

II. A rejection of *Kelo* will not spell doom for economic growth.

In *Kelo*, this Court gave deference to the government's determination that economic rejuvenation could justify a taking. *Kelo*, 545 U.S. at 483; see also *id.* at 517–518 (Thomas, J., dissenting) (arguing that it is "most implausible that the Framers intended to defer to legislatures as to what satisfies the Public Use Clause"). But as one Ohio Supreme Court Justice remarked while examining Ohio's takings clause,

> [a]n anxiety to carry out a scheme of internal improvement at the least possible expense, has induced the legislature and the courts to forget the provisions of the constitution. But, however great the public benefit derived from public improvements, it should be remembered that the highest possible public good is to secure every person in the full and complete enjoyment of his property.

Symonds v. *City of Cincinnati*, 14 Ohio 147, 184 (1846) (Read, J., dissenting).

The *Kelo* Court recognized that its state counterparts might disagree with its decision and "acknowledged that property owners might find redress in the states' courts and legislatures, which remain free to restrict such takings pursuant to state laws and constitutions." *Norwood* v. *Horney*, 853 N.E.2d 1115, 1122 (Ohio 2006). The states took up this charge. Both before and after *Kelo*, several state supreme courts rejected *Kelo*'s reasoning and conclusion. See*, e.g.*, *Benson* v. *South Dakota*, 710 N.W.2d 131, 146 (S.D. 2006) (distinguishing *Kelo* and noting that it had long ago adopted the "use by the public test"); *Bd. of Cnty. Comm'rs of Muskogee Cnty.* v. *Lowery*, 136 P.3d 639, 650–51 (OK 2006) (noting that "the transfer of property from one private party to another in furtherance of potential economic development or enhancement of a community in the absence of blight as a purpose, which must yield to our greater constitutional obligation to protect and preserve the individual fundamental interest of private property ownership"); *Bd. of Cnty. Comm'rs of Muskogee Cnty*., 136 P.3d at 651 (citing pre-*Kelo* decisions from Arizona, Arkansas, Florida, Illinois, South Carolina, Michigan, and Maine). The states overwhelmingly enacted eminent domain reform, with many rejecting *Kelo* through constitutional amendments and statutes. See *Eminent Domain*, Institute for Justice, https://tinyurl.com/bscntykz (last visited Jan. 7, 2025).

In Ohio, change came from both the state supreme court and the legislature.

> In response to th[e] invitation in *Kelo*, Ohio's General Assembly unanimously enacted 2005 Am.Sub.S.B. No. 167. The legislature expressly noted in the Act its belief that as a result of *Kelo*, "the interpretation and use of the state's eminent domain law could be expanded to allow the taking of private property that is not within a blighted area, ultimately resulting in ownership of that property being vested in another private person in violation of Sections 1 and 19 of Article I, Ohio Constitution."

Norwood, 853 N.E.2d at 1122. In one of the earliest cases to explicitly reject *Kelo*, the Ohio Supreme Court held that "although economic factors may be considered in determining whether private property may be appropriated, the fact that the appropriation would provide an economic benefit to the government and community, standing alone, does not satisfy the public-use requirement of Section 19, Article I of the Ohio Constitution." *Id.* at 1123.

Despite these reforms and rejections of *Kelo*, the states have been able to grow without unreasonable demands for private property. Cf. Brief Amicus Curiae of John Norquist, *Kelo* v. *City of New London*, 545 U.S. 469 (2005) (No. 04-108), 2004 WL 2811055, at *4–*10 (detailing the ability of the private sector "to be successful in bringing about healthy economic development without the use of eminent domain").

Take, for instance, the $20 billion Intel Corporation computer chip plants currently under construction in New Albany, Ohio. To secure the land necessary to

take on this endeavor, Intel "bought 750 acres of land recently annexed into New Albany for $111 million . . . . That works out to about $148,000 per acre." Mark Williams, Jim Weiker, & Julie Fulton, *Intel spends $111 million on 750 acres of land for its New Albany factories*, The Columbus Dispatch (July 6, 2022), https://tinyurl.com/intel-buys-land. Intel expects to hire 3,000 employees at the plants, and "the project is expected to create 7,000 construction jobs and 10,000 indirect jobs." Maria DeVito, *Panel addresses annexation, growth and public safety at Johnstown Intel forum*, Newark Advocate (May 20, 2022), https://tinyurl.com/yc2teb7v.

Intel is not alone in Ohio. In 2023, Amazon purchased nearly 400 acres for $116.6 million near the Intel site. Jim Weiker, *Amazon looking at massive technology complex in Licking County*, The Columbus Dispatch (Jan. 25, 2023), https://tinyurl.com/amazon-buys-hundreds-of-acres.

