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 Supreme Court Of New York, Appellate Division, Fourth Department

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The Petition established that this case presents a chance both to resolve a split about how courts should treat pretextual takings under *Kelo* v. *City of New London*, 545 U.S. 469 (2005), and to consider whether *Kelo* should be overturned entirely. That is because the purpose of the taking here is to provide what the New York Court of Appeals rightly called "a parking facility used by the customers of a profit-making business." App. 10a. Nothing in the BIO disputes that basic truth—nor could it, since Respondents are the ones who persuaded the Court of Appeals of this project's private, "'commercial'" nature. *Ibid.*

Instead, the BIO devotes most of its energy to a host of purported vehicle problems—none of which exists. It also tries to paint this taking as somehow more public than the taking in *Kelo*. And it halfheartedly suggests that this taking—which is expressly designed to create a private parking lot for a for-profit business—would be analyzed the same in jurisdictions other than New York. At bottom, the BIO simply highlights that Petitioner and Respondents take fundamentally different views about the breadth and continued viability of *Kelo*—just as lower courts and even Members of this Court have taken different views. The Petition should thus be granted to allow the Court to determine which views are correct.

A. This case is a good vehicle.

The BIO asserts that there are four vehicle problems with this case. It claims that the Petitioner lacks standing. BIO 10. And the claim is moot. BIO

11. And waived. BIO 12. And the whole thing is barred by res judicata. BIO 26. Each of these arguments is straightforwardly wrong.

1. Petitioner has standing.

The BIO objects that Petitioner lacks standing because it transferred its interest in the condemned property to a related LLC. BIO 10. This does not matter. When Petitioner first filed this action below, it was under contract to buy the land in question. New York courts uniformly hold that contract purchasers of land have standing to bring challenges like this. See, *e.g.*, *Faith Temple Church* v. *Town of Brighton*, 17 A.D.3d 1072, 1073 (N.Y. App. Div. 2005). Petitioner's interest in the land was later transferred to a sister LLC, but New York law is equally clear that an action or appeal may proceed in the name of the original parties after a transfer of an interest in real property unless a court orders otherwise. N.Y. C.P.L.R. § 1018.[1] The standing objection thus lacks any merit as a matter of law (which is presumably why Respondents never raised it below).

2. This case is not moot.

Alternatively, the BIO suggests that this case is moot because Respondents have already taken title to Petitioner's property. BIO 11. Of course not.

First, a word of explanation: New York law divides the taking of property for public use into three independent lawsuits. One lawsuit (the sort from which this petition arises) provides for a challenge to the lawfulness of the taking. N.Y. E.D.P.L. § 207.

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[1] Federal law works the same way. Fed. R. Civ. P. 25(c).

Another allows a condemnor to take title to the condemned property, conditional on tendering an advance payment of estimated just compensation. *Id.* § 402. And the last allows the property owner to challenge the amount of compensation. *Id.* § 503. Nothing in New York law requires these three proceedings to happen sequentially. So, even though Petitioner filed this case to challenge Respondents' right to take its property, App. 2a, Respondents in the meantime tendered their advance payment and filed a separate suit to take title, which is still pending on appeal. See *OCIDA* v. *Utica Med. Bldg., LLC*, No. CA-24-01217 (N.Y. App. Div., appeal filed July 24, 2024).

None of this odd structure matters. This Court has already held, in the context of federal eminent domain, that a condemnor's taking title does not extinguish the original property owner's right to challenge the taking's validity. *Catlin* v. *United States*, 324 U.S. 229, 241 (1945) (noting that a contrary construction "would raise serious questions concerning the statute's validity"). And the Second Circuit has recognized the same for New York law. See, *e.g.*, *Brody* v. *Vill. of Port Chester*, 345 F.3d 103, 120 (2d Cir. 2003) (Sotomayor, J.) (noting that condemnee might be entitled to return of his property if he prevailed on his constitutional claims). That is true even where the condemnee has accepted an advance payment because New York's "statutory scheme does not necessarily contemplate that advance payment will be made only after all challenges to title have been resolved[.]" *Id.* at 117. And the rule could not be otherwise. If it were, a condemnor could escape constitutional review of its takings just by making sure it effected them quickly.

