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 Judicial Department

BRIEF OF THE CATO INSTITUTE AND PROFESSOR ILYA SOMIN AS *AMICI CURIAE* 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 v. City of New London*, 545 U.S. 469 (2005), be overturned?

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs in state and federal courts. This case interests Cato because the Fifth Amendment's "Public Use" Clause is fundamental to the protection of private property rights.

Ilya Somin is Professor of Law at the Antonin Scalia Law School at George Mason University, B. Kenneth Simon Chair in Constitutional Studies at the Cato Institute, and the author of numerous works on takings and constitutional property rights, including THE GRASPING HAND: *KELO V. CITY OF NEW LONDON* AND THE LIMITS OF EMINENT DOMAIN (rev. ed. 2016). His briefs and writings on takings law have been cited in decisions by the United States Supreme Court, lower federal courts, state supreme courts, and the Supreme Court of Israel.

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[1] Rule 37 statement: All parties were timely notified of the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Bowers Development, LLC ("Bowers") was under contract to purchase land in Utica, New York, planning to construct a medical office building. Pet.Br. at 2. Respondent Central Utica Building, LLC ("Central Utica")—a business competitor to Bowers—asked the Oneida County Industrial Development Agency ("OCIDA") to condemn the land so that Respondent could build a parking lot for a medical office building on adjoining property. *Id.* Because Central Utica's project might stimulate the local economy, and improve the community, OCIDA agreed to condemn the land and give it to Central Utica. Pet.Br. at 3 & n.3. Bowers objected to this private-to-private taking as beyond the scope of the Fifth Amendment's Public Use Clause, which only allows the use of eminent domain to take property for a "public use." *Id.* n.2; U.S. CONST. amend. V. The Appellate Division below upheld the taking because it was "rationally related to a conceivable public purpose," namely "mitigating parking and traffic congestion." Pet.App. 4a. The Appellate Division based its ruling in part on *Kelo v. City of New London*, 545 U.S. 469 (2005).

Kelo is one of the most severely flawed and much-criticized decisions in modern Supreme Court history. The Court's holding that private "economic development" qualifies as a "public use" sufficient to authorize the use of eminent domain to take private property is deeply at odds with text and original meaning, and based on a variety of other errors. *Kelo*, 545 U.S. at 473–77. Justice John Paul Stevens, author of the Court's majority opinion in *Kelo*, later admitted

its reasoning was based, in part, on an "embarrassing to acknowledge" error in interpreting previous precedent. JOHN PAUL STEVENS, THE MAKING OF A JUSTICE: REFLECTIONS ON MY FIRST 94 YEARS 437 (2019).

In addition, *Kelo* has generated widespread confusion in state and lower federal courts because of its lack of clarity on what qualifies as a "pretextual" taking that remains invalid even under the Court's otherwise highly deferential approach to review of condemnations under the Public Use Clause. 545 U.S. at 478 (stating government cannot take property "under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit").

Part I outlines the confusion *Kelo* has created in the lower courts. State and federal courts have adopted five distinct approaches to determining what qualifies as a pretextual taking. Some emphasize the subjective intentions of the government officials who decided to condemn the property; some focus on the distribution of benefits from the condemnation; some on whether there is a private beneficiary whose identity is known in advance; some on the extent of the planning process behind the taking; and some adopt a posture of near-total deference.

In Part II, *amici* explain how this case is an excellent vehicle for resolving the confusion. All four of the possible indicia of a pretextual taking identified by lower courts are present: dubious intentions, a highly skewed distribution of benefits, a known private beneficiary, and the absence of any extensive planning process. Thus, the Court can use the case as an

opportunity to consider the relative significance of these factors.

Part III outlines the reasons why the Court should take this opportunity to overrule *Kelo*. The ruling is deeply at odds with the text and original meaning of the Public Use Clause. It also includes other serious errors in reasoning, including a crucial one admitted by Justice Stevens, author of the Court's majority opinion.

