No. _____

In the
Supreme Court of the United States

LAVERN BEHM,
Petitioner,
v.

MONTANA-DAKOTA UTILITIES CO.,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of North Dakota

PETITION FOR WRIT OF CERTIORARI

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August 12, 2019

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QUESTIONS PRESENTED

Montana Dakota Utility (hereinafter MDU), a private corporation, employed the power of eminent domain to procure an easement on Vern Behm's farmland immediately along a pre-existing county road *but outside* the right-of-way. This taking by a private entity was for the purpose of extending an underground natural gas pipeline for the sole use of another private company, Burlington Northern Santa Fe. The district court dismissed the action, finding that the purpose of the pipeline (heating a switch during the winter months) was already being met by the use of propane tanks and that MDU's refusal to use the township thirty-three foot easement that follows and parallels the existing county road demonstrated that the subject easement was not necessary and was indeed a mere convenience to the railroad.

On appeal the North Dakota Supreme Court reversed the district court, ignoring the lower court's findings relating to necessity and mere convenience to a private company, holding that the only requirement for the taking is a determination *by the private company* that its taking was for a public use. *Montana-Dakota Utilities Co. v. Behm*, 2019 ND 139, 927 N.W.2d 865. Lavern Behm asserts that this taking is unwarranted and a violation of due process and the taking clause.

The petitioner presents the following questions:

1. Is it a violation of due process and the taking clause for the state – as a matter of law – to allow a private corporation to take private property through eminent

domain based solely on the private corporation's own determination that the taking is for a public use?

2. In an eminent domain case where the trier of fact has found that the taking is not a public use, is not necessary, and is merely for the convenience of one private entity for the benefit of another private entity, is it a violation of due process and the taking clause for an appellate court to disregard these evidentiary findings and allow the taking to occur based solely on the private company's own determination that there is a public use?

3. Should the case of *Kelo v. New London*, 545 U.S. 469 (2005), be overruled and the analysis presented by Justice Thomas in his dissent be adopted by this Court?

PARTIES TO THE PROCEEDING

Petitioner Lavern ("Vern") Behm is a North Dakota farmer and landowner. He was defendant in the state district court and appellee and cross-appellant before the North Dakota Supreme Court.

Respondent is Montana-Dakota Utilities Co. ("MDU"), a private corporation. MDU was plaintiff in the district court and appellant and cross-appellee before the North Dakota Supreme Court.

PROCEEDING BELOW

The petition relates to the decision of the North Dakota Supreme Court, *Montana-Dakota Utilities Co. v. Behm*, 2019 ND 139, 927 N.W.2d 865. The opinion was issued on May 16, 2019; the Supreme Court issued its mandate on June 7, 2019. The North Dakota Supreme Court docket number is 20180321.

The district court issued its decision dismissing MDU's action on December 14, 2017 and its decision awarding attorney fees on May 29, 2018. The district court docket number is Ward Co. No. 51-2016-CV-01678. Neither decision issued by the district court is reported. Judgment by the district court was entered on July 20, 2018.

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Vern Behm hereby petitions this Court to issue a writ of certiorari directed to the North Dakota Supreme Court.

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Montana-Dakota Utilities Co. v. Behm, 2019 ND 139, 927 N.W.2d 865. The district court two orders are not published.

JURISDICTION

The North Dakota Supreme Court issued its decision on May 16, 2019 and its mandate on June 7, 2019. This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause, the Takings Clause, the Public Use Clause, all of the Fifth Amendment of the U.S. Constitution, and the Fourteenth Amendment as applying these constitutional rights to the States.

STATEMENT OF THE CASE

The Court, the Hon. Gary H. Lee presiding, ruled in favor of the defendant Lavern Behm and granted his motion to dismiss this eminent domain action brought by MDU because the taking was not "necessary." The petitioner sought to raise in his brief before the North Dakota Supreme Court the proper interpretation of the Due Process Clause, the Taking Clause, and Public Use Clause of the Fifth Amendment, and the Right to a Jury under the Seventh Amendment. The federal

questions were timely and properly raised. The North Dakota Supreme Court refused to address the federal questions and reversed and remanded the case for trial on eminent domain damages to be awarded to Behm. *Montana-Dakota Utilities Co. v. Behm*, 2019 ND 139, 927 N.W.2d 865.

