No. 19-197

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should review a question of federal law that was not decided by or properly presented to the state supreme court.

2. Whether the Fifth Amendment prohibits a public utility from exercising eminent domain to install an underground gas line to service a customer within its area of service, when the state legislature has specifically declared the use of land for "pipelines . . . for supplying or conducting gas" to be an appropriate "public use."

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

RULE

INTRODUCTION

Lavern Behm petitions this Court to decide whether the Fifth Amendment prohibits a public utility from exercising eminent domain to provide service to a customer. The transfer of private property to a public utility is in the class of eminent domain cases that Justice O'Connor labeled "relatively straightforward and uncontroversial." *Kelo v. City of New London, Connecticut*, 545 U.S. 469, 498 (2005) (O'Connor, J., dissenting). Nevertheless, Behm asserts that the case presents an important challenge to the Court's decision in *Kelo*, and raises various questions addressing "the proper interpretation of the Due Process Clause, the Taking Clause, and Public Use Clause of the Fifth Amendment, and the Right to Jury under the Seventh Amendment." Pet. 1.

The Court should deny Behm's petition. First, this Court lacks jurisdiction because Behm did not properly present any federal issue to the North Dakota Supreme Court or the district court. This Court does not consider federal issues raised for the first time in a petition for certiorari. That alone is enough to deny the petition.

Second, even if Behm had properly raised federal claims *and* the Court were inclined to revisit *Kelo*, this case is not the vehicle to do so. While Behm styles his petition as an attack on *Kelo*, the underlying case does not involve takings for the purpose of economic development and therefore does not implicate *Kelo* whatsoever. In fact, North Dakota law explicitly prohibits use of eminent domain for "economic development."

Rather, this case involves one of the most basic and universal uses of eminent domain: a public utility condemning land for the benefit of a customer requesting utility service. The petition does not present a question that warrants this Court's attention.

STATEMENT OF THE CASE

BNSF Railway Company ("BNSF") operates a rail line that runs through Ward County, North Dakota. As with most rail lines, the line has railroad switches that allow trains to be safely guided from one track to another. Through summer months, the switches work smoothly with little need for maintenance. But in the winter months, when temperatures in Ward County plummet, the switches become covered with snow and ice and will freeze and become inoperable unless they are heated. Affidavit of Paul Fiechtner, ¶¶ 5-8.

BNSF currently uses propane tanks to supply the switch heaters, which it must regularly service and refill by truck. *Id.* ¶6. The problem is that when the heaters are needed most the weather is at its worst. The roads are unpaved and in winter they are sometimes impassable because of snow and ice, which sometimes prevents BNSF from being able to refill the tanks. *Ibid.*; Pet. App. 2.

To solve the problem, BNSF requested that Respondent Montana-Dakota Utilities Co. ("MDU") install an underground gas pipeline so the heaters would have a reliable source of fuel. Pet. App. 2. MDU agreed to install the gas line, and to do so it sought an easement from Petitioner Lavern Behm. After Behm refused, MDU brought an eminent domain action to

acquire an easement across Behm's property to run the gas line for the railroad switch. Pet. App. 58-64. North Dakota law specifically authorizes exercise of eminent domain to install gas pipelines. N.D.C.C. § 32-15-02(10); Pet. App. 7-8. The pipeline is four inches in diameter and would run beneath Behm's property. It would require an easement 10 feet wide and 240 feet long across Behm's land and would run adjacent to a road. Tr. Ex. 3; Pet. App. 24.[1] Because the easement is underground, it would pose no long-term harm to Behm's land and it would not interfere with his farming operations except for the brief period necessary for the installation of the pipe.

Behm opposed MDU's eminent domain action based solely on state law, arguing that MDU exceeded its authority under state statutes and the state constitution. *See* Pet. App. 64-71. Behm made no argument in the district court that MDU's eminent domain action violated the federal constitution. *See* Pet. App. 64-71. Consequently, the district court only analyzed whether MDU's eminent domain action complied with state law. Pet. App. 41-48.

Part of Behm's argument is that the easement across his property is not "necessary" because MDU has two alternatives routes it could use. Pet. App. 12. Behm's first alternate would run around Behm's property and through an existing BNSF easement. But

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[1] Amicus Northwest Legal Foundation claims, without citation, that a portion of the road is asphalt and that there is an adjacent "19 foot easement way." Amicus, 4. Both contentions are incorrect and have no support in the record. No portion of the road is paved and there is no "19 foot easement way" available to MDU.