Overruling *Kelo* would be consistent with this Court's precedent on criteria for reversing previous decisions, as outlined in rulings such as *Knick v. Township of Scott*, 588 U.S. 180 (2019). Reversing *Kelo* would also help resolve the confusion engendered by the ruling's vague criteria for determining what qualifies as a pretextual taking.

This Court should grant the petition, and overturn *Kelo*. Even if the Court does not wish to reverse *Kelo*, it should still grant the petition to clarify the proper standard for pretextual takings.

ARGUMENT

I. *KELO* HAS DIVIDED STATE AND LOWER FEDERAL COURTS ON THE QUESTION OF PRETEXTUAL TAKINGS.

Though the *Kelo* majority took a broad view of what qualifies as "public use"—holding that almost any potential benefit to the public qualifies—the Court left room for significant judicial scrutiny of takings where the official rationale is a pretext "for the purpose of

conferring a private benefit on a particular private party." *Kelo*, 545 U.S. at 477–78.

Unfortunately, *Kelo* says very little about the question of how to determine whether or not a taking that transfers property to a private party is pretextual. In a recent opinion, Justice Thomas (joined by Justice Gorsuch) noted that "our doctrine makes it difficult to discern public use from private favors" and urged that "we should grant certiorari to provide some much needed clarity." *Eychaner v. City of Chicago*, 141 S. Ct. 2424 (2021) (Thomas, J., dissenting from denial of certiorari).

In the absence of clear guidance from this Court, lower courts have adopted a variety of different approaches to assessing what qualifies as a pretextual taking. Most lower-court rulings have used one of four possible criteria to assess whether a private-to-private taking is pretextual: (1) the distribution of benefits from the taking; (2) the extent of a planning process that led to the taking; (3) whether the new owner's identity was known by the condemning authorities in advance of the taking; and (4) the subjective intent of the condemning authorities for the taking.[2]

However, some courts, like the New York Appellate Division below, take a fifth approach, essentially rubberstamping takings even when each factor militates strongly in favor of finding pretext. The

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[2] For overviews of the relevant jurisprudence, see ILYA SOMIN, THE GRASPING HAND: *KELO V. CITY OF NEW LONDON* AND THE LIMITS OF EMINENT DOMAIN 192–200 (rev. ed. 2016); and Daniel B. Kelly, *Pretextual Takings: Of Private Developers, Local Governments, and Impermissible Favoritism*, 17 SUP. CT. ECON. REV. 173, 184–99 (2009).

result is a stark division that this Court should resolve.

A. Distribution of benefits

Some courts emphasize the magnitude of public benefits that result from the taking and how these stack up against purely private benefits. In the District of Columbia, "[i]f the property is being transferred to another private party, and the benefits to the public are only incidental or pretextual, a pretext defense may well succeed." *Franco v. Nat'l Capital Revitalization Corp.*, 930 A.2d 160, 173–74 (D.C. 2007) (internal quotation marks omitted). Similarly, one district court interpreted *Kelo* to require "careful and extensive inquiry into whether, in fact, the development plan is of primary benefit to the developer . . . [and] only incidental benefit to the [public]," *MHC Financing Ltd. P'ship v. City of San Rafael*, 2006 WL 3507937, at *14 (N.D. Cal. Dec. 5, 2006). But this holding was reversed by the Ninth Circuit in an opinion broadly deferential to the political process. *See MHC Fin. Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118 (9th Cir. 2013).

B. Extent of planning process

Other courts consider the extent of the planning process that led to the taking. If there is a development plan analogous to New London's in *Kelo*, these courts are unlikely to find pretext. *See, e.g.*, *Mayor of Balt. v. Valsamaki*, 916 A.2d 324, 352–53 (Md. 2007) (emphasizing absence of a clear plan for the use of the condemned property and contrasting it with *Kelo*); *Middletown Twp. v. Lands of Stone*, 939 A.2d 331, 338 (Pa. 2007) ("evidence of a well-developed plan of proper scope is significant proof that an authorized purpose

truly motivates a taking"); *R.I. Econ. Dev. Corp. v. The Parking Co.*, 892 A.2d 87, 104 (R.I. 2006) (contrasting case with "New London's exhaustive preparatory efforts that preceded the takings in *Kelo*"). On this reasoning, Nicole Garnett notes, "planning almost always precludes a finding of pretext" because "*Kelo* proceeds on the assumption that planning and pretext are usually incompatible." Nicole Stelle Garnett, *Planning as Public Use?*, ECOLOGY L. Q. 443, 454 (2007); *Cf. Kelo,* 545 U.S. at 478; *id.* at 493 (Kennedy, J., concurring) (arguing against a presumption of invalidity because the "taking occurred in the context of a comprehensive development plan").