> Amazon's new land purchases are just north of 113 acres the tech company bought three years ago for $21.8 million . . . . The purchase is also in addition to 93 acres Amazon [previously] purchased . . . for $16 million . . . , where it planned to build a 170,000-square-foot data center.

Id. Like Intel, the Amazon purchases are expected to bring jobs and economic growth to Ohio—without using eminent domain. See *Governor DeWine Announces $10 Billion Investment Plan from Amazon Web Services in Greater Ohio*, Office of the Governor, State of Ohio (Dec. 16, 2024), https://tinyurl.com/10-billion-from-amazon.

As another example, consider the development of the Walt Disney World theme park in Orlando, Florida. When Disney began acquiring land in central Florida, land prices were as low as $107/acre, with sellers often eager to unload "useless swampland." Daniel Ganninger, *How Walt Disney Secretly Bought the Land for Walt Disney World*, Medium (May 2, 2024), https://tinyurl.com/mr4ytmha. After two years of land acquisitions, "Disney had acquired actual title or options for over 27,000 acres of land, comprising roughly forty-three square miles." Chad D. Emerson, *Merging Public and Private Governance: How Disney's Reedy Creek Improvement District "Re-Imagined" the Traditional Division of Local Regulatory Powers*, 36 Fla. St. U. L. Rev. 177, 187 (2009). Disney's purchase of the land brought new life to the area. A 1967 report "concluded that, from the start of construction through the first decade of operation, the project would generate more than $6.6 billion in 'new wealth.' In particular, the report estimated new visitor expenditures exceeding $3.9 billion, new payrolls reaching $2.2 billion, and more than $400 million in construction related expenditures." *Id.* at 205. "Moreover, the announcement of the project increased area land values more than thirty percent." *Id.* at 206. And they did it all without eminent domain.

In *Kelo's* wake, forty-seven states strengthened their eminent domain protections. Institute for Justice, *Eminent Domain*, *supra*. While some states utilized legislative reforms to enact these changes, others relied on judicial decisions. *Id.* As expected, each state's approach was different, and the reforms' impacts have varied greatly. Marc Mihaly & Turner Smith, Kelo's *Trail: A Survey of State and Federal*

Legislative and Judicial Activity Five Years Later, 38 Ecol. L.Q. 703, 707 (2011).

One commenter categorized the states' approaches into four categories: strong limitations, intermediate limitations, weak limitations, and status quo plus. *Id.* at 708. Among the states with the strongest limitations are Florida, South Dakota, and Michigan. *Id.* 709–11. From 2006 to 2021, those states ranked twenty-fifth, tenth, and forty-fifth, respectively, in economic growth. Andrew DePietro, *U.S. GDP by State and Fastest Growing States by GDP Growth*, Forbes (May 18, 2022), https://tinyurl.com/fastest-growing-states. Comparatively, a few states with the worst or no protections against eminent domain are New York, Arkansas, and Hawaii, Mihaley & Smith, *supra*, at 721–23, which were ranked eighteenth, thirty-third, and forty-third in growth from 2006 to 2021, DePietro, *supra*.

This is no statistical regression, but these numbers show that states can, and do, grow and develop economically without using eminent domain. The *Kelo* decision, and its proponents after, have long insisted that without *Kelo*, economic development would be stifled, if not halted. See *Kelo*, 545 U.S. at 484–85; Arthur J. Rolnick & Phil Davies, *The Cost of* Kelo*,* Federal Reserve Bank of Minneapolis (June 1, 2006), https://www.minneapolisfed.org/article/2006/the-cost-of-kelo. But that simply is not true, as the numbers above demonstrate. If eminent domain was the only way to spark economic development, there would be a direct and clear negative correlation between economic growth and eminent domain restrictions. The states with strong eminent domain protections

would be flailing economically while states that embrace eminent domain would be thriving. It has been twenty years since *Kelo* was decided. Surely twenty years is sufficient time to see the economic impact of different state policies. Here, time speaks for itself, and it says that eminent domain does not boost economic development.

Also problematic is that eminent domain is not used as a last resort for developers, but as a cheap way through the obstacle that is private ownership. Take *Norwood* for example. After the Ohio Supreme Court ruled in their favor, Joy and Carl Gamble, two of the plaintiffs in the case, reached an agreement to sell their property to the developers. John Kramer, *Norwood Homeowners Carl and Joy Gamble Announce Sale of Home*, Institute for Justice (Mar. 30, 2007), https://tinyurl.com/bde8k6zp. The developers had the money to buy the property they wanted, but they wanted the government to get it for them. Or look at the case of Bob Blue, a business owner in Hollywood. *Eminent Domain Success Stories*, Institute for Justice, https://tinyurl.com/7k4ampzx (last accessed Jan. 8, 2025). He fought off the city's eminent domain action, and the developer simply built around his property. *Id.* There was no need for eminent domain, but it would have been convenient for the developer, making the land acquisition cheaper and quicker.