The district court below properly analyzed this case and made the following findings:

> ¶5 Lavern Behm owns agricultural land in Ward County, Section 16, 155 N., 84 W. The land is bounded on the west side by a gravel township road, commonly referred to as 128th Street Northwest. The land is cut, generally east to west, by a Burlington Northern Santa Fe railroad right-of-way. Along the southern edge of the property MDU maintains a pipeline running generally east to west.
>
> ¶6 Burlington Northern Santa Fe maintains and operates a switch on its right-of-way. In order to keep the switch operating in the winter months, Burlington Northern Santa Fe must keep the switch heated so that it is free of ice and snow. Presently, this is done by a propane heater. Propane tanks are located near the property. The propane tanks need to be filled and serviced periodically.
>
> ¶7 To obviate the continued need to service and fill the propane tanks MDU proposes to place a buried pipeline of "4 inch poly and 4 inch steel" from the existing pipeline at the southern border of the property. The pipeline would run

approximately 3000 feet, south to north, from the existing MDU pipeline, to the site of the Burlington Northern Santa Fe switches. The pipeline would run entirely beneath property owned by Lavern Behm.

. . .

¶14 The purpose of the proposed pipeline in this case is to carry natural gas to heat the Burlington Northern Santa Fe switch.

. . .

¶20 The location of the proposed pipeline further stretches the meaning of necessity to mean mere convenience to MDU. That convenience is not even a present convenience, but one of a future, highly speculative convenience.

¶21 128th Street Northwest runs down the section line. As such, the standard 66 foot easement exists (33 feet on each side of the section line). The proposed pipeline easement starts at 33 feet from the section line, and is 10 feet wide. The pipeline runs down the middle of this 10 foot easement, a mere 38 feet from the section line, and but 5 feet from the end of the statutory section line right-of-way. The pipeline is to run entirely beneath Lavern Behm's farmland.

¶22 MDU's District Manager, Curtis Olson, testified. He stated he was somewhat involved in the project, but had never even visited the site. He agreed that MDU had only minimal discussions or negotiations with Lavern Behm

regarding the placement of the pipeline. MDU did not attempt to place the pipeline within the existing 33 foot section line right-of-way. Olson stated that he had no discussions with local township officers regarding any proposal to place the pipeline within the 33 foot section line right-of-way. Nor did he have any discussions with township officials regarding any plans for future changes or improvements to 128th Street Northwest. The bottom line from this testimony appears to be that MDU considered no other options regarding the placement of the pipeline other than across and beneath Lavern Behm's property.

¶23 When questioned why the proposed route was chosen (a mere 5 feet away from the existing section line right-of-way) and not a possible route within the 33 foot section line right-of-way, Olson stated that if 128th Street Northwest was ever improved, MDU would have to bear the cost of any movement or replacement of the pipeline.

¶24 The proposed taking a Lavern Behm's property for the purpose of this pipeline is thus premised on a project to benefit a single user, Burlington Northern Santa Fe. It is to be placed on Lavern Behm's property, a mere 5 feet from the existing 33 foot section line right away. That placement is deemed necessary by MDU based on the speculative fear of a future event which may never occur, and even if it does, may not necessitate the repair or replacement of the

pipeline. The necessity proposed by MDU is nothing more than its own mere convenience.

¶25 Contrasted to this are Lavern Behm's rights to own his property and to farm or otherwise develop it as he sees fit, without the burden of this easement. The burden on Lavern Behm is immediate and permanent as opposed to the uncertain and speculative necessity argued by MDU.

¶26 The Court therefore finds that the proposed taking and pipeline route is not compatible with the greatest public benefit when weighed against the immediate and permanent private injury to Lavern Behm.