Planning thus risks providing "a constitutional safe harbor" for condemning authorities regardless of how pretextual the taking or incidental the resulting public benefits. Garnett, *Planning as Public Use?*, *supra*, at 454.

C. Whether the identity of private beneficiary was known in advance.

The Third Circuit focuses on whether the identity of the new private owner was known by condemning authorities in advance of the taking. If so, it is more likely to find pretext. In *Carole Media v. New Jersey Transit Corp.*, 550 F.3d 302 (3d Cir. 2008), there was evidence that the taking was undertaken in part because it benefited a rival firm. Nonetheless, the Third Circuit upheld the taking because "there [was] no allegation that NJ Transit, at the time it terminated Carole Media's existing licenses, knew the identity of the successful [future] bidder." *Id.* at 311. In so doing, the court sidestepped the problem that a taking can be intended to benefit a known private party even if the benefit to that party comes in a form

other than receiving ownership of the condemned property. SOMIN, GRASPING HAND, *supra*, at 196.

D. Governmental intent

Some courts focus attention on the "true," intention behind the taking, which "must [be to] primarily benefit the public." *Middletown Twp.*, A.2d at 337; *see also In re O'Reilly*, 5 A.3d 246, 258 (Pa. 2010) ("[T]he public must be the primary and paramount beneficiary of the taking."). These rulings look behind the official rationale to find "the actual purpose" of the taking in order to check whether the official rationale is a "mere pretext." *Cnty. of Hawai'i v. C&J Coupe Family Ltd. P'ship*, 198 P.3d 615, 642 (Haw. 2008). *Kelo*, as these courts understand it, does not authorize "bad faith" takings intended to benefit private parties, which they consider "well established . . . violation[s] of the takings clause." *New England Estates v. Town of Branford*, 988 A.2d 229, 252 (Conn. 2010).

E. Extreme deference

Lastly, some courts rubberstamp takings even when each factor—the distribution of benefits, the planning process, the identity of the new owner, and the subjective governmental intent—weighs strongly in favor of a pretextual taking. Consider *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008). There, the court considered a challenge to a taking lobbied for and initiated by developer Bruce Ratner. But it refused to consider either evidence of improper motive or evidence concerning the uneven distribution of benefits from the condemnation. *Id.* at 55, 62. As long as the taking was "rationally related to a classic public purpose," it would be improper to closely scrutinize "the mechanics of [the] taking … as a means to gauge

the purity" of government officials' motives. *Id.* at 62. It was irrelevant that the benefits of the taking would flow mostly to Ratner, or that any incidental benefits to the community might be "dwarf[ed]" by the project's costs. *Id.* at 58. Nor did it matter that "Ratner was the impetus behind the project," or that the condemning authority "adopted his [initial redevelopment plan] without significant modification." *Id.* at 55–56.

While the court purported to "preserve the possibility" that an egregious "fact pattern" may arise necessitating "closer objective scrutiny" of a private-to-private taking, it is difficult to see what those circumstances might be. *Id.* at 63. Consider also *Didden v. Village of Port Chester*, 173 F. App'x 931 (2d Cir. 2006). In that case, Port Chester created a "redevelopment area" and gave developer Gregg Wasser a virtual blank check to condemn private property within it. *Id.* at 932. When local property owners Bart Didden and Dominick Bologna sought a permit to build a CVS pharmacy in the area, Wasser demanded that they either pay him $800,000 or give him a 50 percent partnership interest in the store, threatening to have their land condemned if they refused. SOMIN, GRASPING HAND, *supra*, at 197. When they refused, the village condemned their property, a taking which the Second Circuit had little difficulty affirming. *Didden*, F. App'x at 933.