That is exactly what is happening here. If the competing developers really wanted Petitioners' property, they could have paid for it. And if property owners ultimately do not want to sell, that is their choice. But here the competing developers did not even

need Petitioners' property to run their business; they paved it into a parking lot. Instead, fearing competition and wanting a government handout, the developers had the Oneida County Industrial Development Agency ("OCIDA")—a government agency—do their dirty work—all in the name of economic development. OCIDA, single-handedly, chose an economic winner and loser, which rarely results in actual development.

The Federal Reserve, the federal government's leading institution on financial policy, has dismissed *Kelo* and the notion that eminent domain can be used to spur economic growth. Rolnick & Davies, *supra*; Thomas A. Garrett & Paul Rothstein, *The Taking of Prosperity?* Kelo vs. New London *and the Economics of Eminent Domain*, Federal Reserve Bank of St. Louis (Jan. 1, 2007), https://tinyurl.com/f6jx47ur. "Contrary to the Court's finding, using eminent domain to take property from one private developer to give it to another does not promote economic development; in fact, such takings diminish economic activity and, therefore, the general welfare." Rolnick & Davies, *supra.* From the time it was decided through today, *Kelo* has contradicted modern economic theory and research shows that the economy prospers most when the government does not interfere. *Id.* Rather, "economic theory says that government can distinguish between economic development—which it should not interfere with—and other land uses serving the public interest." *Id.* Intervening in the free market to ensure one private party succeeds and another fails is the exact conduct that *Kelo* supposedly forbade, but now facilitates.

The experiences of the states that have rejected *Kelo* show that respect for property rights and economic development can go hand in hand without the government forcibly taking from one to enhance the other. Thus, the Court need not worry that overruling *Kelo* will result in economic growth being stunted.

III. The Court should grant the petition.

This case presents a good opportunity for the Court to fix the unjust results of *Kelo*. Unlike *Eychaner* v. *City of Chicago, Illinois*, where the lower court upheld a "forcible transaction" because "[r]ecognizing the difference between a valid public use and a sham can be challenging," 141 S. Ct. 2422, 2424 (2021) (Thomas, J., with whom Gorsuch, J., joins, dissenting from denial of certiorari) (citation omitted), New York, here, rolls head first into *Kelo's* appropriation of private property for the commercial benefit of another private party.

Under New York law, industrial development agencies may acquire private property "necessary for its corporate purposes." Pet. App. 9a (quoting N.Y. Gen. Muni. L. § 858(4)). "The purposes of [an industrial development] agency are to promote, develop, encourage[,] and assist in the acquiring, constructing, reconstructing, improving, maintaining, equipping[,] and furnishing industrial, manufacturing, warehousing, commercial, research, renewable energy[,] and recreation facilities." Pet. App. 9a–10a (alterations in original) (quoting N.Y. Gen. Muni. L. § 858). The only way for the New York Court of Appeals to find a permissible taking was to determine that "[a]s a general matter, a parking

facility used by the customers of a profit-making business plainly has a 'commercial' purpose," and, thus, a permissible purpose under New York law. Pet. App. 10a.

This case also emphasizes *Kelo's* problem of taking from private party A to give to private party B. There is no dispute that Respondent Central Utica Building, LLC ("CUB"), a private corporation, "planned to build a medical office building on" a parcel of land adjoining the property that Petitioner had contracted to purchase for a similar purpose. Pet. App. 8a. And, there is no dispute that CUB "requested that OCIDA exercise its authority to take the property so that CUB could build a parking facility that would serve the medical office building during the day"—which it did. Pet. App. 8a. The line of succession from A to B was not interrupted by the government's ownership of the land but was facilitated by the government to benefit CUB over Petitioner.

Similar to *Eychaner*, OCIDA "decided to use the coercive power of the government to give [a private] company a valuable parcel of not-yet-blighted-land." *Eychaner*, 141 S. Ct. at 2424 (Thomas, J., dissenting from denial of certiorari). And worse than that, the taken land was intended to be put to an economically beneficial and competitive use. At the end of the day, the government picked a winner and a loser and eliminated the free market of competition. This case is the epitome of the *Kelo* error and presents the Court with the perfect opportunity to correct that error.

CONCLUSION

"Failure to step in today not only disserves the Constitution and [the Court's] precedent, but also leaves in place a legal regime that benefits 'those citizens with disproportionate influence and power in the political process, including large corporations and development firms.'" *Id.* at 2423 (Thomas, J., dissenting from denial of certiorari) (quoting *Kelo*, 545 U.S. at 505 (O'Connor, J., dissenting)). As such, the Court should grant the petition and overrule *Kelo*.

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