¶27 The Court further finds that MDU's decision is arbitrary and capricious. A decision is arbitrary or capricious if it is not the product of a rational mental process by which the law and facts are relied upon and considered together for achieving a reasoned and reasonable interpretation. Grand Forks Housing Authorities v. Grand Forks Board of County Commissioners, 2010 ND 245, 793 NW2d 168.

¶28 In this case it appears as if MDU looked only at its own convenience when it determined to take this pipeline easement. The decision was based on the sheer speculation of what might, or might not occur at some unknown future date, and which might impose some unknown and uncertain future cost. MDU did not consider at all the private injury its pipeline would impose

> on Lavern Behm and his property. This one-sided analysis by MDU, resolving all uncertainties and speculations in its favor, and without consideration of Lavern Behm's rights of ownership is arbitrary and capricious.

App. 19-20, 21, 24-27.

The testimony that was received at the evidentiary hearing supports the district court's findings. Curt Olson, MDU's district manager for the Minot area, testified that that MDU has proposed a four-inch pipeline, to facilitate Burlington Northern in regards to its switch station T. 6, 8, 15-16. Olson testified that the switches are now receiving fuel via the propane tanks already in existence. T. 16. Olson confirmed that the easement MDU was requesting over Behm's property runs parallel and outside the thirty-three foot right-of-way that exists along the county road. T. 17-18. Olson testified that MDU never applied to use the right-of-way adjacent to the county road. T. 18. Olson confirmed that the purpose of the proposed gas line was to service only one client, Burlington Northern. T. 20. Olson confirmed that the thirty-three foot right-of-way along the road existed along a section line right-of-way. T. 22. Olson stated that the reason for not using the right-of-way is because if there's any future roadwork, the line would have to be moved at MDU's expense. T. 23. Olson also confirmed that he had not checked with the Township as to whether or not there was any planned future roadwork. T. 25. Olson also admitted that if the line was placed on Behm's property (as requested) it may be necessary to move that line in the future. T. 26. Olson also confirmed that the purpose of putting in the

line was so that the propane tanks presently used by Burlington Northern would no longer be needed. T. 28-29. In other words, by putting in the line, the only change that will occur is Burlington Northern will no longer have to fill up the propane tanks. T. 29.

The landowner Vern Behm testified that he owns land on both sides of the section line. T. 41. Behm testified that he has observed Burlington Northern filling up the propane tanks that are used to keep the switches warm. T. 46. Behm testified that Burlington Northern uses a pay loader to keep the service road open in the winter, and have a daily operator in the winter who checks the switches. T. 47. Behm testified that he considers this merely an issue of convenience on the part of Burlington Northern. T. 47. Behm is aware of the existence of the right-of-way thirty-three feet on each side of the township line. T. 47-48. Behm testified that the road is well-maintained and he is not aware of any planned roadwork or any plan to widen the road. T. 48. Behm failed to see any reason why MDU couldn't use the right-of-way along the road. T. 49. Behm further testified that Burlington Northern has the option to just continue using the propane tanks and not doing the natural gas line at all. T. 49. Behm further testified that he is been farming in this area since 1970, and the land has been in his family for 75-80 years. T. 51.

Ward County Commissioner John Fjeldahl testified as to the purpose of section line right-of-ways and that the road and right of way is for public use for travel as well as the placement of utilities along the road. T. 53. Commissioner Fjeldahl testified that it is his

understanding that the intention of the county is for these right-of-ways to be used instead of using personal land. T. 54. Commissioner Fjeldahl stated that it was his opinion as a property owner and as a County Commissioner that he would prefer that the utilities be put on the statutory right away versus on private property. T. 55. Commissioner Fjeldahl further testified that if MDU wants to build a pipeline they should use the right-of-way first, if it's available to them. T. 59. Commissioner Fjeldahl also testified that he knows that it is possible to put a pipeline along the right-of-way, because it has been done. T. 59.