Despite the dubious circumstances surrounding the taking, the court refused to even consider the possibility of pretext. It was irrelevant that the taking occurred only one day after Wasser made his unreasonable demands. It was irrelevant that the lion's share of the benefits went to Wasser, whose plan for the property was to build a Walgreens, virtually

identical to the previous owners' plan to build a CVS pharmacy. SOMIN, GRASPING HAND, *supra*, at 198. It was irrelevant that the taking occurred not as the culmination of a systematic planning process, but due to Didden and Bologna's refusal to pay Wasser or give him a 50 percent stake in their business. The Second Circuit's ultra-deferential approach is shared by the Ninth Circuit, *see MHC Financing Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118, 1129 (9th Cir. 2013), the territory of Guam, *see Gov't of Guam v. 162.04 Square Meters of Land*, 2011 Guam 17, 23 (2011); and the New York Court of Appeals. *See Nat. Fuel Gas Supply Co. v. Schueckler,* 150 N.E.3d 1192 (N.Y. 2020) (upholding condemnation of property for private pipeline that might never be built); *Kaur v. N.Y. State Urban Dev. Corp.*, 933 N.E.2d 721, 730 (N.Y. 2010); *Goldstein v. N.Y. State Urban Dev. Corp.,* 921 N.E.2d 164 (N.Y. 2009).[3]

As these five widely divergent approaches make clear, there is no consensus among state and lower federal courts on the question of pretextual takings after *Kelo*. This five-way split has created a confusion that calls out for this Court's clarification.

II. THIS CASE IS A GOOD VEHICLE TO RESOLVE THE SPLIT IN THE LOWER COURTS.

The present case is an excellent opportunity to resolve the division over pretextual takings in the lower courts. It features all four possible indicia of pretext identified by various lower court decisions: (1)

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[3] *Cf.* SOMIN, GRASPING HAND, *supra*, at 196–200 (discussing many of these cases in detail); Ilya Somin, *Let There Be Blight: Blight Condemnations in New York After* Goldstein *and* Kaur, 38 FORDHAM URB. L.J. 1193 (2011) (discussing *Goldstein* and *Kaur*).

dubious subjective motivations on the part of the condemning authority, (2) a private beneficiary whose identity was known in advance, (3) a severely skewed distribution of benefits favoring a single private party, and (4) the absence of a thorough planning process. Thus, the Court can use this case to assess the relative significance of these factors.

There is little doubt that OCIDA condemned Bowers's property because the agency was motivated to benefit a rival firm that needed the property to build a parking lot for its own facility. Pet.Br. at 1–3. Indeed, the condemnation was undertaken at Central Utica's request. *Id.* Likewise, there is no doubt that Central Utica will reap the lion's share of the benefits from the taking, and that its identity was known in advance.

Finally, there was no "carefully considered development plan" in this case, of the sort the Court (wrongly) believed to have existed in the *Kelo* case. *Kelo*, 545 U.S. at 478 (quotation omitted).[4] The condemnation in this case was a one-off taking conducted outside the context of any broader development plan. Pet.Br. at 24. It thus qualifies as "a one-to-one transfer of property, executed outside the confines of an integrated development plan" of the sort the *Kelo* Court suggested "would certainly raise a suspicion that a private purpose was afoot." *Kelo*, 545 U.S. at 487.

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[4] In reality, the development plan in *Kelo* was poorly designed and ultimately failed miserably, as nothing was ever built on the condemned property, which ultimately ended up being used by a colony of feral cats. *See* SOMIN, GRASPING HAND, *supra*, at ch. 1, and 233–37.

III. THE COURT SHOULD OVERRULE *KELO*.

This Court should overrule *Kelo* because it is deeply at odds with the text and original meaning of the Public Use Clause and is also marred by other errors. Overruling *Kelo* is also well-justified by this Court's standards for reversing precedent.