And even if the law *were* otherwise, the BIO is simply wrong to say that Petitioner has acquiesced in the taking of its land. Petitioner's sister entity Utica Med Building, LLC, continues to object to the taking. Its acceptance of the advance payment was specifically conditioned on its retention of the rights advanced in this proceeding;[2] it objected to the transfer of its property in the state trial court, specifically noting that any vesting of title might need to be unwound if this parallel proceeding succeeded; and, as noted, it has appealed the subsequent order vesting title in Respondents. See *OCIDA* v. *Utica Med. Bldg., LLC*, No. CA-24-01217 (N.Y. App. Div., appeal filed July 24, 2024). Simply put, Respondents *chose* to transfer title while the legality of the taking was still unsettled. New York law says they can do this—but they cannot, by choosing to receive title, eliminate the ongoing legal challenge to the taking.

3. The Fifth Amendment question was preserved.

The BIO also says the Fifth Amendment claim was either not raised below or else waived at oral argument. This is wrong.

First, Petitioner expressly preserved its rights under the Fifth Amendment at every stage of the proceeding. Petitioner invoked the Fifth Amendment at the initial public hearing. R.5305 (Petitioner objecting to then-proposed taking in public comment

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[2] It accepted the payment "under a full reservation of its rights to continue its challenge of OCIDA's rights to take the Property through eminent domain, including . . . filing a petition for certiorari from the United States Supreme Court." Ltr. from Michael Fogel to Paul J. Goldman (Aug. 14, 2024).

because taking property "for the benefit of [a] private entity . . . does not meet the requirement of a 'public purpose' under the federal and state constitutions[.]"). Then Petitioner raised it again in its briefing. See, *e.g.*, Br. for Petitioners, *Bowers Dev., LLC,* v. *OCIDA*, 2022 WL 17227957, at *28 (N.Y. App. Div. July 26, 2022) ("[Respondents] have failed to meet the public purposes requirements of the federal and state constitutions[.]"). The Appellate Division resolved the public-use question on the merits, App. 4a, and then Petitioner unsuccessfully sought leave to appeal, again expressly invoking the Fifth Amendment. See, *e.g.*, Mot. for Leave to Appeal at 7, *Bowers* v. *OCIDA* (N.Y. App. Div. March 6, 2024) ("This violates the Fifth Amendment of the United States Constitution and violates the public use doctrine and should be examined by the Court of Appeals."). To be sure, the Fifth Amendment was not a major focus of the briefing below—and perhaps wisely so, when "the [New York] Court of Appeals . . . ha[s] made plain that there is no longer any judicial oversight of eminent domain proceedings in New York." *Uptown Holdings, LLC* v. *City of New York*, 77 A.D.3d 434, 437 (N.Y. App. Div. 2010) (Catterson, J., concurring). But the brevity of the argument is irrelevant: This Court has long held that a party need only properly invoke its federal claim, not preserve any particular argument in support of that claim. *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). Petitioner's repeated invocations of the Fifth Amendment therefore preserve the claim.

And that properly invoked federal claim was never waived. The BIO asserts that Petitioner expressly waived its Fifth Amendment claim before the New

York Court of Appeals. See BIO 12 (citing Ct. App. Trans. 26). But, in candor, Petitioner cannot tell what in that transcript Respondents think could constitute a waiver.[3] The only thing that appears on page 26 is a discussion of the difference between medical and commercial uses as a matter of New York's eminent domain statutes. That was the issue on appeal at that stage: whether this project was a sufficiently "commercial" venture to fall within OCIDA's statutory authority. The Court of Appeals held that it was, and it expressly declined to consider any of Petitioner's other claims in the first instance. App. 10a, 11a. After that, the Appellate Division resolved the live Fifth Amendment question on the merits, holding that this private "commercial" venture was a constitutionally sufficient public use. App. 3a–4a. That second question is ripe for this Court's review.