REASONS FOR GRANTING THE PETITION

The following questions are presented to this Court:

1. Is it a violation of due process and the taking clause for the state – as a matter of law – to allow a private corporation to take private property through eminent domain based solely on the private corporation's own determination that the taking is for a public use?

2. In an eminent domain case where the trier of fact has found that the taking is not a public use, is not necessary, and is merely for the convenience of one private entity for the benefit of another private entity, is it a violation of due process and the taking clause for an appellate court to disregard these evidentiary findings and allow the taking to occur based solely on the private company's own determination that there is a public use?

3. Should the case of *Kelo v. New London*, 545 U.S. 469 (2005), be overruled and the analysis presented by Justice Thomas in his dissent be adopted by this Court?

A. An Analysis of the Decision Below

Instead of applying the North Dakota Constitution and the implementing statutes which require necessity,[1] the North Dakota Supreme Court ignored its own law requiring necessity and reframed Behm's argument (inaccurately) as one only asserting there was no public use. *Montana-Dakota Utilities Co. v. Behm*, 2019 ND 139 ¶7, 927 N.W.2d at 868 ("We interpret Behm's argument to be that the court erred in ruling the proposed taking was for a public use."). Despite the existence of constitutional and statutory provisions that recognize the requirement of necessity for a taking under the state constitution and state statutes, the North Dakota Supreme Court ignored the district court findings and refused to consider the options available to MDU in lieu of the taking. The Supreme Court also considered the lack of necessity as irrelevant in this eminent domain action. More specifically, the North Dakota Supreme Court decided that the private corporation would be allowed to take

[1] Petitioner does not assert any unconstitutionality of the state constitution or the statutes implementing the constitutional provision and instead asserts that the state Supreme Court improperly applied those provisions. As such there is no notification required under Rule 29.4(c). As a matter of fact, if the North Dakota Supreme Court had properly applied its own constitution and laws requiring a public use and a necessity for the taking, there would be no need to assert petitioner's rights under the federal constitution.

Behm's private property through eminent domain despite the fact that the adjacent township right away (a mere ten feet from the line of taking) was readily available. The state Supreme Court also refused to consider that the railroad had the option of continuing to heat the switches with propane instead of installing natural gas service on Behm's private property. Instead of applying the necessity requirement found in the state constitution or the state statutes, the North Dakota Supreme Court ruled as a matter of law that the only requirement for the taking is a determination by the private company that its taking is for a public use:

> A "court's review of public necessity is limited to the question of whether the taking of the particular property sought to be condemned is reasonably suitable and usable for the authorized public use." [citation omitted]. . . The necessity inquiry under N.D.C.C. § 32-15-05(2) turns on whether the particular property proposed to be taken is necessary for the public use, not whether the authorized public use is itself necessary. . . . We conclude the district court erred in ruling MDU's proposed taking was not necessary for a public use.

Montana-Dakota Utilities Co. v. Behm, 2019 ND 139, ¶¶14, 16, 18, 927 N.W.2d at 870, 871, 871.

In our view, the concept of public use must be more than just the use *for one* of MDU's customers. To this end we quote Justice Thomas' dissent in *Kelo*: "The constitution's text, in short, suggests that the Takings Clause authorizes the taking of property only if the

public has a right to employ it, not if the public realizes any conceivable benefit from the taking." *Kelo v. New London*, 545 U.S. 469, 505 (2005) (Thomas, J., dissenting). Justice Thomas proceeds to properly assert that "the Public Use Clause is most naturally read to authorize takings for public use only if the government or the public actually uses the taken property." *Ibid.* at 514 (Thomas, J., dissenting). To hold otherwise is to effectively render the Public Use Clause superfluous, if not "a virtual nullity, without the slightest nod to its original meaning." *Ibid.* at 506 (Thomas, J., dissenting).