A. Text and original meaning

The ultra-broad definition of "public use" embraced by the *Kelo* case is at odds with the text and original meaning of the Fifth Amendment.

The text of the Fifth Amendment indicates that property may only be taken for "public use." U.S. CONST. amend. V. These words would be rendered largely meaningless or superfluous if "public use" were interpreted broadly to include virtually any potential public benefit, since almost any private-to-private condemnation would then qualify. As Justice O'Connor noted in her *Kelo* dissent, "[t]o reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings 'for public use' is to wash out any distinction between private and public use of property—and thereby effectively to delete the words 'for public use' from the Takings Clause of the Fifth Amendment." *Kelo*, 545 U.S. at 494 (O'Connor, J., dissenting).

The position adopted in *Kelo* also goes against the intuitive ordinary understanding of "public use." SOMIN, GRASPING HAND, *supra*, at 65–68. In *District of Columbia v. Heller,* Justice Scalia wrote that "[i]n interpreting [the Constitution's] text, we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were

used in their normal and ordinary as distinguished from technical meaning.'" 554 U.S. 570, 576–77 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)). The narrow understanding of "public use" is far more in line with ordinary meaning than the broad one adopted by the Court in *Kelo*.

If the American Founders agreed on anything, it was on the importance of protecting private property rights. John Adams said that "[p]roperty must be secured or liberty cannot exist." *Discourses on Davila*, *in* 6 THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed., 1851). James Madison—the principal architect of the Takings Clause[5]—was perhaps most explicit and far-reaching:

> Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals[.] … This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*."

Property, *in* 1 THE FOUNDERS' CONSTITUTION 598 (Philip Kurland and Ralph Lerner eds., 1987).

An interpretation of the Public Use Clause that gives government a near-blank check to take property for transfer to private parties is deeply at odds with this commitment to the protection of property rights, and thereby contrary to original meaning.

Some of this Court's earliest members embraced a narrow interpretation of public use, under which the

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[5] On Madison's key role in drafting and enacting the Takings Clause, see AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 77–79 (1998).

taking of property is only permissible when the property in question is used for a publicly owned facility or for a private one that is legally required to serve the general public, as in the case of a common carrier or public utility. *See, e.g.*, *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.) (stating that private-to-private takings are "against all reason and justice" and "a political heresy altogether inadmissible in our free republican governments"); *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 312 (1795) (Paterson, J.) (suggesting that it is impermissible for the state to "take land from one citizen, who acquired it legally, and vest it in another").

John Locke and William Blackstone—British legal and political theorists whose views on property greatly influenced the founding generation—also distinguished between takings of property for publicly owned projects, and takings for transfer to other private parties. SOMIN, GRASPING HAND, *supra,* at 38–39. They argued the former were permissible and the latter not. *Id.*

The narrow understanding of "public use"—which rejected private-to-private takings as unlawful—remained the dominant view throughout the nineteenth century, including after the Civil War. *See, e.g.*, *W. River Bridge Co. v. Dix*, 47 U.S. 507, 546 (1848) (Woodbury, J.) (endorsing the view that "public use" requires use or access "for the people at large"); SOMIN, GRASPING HAND, *supra*, at ch. 2 (providing extensive overview of relevant cases from state and federal courts).

Some originalists argue that the point in time to consider evidence of original meaning of provisions of the Bill of Rights—at least when applied to the

states—is circa 1868, when the Fourteenth Amendment "incorporated" the Bill of Rights against state governments. AMAR, BILL OF RIGHTS, *supra*, chs. 7–12; *see also* KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP 296–97 (2014). There is extensive evidence that the narrow view of "public use" predominated around the time the Fourteenth Amendment was enacted. A large majority of state supreme courts that addressed this issue during the relevant period endorsed the narrow view, as did leading influential legal treatise writers, such as Justice Thomas Cooley and John Lewis. *See* SOMIN, GRASPING HAND, *supra*, at 43–55 (providing extensive analysis of this evidence). In addition, the narrow view is more consistent with the likely understanding of "public use" by both ordinary citizens and more legally sophisticated observers. *Id.* at 65–68.