4. This case is not barred by res judicata.

Finally, the BIO suggests that the constitutional question here is barred by res judicata because, years ago, the prior owner of Petitioner's property filed an unsuccessful challenge under New York environmental-review laws. BIO 26. Again, of course not. No trial-court decision could create a preclusion problem here because New York vests exclusive jurisdiction over challenges to the exercise of eminent domain in the Appellate Division. N.Y. E.D.P.L. § 207. A trial-court decision in an environmental-review challenge didn't resolve the constitutionality of the taking because it couldn't have—which, again, is why

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[3] The full transcript is available online: https://www.nycourts.gov/ctapps/arguments/2023/Nov23/Transcripts/111423-89-Oral-Argument-Transcript.pdf.

Respondents neither pressed nor prevailed on this argument below.

B. The BIO's attempts to square this taking with *Kelo* fail.

The BIO further suggests that this case presents no occasion to revisit *Kelo*, either because the taking is not really for private use or because the taking was the product of a lengthy planning process unrelated to a purely private benefit. Each argument is wrong.

Begin with the BIO's defense that the government has only leased the condemned property to a private beneficiary, rather than transferring the property in fee simple. BIO 19. This makes no difference because the same thing was true in *Kelo*. 545 U.S. at 476 n.4 (noting that the New London equivalent of OCIDA had negotiated a long-term lease with a private developer). None of the opinions suggested that this distinction mattered. Quite the contrary. Cf. *id.* at 478 (noting that "the City [was not] planning to open condemned land—*at least not in its entirety*—to use by the general public" (emphasis added)). And it shouldn't. If the Constitution forbids the taking of land to transfer it to a private owner, it should make no difference whether the government transfers an entire interest in the property or whether it merely transfers *nearly all* the interest in the property.

Likewise incorrect is the BIO's idea (at 21) that this taking is for public use because it will be used by the private office building's customers, who are themselves members of the public. Given that all businesses have customers, this much would be true of any taking on behalf of any private business. The customers of a Ritz-Carlton, for instance, are

members of the public, but this does not mean using eminent domain to "replac[e a] Motel 6 with a Ritz-Carlton" would therefore be a public use. *Kelo*, 545 U.S. at 503 (O'Connor, J., dissenting).

Rather, this taking, like the *Kelo* taking, is private in any ordinary sense of that word. The parking lot will be used by a private business for "commercial" purposes. Respondents concede that, at least during the day (when people do most of their parking), the public is forbidden from using the lot so the private business's customers can. See Ct. App. Trans. 30–31 ("Judge Rivera: No one else can park there? [Counsel]: No one—no one else can park there."). As the court below noted, this taking was begun at the specific request of private party that stood to benefit, Respondent Central Utica Building. App. 8a. And the process itself was driven by that private beneficiary, who, among other things, privately planned with OCIDA how best to exercise eminent domain months before actually requesting it. R. 5282, 5596, 5602–05, 5611, 5747.

The BIO is also mistaken in its attempts to characterize this taking as the product of a lengthy government planning process akin to the one in *Kelo*, which was driven by the analogue of OCIDA itself. BIO 17–18; see also *Kelo*, 565 U.S. at 473–75 (explaining that "state and local officials . . . target[ed] New London" for redevelopment, that the New London Development Corporation created the development plan, and that the Development Corporation negotiated purchases). To be sure, here a private hospital had created its own longstanding plan to move into the area. And the planning for that private hospital contemplated a private office

building somewhere nearby. Unsurprisingly, years later, private developers like Petitioner and Respondent Central Utica Building had acquired land near the hospital to build exactly the kind of private office space that would make sense near a hospital. But the fact that the hospital itself was long planned cannot turn this taking for an office-building parking lot into a long-planned, government-driven taking. As Respondents put it at oral argument before the Court of Appeals, the hospital and the private medical-office building are "separate and distinct projects. They're separate ownership, separate financing, they're separate[.]" Ct. App. Trans. at 31–32.