The starting point in reference to property rights must be that the property is owned by an individual, and that the holding of that property is a significant right and that property cannot be taken unless absolutely necessary *and* for public use. Where property rights are being taken by the government, any and all presumptions should be in favor of the landowner, not the government or the private corporation that has been allowed to take the private property. In other words, the presumption should *not* be that there is a public use when the government or a private corporation authorized by the government is taking away someone's property. The presumption should be *against* the taking, and the burden should be on the government (or the private corporation) that asserts the right to take the property. In this case, not only did the Supreme Court of North Dakota ignore the district court's findings and find a public use, it allowed the private corporation itself to determine on its own whether there is a public use, and did not require necessity for the taking.

If indeed property is a fundamental right, or for that matter a right which has constitutional dimensions, one would think that the taking of private property by eminent domain cannot be countenanced if the taking is not necessary—or if the taking is not for public use but merely for the convenience of one particular private corporation. Moreover, this case involves a private corporation, MDU, taking private property to service one single client, Burlington Northern Railroad. Following an evidentiary hearing, the district court, the Hon. Gary Lee presiding, made specific findings, including the finding that the taking of the private property is not necessary because a mere ten feet away stands a public right-of-way that is not only available to be used, but was statutorily created for this very purpose. In addition, the district court found that Burlington Northern Railroad is perfectly capable of continuing to heat the switches through propane tanks that stand adjacent to the rail line on its own railway easement, and as such placing the natural gas pipeline along the landowner's property is not necessary.

Amazingly, the North Dakota Supreme Court refused to apply its own Constitution and the statutes implementing the state constitutional provisions relating to eminent domain designed to protect the rights of the landowner, and as such it is appropriate for this Court to apply the federal Due Process Clause and Taking Clause to protect the property rights of the landowner.

We note that this Court has, on occasion, stated that the presumption of need in an eminent domain case is not "automatic":

> [T]he Commission's reading of the statute is entitled to deference because it "gave effect to the statutory presumption of Amtrak's need for the track, and in so doing implemented and interpreted the statute in a manner that comports with its words and structure." *Ibid.* But this begs the question of what showing Amtrak must make to establish that the track is "required" so that Amtrak may therefore obtain the benefit of the presumption of need.

National Railroad Passenger Corporation v. Boston & Maine Corp., 503 U.S. 407, 426 (1992), White, J., dissenting. When the taking authority fails to demonstrate that the taking is required, there is no need.

In addition, this Court has stated "that delegations of eminent domain power to private entities are of a limited nature." *Ibid.* at 421, citing *United States v. Carmack,* 329 U.S. 230, 243, n.13 (1946). The specific footnote in *Carmack* provides as follows:

> In the instant case, we deal with broad language employed to authorize officials to exercise the sovereign's power of eminent domain on behalf of the sovereign itself. This is a general authorization which carries with it the sovereign's full powers except such as are excluded expressly or by necessary implication. A distinction exists, however, in the case of

> statutes which grant to others, such as public utilities, a right to exercise the power of eminent domain on behalf of themselves. These are, in their very nature, grants of limited powers.

United States v. Carmack, 329 U.S. 230, 243, n.13 (1946).

We assert that a finding of necessity is required before there can be a taking of private property by a private company, and where there are alternatives readily available to render the taking unnecessary, the taking should not be allowed. Again, as aptly stated by Justice Thomas, necessity must be a prerequisite to any taking: "[T]he Government may take property only when necessary and proper to the exercise of an expressly enumerated power." *Ibid.* at 511 (Thomas, J., dissenting). All too often the analysis of many courts begins with the proposition that the taking of private property is allowed as long as just compensation is paid. But the more appropriate analysis should be that property is an essential (if not fundamental) right that cannot be encroached upon unless the state – or the private entity asserting the power of the state through eminent domain – proves at an appropriate evidentiary hearing the there is indeed a proper public use and that that the specific taking is required or necessary.

In addition, we believe that deference to the legislature should not justify the abdication of this Court's role to protect property rights. Every court that reviews a government sponsored taking should be obligated to ensure that the taking is indeed for a public use and that the taking is necessary. In our

view, a right that is not enforced by the courts is not a right but merely an empty phrase signifying nothing.