Lastly, the narrow view better effectuates the intent of the framers of the Fourteenth Amendment to use incorporation to protect the property rights of Blacks and white Unionists against potentially hostile state governments. A broad interpretation of "public use" would have given state and local governments a largely free hand to use eminent domain to target these groups' property. *Id.* at 64.

B. Other flaws in the *Kelo* decision

Kelo also has severe flaws that are not directly connected with originalism and should be troubling to jurists of all methodological persuasions. The Court's extreme deference to the government's determinations of what qualifies as "public use" is an anomaly, as no other enumerated right protected by the Bill of Rights is singled out for such heavy judicial deference to the

very government entities the right is supposed to protect us against. *Id.* at 116–18. Such deference makes little sense, given that state and local governments often have strong incentives to use eminent domain to target the property of the poor, minorities, and the politically weak for the benefit of those with greater political influence. *See id.* at ch. 3 (providing extensive overview of this problem).

Justice John Paul Stevens, author of the Court's majority opinion, admitted that *Kelo* is marred by his "embarrassing to acknowledge" error in interpreting late nineteenth and early twentieth century "substantive due process" precedent. STEVENS, *supra*, at 437. Citing one of the *amici*'s writings on the subject, which first pointed out this error,[6] Stevens admitted that his statement that the result in *Kelo* was supported by "over a century of our case law" was wrong. *Kelo*, 545 U.S. at 490.[7]

The Court confused cases challenging state takings in federal court on the basis of the Due Process Clause of the Fourteenth Amendment with cases challenging them under the Public Use Clause of the Fifth Amendment. *See* SOMIN, GRASPING HAND, *supra*, at 123–26. At that time, the Court had not yet recognized that the Takings Clause was incorporated against state governments. *See, e.g.*, *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158 (1896) ("[T]he Fifth

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[6] *See id.* at 437 (citing Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings after* Kelo, 15 SUP. CT. ECON. REV. 183 (2007)).

[7] Justice Stevens, however, continued to defend the result in *Kelo* on grounds vastly different from that adopted by the Court. *Id.* at 435–40. For a detailed discussion and critique of Justice Stevens's later rationale for the ruling, see SOMIN, GRASPING HAND, *supra*, at 71–72, 125–26.

Amendment applies only to the federal government"). Thus, the only way to challenge state and local takings in federal court was to do so under the Due Process Clause. SOMIN, GRASPING HAND, *supra*, at 123–24.

Under the Due Process Clause, federal courts during this period generally reviewed takings deferentially. *Id.* at 124–25. But where a challenged taking was initiated by the federal government, thus putting the Public Use Clause into play, the Court made clear that a much less deferential approach would apply to private-to-private condemnations. *See, e.g.*, *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 680 (1896) (indicating that federal private-to-private takings do not deserve the same degree of deference "as when the government intends to use the land itself").

Kelo is also flawed from the standpoint of a variety of "living constitution" theories of interpretation. *See* SOMIN, GRASPING HAND, *supra*, at 99–111 (reviewing application of several such theories in detail). It is most obviously problematic under "representation-reinforcement," theory, which emphasizes the importance of protecting the rights of minorities and those lacking in political influence; such groups have historically been victimized by takings transferring property to politically influential private parties. *Id.* at 100–02.

C. *Kelo* should be overruled under this Court's guidelines for reversing precedent.

In *Knick v. Township of Scott*, a case overturning a Takings Clause precedent,[8] this Court noted that "[w]e have identified several factors to consider in deciding whether to overrule a past decision, including 'the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, . . . and reliance on the decision.'" *Knick*, 588 U.S. at 203 (quoting *Janus v. AFSCME*, 585 U.S. 878, 916–18 (2018)); *see also Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 267–68 (2022) (emphasizing relevance of "the nature of" a prior ruling's "error," "workability," and reliance interests). The Court also emphasized that a decision is more deserving of reversal if it "has come in for repeated criticism over the years from Justices of this Court and many respected commentators." *Knick*, 588 U.S. at 203. Moreover, *stare decisis* "is at its weakest when we interpret the Constitution," because an error cannot be corrected through the legislative process. *Agostini v. Felton*, 521 U.S. 203, 235 (1997).