And it is undisputed on this record that this taking was undertaken solely because it was requested by the separate private for-profit entity that owns the office building. To the extent accountable elected officials interacted with this taking, they did so to oppose it.[4] So this is not a taking driven by a longstanding, government-led economic development plan. It is, instead, what the New York Court of Appeals said it was: a taking at the "request[]" of a private business that "house[d] private, rent-paying doctors' offices." App. 8a. And even if Respondents were right—if this privately driven taking did fit squarely within the limits of *Kelo*—that would be all the more reason to grant the second question presented and overturn that decision.

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[4] The then-mayor of Utica, where Petitioner's property sits, publicly opposed this taking. R. 6329.

C. This case would have come out differently in other jurisdictions.

The BIO also tries to cast doubt on the existence of the split laid out in the Petition. After all, it reasons, at least one New York case has rejected a taking (related to a power company), and so New York must apply the same standard of review as anywhere else. *Syracuse Univ.* v. *Project Orange Assocs. Servs. Corp.*, 71 A.D.3d 1432 (N.Y. App. Div. 2010).

But the split of authority is not about whether *any* taking can be rejected under *any* circumstances. The split of authority is about the legal rule in evaluating claims of pretext—and "courts have been all over the map." Pet. 22 n.16 (citation omitted). In Pennsylvania, for example, it "is not enough to merely wave the proper statutory language like a scepter under the nose of a property owner and demand that he forfeit his land[.]" *Middletown Twp.* v. *Lands of Stone*, 939 A.2d 331, 340 (Pa. 2007). Instead, courts there look into the "true goal of the taking[,]" asking whether the government's asserted public purpose "was real and fundamental, not post-hoc or pre-textual." *Id.* at 338, 340. If that test applied here, a court would have to ask why the asserted public use (that the public could use this private parking lot "at night" when its new owner didn't need it) was never mentioned at the public hearing in support of this project and only came in a post-hoc letter from the private beneficiary.[5] The same would be true in Hawaii, which requires an inquiry into "the actual purpose of a condemnation action." *County of Hawaii* v. *C & J Coupe Fam. Ltd. P'ship*, 198 P.3d 615, 647

[5] This post-hoc letter is in the record below at R. 5992.

(Haw. 2008); see also Pet. 11–14 & n.9 (collecting cases).

But, under the New York test, the actual purpose was irrelevant. All that mattered below was that the condemnor asserted a public benefit. App. 4a. The fact that this purpose was never even mentioned in the public hearing was irrelevant because the only inquiry was into whether the purpose had been asserted. In short, the condemnor had "wave[d] the proper statutory language like a scepter under the nose of" Petitioner, *Lands of Stone*, 939 A.2d at 330, and the court below said that was enough. In other jurisdictions, it is not. That is a division of authority worth this Court's attention.

D. *Kelo* was wrongly decided and should be revisited.

At bottom, the dispute is not about the facts here or the specifics of Pennsylvania's case law. Instead, the dispute is about what the Fifth Amendment means. Respondents believe not only that *Kelo* was rightly decided but that it should be read as expansively as possible. And Respondents are not alone—their amicus, the County of Oneida, seems to think that the very concept of a public-use requirement conflicts with the meaning of "[s]overeignty," which "requires the sovereign to have dominion over its subjects, including the right to take property for 'public benefit.'" Oneida Amicus 6–7. It is surely not the only government entity that feels that way. There is, undeniably, a stark disagreement about the scope (or perhaps the wisdom) of the Constitution's Public Use Clause—not just between these parties, but among lower courts and even

among Members of this Court. Pet. 7–13, 22–23. The petition should be granted to allow the Court to resolve it.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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