It is our position that the right to retain and use one's own property deserves a *higher* standard of constitutional protection than it is presently afforded, especially in regards to real property. It is appropriate for this Court to provide *more* protections – not less – when property is being taken by a government entity or, worse yet, by some private entity given the power of the State to take (or employ for its own use) a person's real property. We will next consider why adopting this position is supported by the history of property rights.

B. The Origins and Constitutional Importance of Property Rights

Our founding fathers understood full-well the importance of property and the need for the protection of property rights. The drafters of the Constitution, as well as the drafter of the twelve proposed amendments (of which ten were ratified on December 15, 1791), were careful students of the writings of John Locke, who created a trinity relating to the right to property, asserting that the concept of property entails life, liberty, and his estate:

> [Man] hath by nature a power not only to preserve his property – that is, his life, liberty, and estate, against the injuries and attempts of other men. . . . [N]o political society can be, nor

> subsist, without having in itself the power to preserve property . . . ."

John Locke, AN ESSAY ON CIVIL GOVERNMENT.[2]

Although the specific guarantee of property rights came later through the Fifth Amendment, the proponents of the adoption of the proposed constitution believed that the protection of property rights stood on equal footing to the protection of the rights of individuals:

> Government is instituted no less for the protection of the property, than of the persons, of individuals. . . The rights of property are

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[2] Locke further espoused his views of the importance of property rights in his Treatise on Government:

> 94. . . . (Whereas government has no other end but the preservation of property.)
> . . .
>
> 124. The great and chief end, therefore, of men uniting into commonwealths and putting themselves under government is the preservation of their property; to which the state of Nature there are many things wanting.

John Locke, CONCERNING CIVIL GOVERNMENT ¶¶ 94 & 124. But one should not assume that this right, like any other, is absolute, as shown by the following language: "As much as one can make use of to any advantage of life before it spoils, so much he may by his labour fix a property in. Whatever is beyond this is more than his share." *Ibid*, ¶30. So too, "we should see him give up again to the wild common of Nature whatever was more than would supply the conveniences of life, to be had there for him and his family." *Ibid*., ¶48. "What portion a man carved to himself was easily seen; and it was useless, as well as dishonest, to carve himself too much, or take more than he needed." *Ibid*., ¶51.

> committed into the same hands with the personal rights.

FEDERALIST No. 54 (Feb. 12, 1788). Although Jefferson made a substantive change to Locke's triad in the Declaration of Independence,[3] it is the Bills of Rights that gave breath and substance to property as a specific right under our supreme law of the land:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

Amendment V (emphasis added).

The belief that property rights should be afforded the same protections as personal rights is not new. Indeed, no less a figure than Judge Learned Hand

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[3] Although Thomas Jefferson replaced Locke's property triad of "life, liberty, and estate" with "life, liberty, and the pursuit of happiness," the words found in our Constitution through the amendment process reverted back to Locke's original concept through the fifth amendment. It should be noted that Jefferson's use of "the pursuit of happiness" was derived from John Locke's writings as well. See John Locke, ESSAY CONCERNING HUMAN UNDERSTANDING Bk. II, Chap. XXXI, Para. 52.

presented this view in his celebrated Holmes lectures given at Harvard University in 1958 (subsequently published under the title, THE BILL OF RIGHTS). In discussing the use of the Due Process Clause in cases involving not property but liberty, Judge Hand decried the adoption "of a stiffer interpretation of the 'Due Process Clause,' when the subject matter is not Property but Liberty, as that word has now come to be defined." To this point, Judge Learned Hand said the following:

> I cannot help thinking that it would have seemed a strange anomaly to those who penned the words in the Fifth to learn that they constituted severer restrictions as to Liberty than Property, especially now that Liberty not only includes freedom from personal restraint, but enough economic security to allow its possessor the enjoyment of a satisfactory life.