All of these factors weigh in favor of reversing *Kelo*. As previously discussed, the reasoning of *Kelo* is extremely weak. *See* §§ III.A–B, *infra*. Like the *Williamson County* decision, overturned in *Knick*, *Kelo* "was not just wrong. Its reasoning was exceptionally ill founded and conflicted with much of our takings jurisprudence." *Knick*, 588 U.S. at 203. Few prominent decisions of this Court include "embarrassing" errors

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[8] The ruling it overturned was *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985).

acknowledged as such by the Justice that authored them. *See* § III.B, *infra*.

Moreover, *Kelo,* like *Williamson County*, is also at odds with other elements of the Court's takings jurisprudence. The Court does not give sweeping deference to the government on the question of whether a regulation qualifies as a taking requiring "just compensation." *See, e.g.*, *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021) (holding that even temporary physical invasions of property qualify as *per se* takings automatically requiring compensation). Nor does it do so on the question of how much compensation is required when a taking occurs. *See* James W. Ely, Jr., *'Poor Relation' Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2004–2005 CATO SUP. CT. REV. 39, 63 (2005) (noting that the Court's deferential approach on public use also directly conflicts "with its handling of the other major constitutional check on eminent domain, the just compensation requirement"). On this issue, the Court has long required that condemning authorities pay "fair market value" compensation. *See United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979) (noting that "the Court . . . has employed the concept of fair market value to determine the condemnee's loss" and the amount of compensation due).

Kelo is also defective when it comes to "workability." *Knick*, 588 U.S. at 203. As already indicated (*see* Part I, *infra*), the decision's vague standards for what qualifies as a "pretextual" taking have caused enormous confusion in the lower courts, creating a five-way division of opinion. A decision overturning *Kelo* and adopting the narrow view of

public use would eliminate much of this confusion by making most private-to-private condemnations presumptively unconstitutional, thereby obviating the need for detailed inquiry into the government's motives, the extent of the planning process, and the distribution of benefits from the taking.

The reliance interests fostered by *Kelo* are relatively weak. In the aftermath of the decision, some 45 states enacted eminent domain reform legislation forbidding or limiting the kinds of "economic development" condemnations upheld by the decision, and several state supreme courts ruled that such takings violate their state constitutions. *See* SOMIN, GRASPING HAND, *supra*, chs. 5, 7 (providing overview of the relevant legislation and court decisions).

Some of the new legislation is weak or ineffective, thus leaving considerable scope for *Kelo*-style takings in a number of states. *Id.* at ch. 5. But even in these states, the reliance interests in question are interests in violating constitutional rights for the sake of transferring property to more politically influential private interests. That interest cannot outweigh the far more important interest property owners have in protecting their rights and not being forced out of their homes.

Moreover, in situations where holdout problems might block land assembly for valuable development projects, private developers have a variety of strategies for getting around holdouts that do not require the use of eminent domain. *See* SOMIN, GRASPING HAND, *supra*, at 90–97 (discussing secret assembly and precommitment strategies as effective alternatives to eminent domain); Daniel B. Kelly, *The 'Public Use' Requirement in Eminent Domain Law: A*

Rationale Based on Secret Purchases and Private Influence, 92 CORNELL L. REV. 1 (2006) (explaining why secret assembly works better for private projects than publicly owned ones).

Like *Williamson County, Kelo* has "come in for repeated criticism over the years from Justices of this Court and many respected commentators." *Knick,* 588 U.S. at 203. Four Justices forcefully dissented in *Kelo* itself, condemning the decision as a grave error. Justice O'Connor famously wrote that "all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public." *Kelo*, 545 U.S. at 494 (O'Connor, J., dissenting). Justice Thomas also issued a forceful dissent, agreeing with Justice O'Connor that "the Court has erased the Public Use Clause from our Constitution." *Id.* at 506 (Thomas, J., dissenting).