MDU showed that the route was impractical because it would add an entire 18,000 feet of pipeline at an additional cost of $1.2 million. *Ibid.* Behm's second alternate route was also impractical because it ran through an existing section line right of way that was adjacent to MDU's proposed route; MDU's rights would therefore be permanently subject to a public easement.[2] *Ibid.* Because MDU's easement would be subordinate, MDU would have to yield to any conflict that arose in the future, such as a change in the road or future development. *Ibid.*

The district court held that while MDU's proposed pipeline is a public purpose authorized by state law (Pet. App. 42), MDU failed to show that the use was "necessary." Pet. App. 44-45. The district court interpreted "necessity" based primarily on an 1883 California case interpreting California law. Pet. App. 44. Because BNSF could fuel the heaters by truck with propane, the district court found that MDU's easement was not necessary. Pet. App. 45. The district court limited its analysis to issues under North Dakota law; no federal constitutional issues were raised by either party in their pleadings. *See* Pet. App. 58-62; Pet. App. 64-71.

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[2] By statute, in North Dakota "the congressional section lines are considered public roads open for public travel to the width of thirty-three feet [10.06 meters] on each side of the section lines." N.D.C.C. § 24-07-03. The North Dakota Supreme Court has explained that "[a]ll section lines, under the grant of Congress of 1866 (section 2477, Rev. Stats. U. S. [U. S. Comp. St. § 4919]), having been accepted by chapter 33, Laws Dak. Ter. 1871, became public highways from the time of the congressional grant." *Hillsboro Nat. Bank v. Ackerman*, 189 N.W. 657, Syl. (N.D. 1922).

The North Dakota Supreme Court reversed. The Court found that the Legislature specified a public utility installing gas pipelines is an authorized "public use" under North Dakota's eminent domain statutes, even when the portion of the pipeline at issue is for the benefit of a single customer. Pet. App. 7-9. The Court also recognized that long-standing state law required deference to the Legislature's determination of what constitutes a necessary public use. Pet. App. 8. On necessity, the Court reaffirmed its past precedent that "a showing of customer convenience in uninterrupted [utility] service . . . was sufficient to render reasonable a conclusion in favor of a taking's necessity" and rejected Behm's arguments to the contrary. Pet. App. 11; *see also* Pet. App. 7 ("To the extent he is not simply misreading our cases, Behm has not provided persuasive reasons for us to depart from the reasoning in more than 40 years of our precedent"). The Court further found that Behm's proposed alternative pipeline routes were impractical. Pet. App. 12-13. As a result, the North Dakota Supreme Court held that under North Dakota law, MDU's eminent domain action was necessary for a public use. Pet. App. 14.

Behm raised ten issues in a cross appeal, including "[w]hether the district court erred in not finding a violation of federal and state constitutional rights by the proposed taking." Pet. App. 14. The Court, however, did not address any of Behm's issues, including the federal issue, because he did not "specifically address any of them in his brief." Pet. App. 14 (citing *State v. Nice*, 2019 ND 73, ¶ 11, 924 N.W. 2d 102 (N.D. 2019) (issues raised but not supported by argument are waived); *see also Olsrud v. Bismarck-Mandan*

Orchestral Ass'n, 2007 ND 91, ¶ 25, 733 N.W.2d 256 ("We have often said a party waives an issue by not providing supporting argument, and without supportive reasoning or citations to relevant authorities, an argument is without merit").

REASONS FOR DENYING THE PETITION

I. This Court Lacks Jurisdiction Over this Case Because Behm Did Not Properly Present A Federal Issue to the Lower Courts.

The first time Behm pressed any federal claim in this case was in his petition to this Court. That alone is enough reason to deny his petition.

This Court has jurisdiction to review final decisions of a state supreme court "where any . . . right . . . is *specifically set up or claimed* under the Constitution or the treaties or statutes of . . . the United States." 28 U.S.C. § 1257(a) (emphasis added). "Under that statute and its predecessors, this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.'" *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (quoting *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (*per curiam*). When a state court's decision does not address the federal questions presented in the petition, this Court assumes that the issue was not properly presented. *Adams*, 520 U.S. at 86. The petitioner then "bears the burden of defeating this assumption, by demonstrating that the state court had

'a fair opportunity to address the federal question that is sought to be presented here.'" *Id.* (quoting *Webb v. Webb*, 451 U.S. 493, 501 (1981)). This has long been the law and this Court has consistently applied it. *See Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (citing cases).