L. Hand, THE BILL OF RIGHTS 50-51 (1958).

As enunciated in Professor James Ely's superb review of the history of property rights, modern justices such as Justice Stewart, have asserted that property rights should hold the position similar if not equal to personal liberties:

> Speaking for the Supreme Court, Justice Potter Stewart amplified this view in *Lynch v. Household Finance Corp.* (1972). Stewart declared "that the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights." In language evoking the attitudes of the

> framers, he further stated, "In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meeting without the other. The rights in property are basic civil rights has long been recognized."

James W Ely, Jr., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 150-151 (3rd ed. 2008), quoting *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972).

According to Professor Ely, the United States Supreme Court began its wayward path away from the historic importance of property rights in its decision in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938):

> By separating property rights from individual freedom [in footnote number 4], the *Carolene Products* analysis instituted a double standard of constitutional review under which the Supreme Court afforded a higher level of judicial protection to the preferred category of personal rights. Economic rights were implicitly assigned a secondary constitutional status. Because the reasonableness of economic regulations was presumed, judicial scrutiny of legislation under the rational basis test became purely nominal. Consequently, the Court gave great latitude to Congress and state legislatures to fashion economic policy, while expressing only

> perfunctory concern for the rights of individual property owners.

James W Ely, Jr., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 140 (3rd ed. 2008).

Given the importance of original intent in present-day constitutional jurisprudence, we will take the time to provide an overview of the history of property rights as articulated by Professor Ely.

Professor Ely provides in his book, THE GUARDIAN OF EVERY OTHER RIGHT, the history of property rights and demonstrates that there is a substantial basis for not only the importance of property rights in colonial times, but also indications that the rights of property were perceived at that time as fundamental rights. Professor Ely first refers to a Massachusetts 1657 county court decision that "recognized as 'a fundamental law' that property cannot be taken 'to the use or to be made the right or property of another man without his own free consent.'" *Ibid.* at 14. By 1750 "[m]ost of the colonists owned land, and 80 percent of the population derived their living from agriculture." *Ibid.* at 16.

Professor Ely next provides a review of the importance of the theories of John Locke and the application of Lockean thinking that "permeated English common law." *Ibid.* at 17. Also important during this time was Adam Smith's 1776 landmark WEALTH OF NATIONS that "contended that governmental intervention in the economy was unnecessary and likely to prove harmful." *Ibid.* at 23.

Although the use of eminent domain was regularly employed by the colonies (but on a limited scale), the colonists generally regarded just compensation as a fundamental principle. *Ibid.* at 25. According to Professor Ely, it is not without meaning that "the cry 'Liberty and Property' became the motto of the revolutionary movement." *Ibid.* at 25. During the Revolutionary era, the general view was that "what a man has honestly acquired is absolutely his own, which he may freely give, but cannot be taken from him without his consent." *Ibid.* at 27. Colonial leaders agreed with "the time-honored English Whig philosophy that regarded protection of private property crucial to the preservation of freedom." *Ibid.* at 28. They also "viewed the security of property as the principal function of government." *Ibid.*

As noted above, it is not without accident that Thomas Jefferson in the Declaration of Independence borrowed heavily from John Locke by adopting Locke's expression of "life, liberty, and estates." Our founders accepted fully the belief that "[t]he acquisition of property and the pursuit of happiness were so closely connected with each other in the minds of the founding generation that naming only one of the two sufficed to evoke both." *Ibid.* at 29.

The Articles of Confederation were adopted in 1781, and in 1787 Congress enacted the Northwest Ordinance which included several provisions relating to property, including the declaration "that no person should be deprived of liberty or property except by the [law of the land], [and] if a person's property were

taken for public purpose, 'full compensation shall be made for the same.'" *Ibid.* at 29.