In 2011, Justice Antonin Scalia called on the Court to overrule *Kelo*, criticizing the decision as one of the Court's biggest "mistakes of political judgment." SOMIN, GRASPING HAND, *supra*, at 238 (internal quotation marks omitted). Since *Kelo*, four current Justices of this Court have urged the Court to overrule it or at least hear cases reconsidering it. *See Eychaner*, 141 S. Ct. at 2422 (Thomas, J., joined by Gorsuch, J., dissenting from the denial of certiorari in case that Justice Kavanaugh also voted in favor of considering); *Goldstein v. Pataki*, 554 U.S. 930 (2008) (Alito, J., dissenting from denial of certiorari).

Kelo has also been extensively criticized by commentators, including numerous scholars. *See, e.g.*, SOMIN, GRASPING HAND, *supra*, at chs. 2–4; Ely, *Poor*

Relation, supra; RICHARD A. EPSTEIN, SUPREME NEGLECT: HOW TO REVIVE CONSTITUTIONAL PROTECTION FOR PROPERTY RIGHTS ch. 4 (2008); Garnett, *Planning as Public Use*, *supra* (criticizing *Kelo*'s excessive deference to planners); Julia D. Mahoney, Kelo*'s Legacy: Eminent Domain and the Future of Property Rights*, 2005 SUP. CT. REV. 103 (2005); Yxta Maya Murray, *Peering*, 22 GEO. J. ON POVERTY L. & POL'Y 249 (2015) (criticizing *Kelo* for victimizing poor and minority communities); Gideon Kanner, Kelo v. New London*: Bad Law, Bad Policy, Bad Judgment*, 38 URB. LAW. 201, 203 (2006).

D. Reversing *Kelo* would not require the Court to overrule any earlier precedents.

Although the Court was wrong to claim the outcome in *Kelo* was backed by a century of precedent, it was supported by two more recent decisions endorsing a broad definition of "public use": *Berman v. Parker*, 348 U.S. 26 (1954), and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). *See Kelo*, 545 U.S. at 480–81 (relying on these two precedents). *Amici* believe the Court should ultimately overrule these two cases as well, as they are badly flawed precedents. *Cf.* SOMIN, GRASPING HAND, *supra*, at chs. 2–3, and 240–41 (outlining reasons why they are wrong).

But the Court need not reverse *Berman* and *Midkiff* in order to overturn *Kelo*. It could, at least for the time being, instead adopt the approach advocated in Justice O'Connor's dissent in *Kelo*, joined by three other Justices. Justice O'Connor pointed out that *Berman* and *Midkiff* are distinguishable from *Kelo* because "[i]n both those cases, the extraordinary, precondemnation use of the targeted property inflicted

affirmative harm on society—in *Berman* through blight resulting from extreme poverty and in *Midkiff* through oligopoly resulting from extreme wealth." *Kelo*, 545 U.S. at 500 (O'Connor, J., dissenting). Cases where eminent domain is used to eliminate a "harmful" preexisting use—such as "blighted" property harmful to public health in *Berman*, or a supposed housing market oligopoly in *Midkiff*—are, on this reasoning, different from those where it is used merely to achieve some public benefit, such as "economic development" of the kind at issue in *Kelo*, or the supposed public benefits in the present case.[9] The Court could leave the issue of whether *Berman* and *Midkiff* should be overruled or further narrowed to a future case.

Adopting Justice O'Connor's approach might not fully resolve the confusion in the lower courts caused by *Kelo*, as there would still be disagreement over what qualifies as a "pretextual" taking. *See* Part I, *infra*. But it would greatly reduce the range of situations where such issues come up, as private-to-private condemnations would only be permissible at all in a much narrower range of circumstances.

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[9] This approach was previously adopted by the Michigan Supreme Court in its 2004 decision striking down economic development takings under its state constitution, which may have influenced Justice O'Connor. *See Cnty. of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004); for a detailed analysis of this ruling, see Ilya Somin, *Overcoming* Poletown*:* County of Wayne v. Hathcock*, Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005 (2004).

CONCLUSION

For the foregoing reasons, and those described by the Petitioner, this Court should grant the petition.

Respectfully submitted,

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