Several states during this colonial period placed in their constitutions "the common law principle that compensation should be paid when private property was taken for public use." *Ibid.* at 31. Professor Ely concludes that "the constitutional protection of property rights was established in the states well before the adoption of the federal constitution." *Ibid.* at 32. Moreover, at the conclusion of the Revolutionary War Professor Ely notes that the Treaty of Paris provided that "there should be no further seizure of property" such as that which had occurred during the Revolutionary War against those who were designated as "traitors" or were declared "person to be guilty of treason" by bills of attainder. *Ibid.* at 34-35. Significantly, "[i]n 1784 James Madison successfully sponsored a bill to halt further confiscation of British property in Virginia." *Ibid.* at 36. At the time of the Constitutional Convention of 1778, "the right to property was among the highest social values in the new republic." *Ibid.* at 41. According to Professor Ely, "the doctrine that property ownership was essential for the enjoyment of liberty had long been a fundamental tenet of Anglo-American constitutional thought. . . . Despite their differences over particular economic issues, the right to acquire and own property was undoubtedly a paramount value of the framers of the Constitution." *Ibid.* at 43.

Given this background, it is therefore not surprising that many provisions of the United States Constitution pertain to property interests and were designed to

rectify the abuses that characterize the Revolutionary era. *Ibid.* at 43.

The original Constitution, of course, did not include a provision proclaiming the natural right of property ownership or declaring that a person could not be deprived of property except by due process of law—even though these views existed in full-force at the time of the drafting and adoption of the U.S. Constitution. The failure to include these rights, as well as other basic rights, into the original constitution was simply due to the fact that "[t]he basic constitutional scheme was to protect individual rights, including property, by limiting the exercise of government power through elaborate procedural devices." *Ibid.* at 47.

According to Professor Ely, "[t]he Federalist attachment to property went beyond the philosophical position that property constituted the basis of civil society and a safeguard to liberty. Federalist also emphasized the economic utility of private property. In their view, a strong national economy rested on private ownership." *Ibid.* at 49.

Because the most compelling objection to ratification related to the lack of the Bill of Rights, "the Federalists informally agreed to accept a bill of rights as the price of ratification." *Ibid.* at 52. The result was the eventual addition of the Fifth Amendment Due Process Clause and the Takings Clause.

The U.S. Constitution was ratified in November 1791, and according to Professor Ely "there is no evidence of opposition to either the due process or the

takings clause of the Fifth Amendment." *Ibid.* at 55. Simply put, the framers and the first United States Congress incorporated through the Fifth Amendment the Lockean view of property rights, rights which were considered essential to liberty and were just as fundamental as the individual rights contained in the first ten amendments.

CONCLUSION

There are compelling reasons for granting a writ of certiorari in this case. Since the rendering of *Kelo v. New London*, 545 U.S. 469 (2005), there has been an outcry relating to the misuse of eminent domain by state political entities (and private entities allowed to do so by the state).

At the vanguard of this outcry stands several members of this Court who have asserted that the decision in *Kelo* was incorrect. The questions presented in the instant case constitute important federal questions that have been presented to a state court of last resort. The rights of property owners and landowners – which many perceive to be fundamental rights – presently stand in harm's way by the misuse of government authority by private entities employing a public power. Private property should not allowed to be taken when it is not necessary and alternatives exist. Private property should not allowed to be taken when there is no public use or actual use by the public. A distinction should be made in regards to a taking through eminent domain by a government entity and a private person or entity which is allowed to employ the

power of eminent domain to its own personal advantage.[4]

The Court is urged to revisit the thoughtful dissent of Justice Thomas in *Kelo v. New London*, 545 U.S. 469, 505-523 (2005). We respectfully suggest that this Court should overrule *Kelo v. New London*, 545 U.S. 469 (2005), and adopt the analysis presented by Justice Thomas in his dissent.

Dated this 12th day of August, 2019.

Respectfully submitted,

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[4] The same may be said as to the distinction between a taking by a government and "the case of statutes which grant to others, such as public utilities, a right to exercise the power of eminent domain on behalf of themselves." *United States v. Carmack,* 329 U.S. 230, 243, n.13 (1946).