This Court's rules amplify this requirement, mandating that a petitioner show when and how he raised the federal issues at both the trial court and the appellate court. "If review of a state-court judgment is sought, specification of the stage in the proceedings, *both in the court of first instance and in the appellate courts*, when the federal questions sought to be reviewed were raised" and "the method or manner of raising them and the way in which they were passed on by those courts, so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari." Rule 14.1(g)(i). Although Behm gives lip service to the rule by stating that the "federal questions were timely and properly raised" (Pet. 1-2), he did no such thing.

In his brief to the North Dakota Supreme Court, Behm raised ten issues, nine of which raised state-law grounds mostly addressing Behm's argument that the taking was not "necessary" under state law. His tenth issue asked, "Whether the district court erred in not finding a violation of federal and state constitutional rights by the proposed taking." Appellee and Cross Appellants' Brief, 6. But he did not support that claim with any argument. He cited no federal cases and nowhere did he even mention the federal due process,

takings, or public use clauses, much less the right to a jury under the Seventh Amendment. That does not meet the Court's minimum requirement that there "be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law." *Webb v. Webb*, 451 U.S. 493, 501 (1981). Simply mentioning "federal constitution" once in a question presented without any argument to support it does not apprise the state court "of the nature or substance of the federal claim."

Moreover, "[f]ailure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court, so long as the State has a legitimate interest in enforcing its procedural rule." *Michigan v. Tyler*, 436 U.S. 499, 512, n.7 (1978). Like this Court, the North Dakota Supreme Court does not address claims that are not supported by argument. The court noted that "Behm lists ten issues in his cross-appeal but does not specifically address any of them in his brief. We do not address inadequately briefed issues." Pet. App. 14. The North Dakota Supreme Court consistently applies that rule, Pet. App. 14 (citing *State v. Nice*, 2019 ND 73, ¶11, 924 N.W.2d 102 (ND 2019), and it only makes sense. Courts cannot be required to guess at what a party's arguments are.

But even if Behm had properly presented a federal claim on appeal, the state supreme court would still have refused to consider it because he failed to make

any federal claims or even mention the federal constitution in the district court. He did not raise it in his answer or in his counterclaims, Pet. App. 64-71, and he never mentioned a federal issue in any of his briefing in the district court. Not surprisingly, the North Dakota Supreme Court does not address questions raised for the first time on appeal. *Heng v. Rotech Med. Corp.*, 2006 ND 176, ¶ 9, 720 N.W.2d 54 (ND 2006). That is yet another independent and adequate state ground barring this Court's consideration of Behm's belated federal claims. *Tyler*, 436 U.S. at 512, n.7.

This Court's consistent refusal to address federal claims raised for the first time in a petition for certiorari is not only jurisdictional, it also "serves an important interest of comity." *Adams*, 520 U.S. at 90. As the Court has explained, "'it would be unseemly in our dual system of government' to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Ibid.* Here it would be fundamentally unfair to the North Dakota Supreme Court to review its decision on federal grounds when no federal claims were properly presented to it.

Beyond interests in comity, the rule is also necessary for the efficient administration of this Court's docket and for proper development of issues. "Requiring parties to raise issues below not only avoids unnecessary adjudication in this Court by allowing state courts to resolve issues on state-law grounds, but also assists us in our deliberations by promoting the creation of an adequate factual and legal record." *Id.* at

90-91; *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (deciding cases in the first instance forces the Court to decide issues "without the benefit of thorough lower court opinions to guide" its analysis).

Behm's assertion that he "timely and properly" raised his federal issues but the North Dakota Supreme Court "refused to address the federal questions" is both inaccurate and unfair to the North Dakota Supreme Court and the State District Court. This "is a court of final review and not first review." *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (per curium) (internal quotation marks omitted). The Court should refuse to give Behm his first review of the federal questions he presents.

II. This Case Is A Poor Vehicle to Revisit *Kelo v. City of New London,* Because It Does Not Implicate Use of Eminent Domain for Economic Development.

Behm identifies no split among circuit courts or state courts of last resort on the questions he presents in his petition. Rather, Behm styles his petition as a vehicle for this Court to revisit its decision in *Kelo v. New London, Connecticut*, and adopt the rationale put forth in Justice Thomas' dissent. *See, e.g.,* Pet. 10-11. Even if the Court were inclined to revisit *Kelo*, this case is a poor vehicle to do so because it is not a taking based on economic development.

Kelo's central holding was that exercise of eminent domain to promote economic development could constitute a "public use" under the Fifth Amendment. 545 U.S. at 484. At issue in *Kelo* was the City of New

London's plan to condemn private property to make way for private development, which would increase the tax base and be more profitable for the city. *Id.* at 473-75. Connecticut had a statute that specifically authorized use of eminent domain to promote economic development, and the question in *Kelo* was whether that purpose qualified as a "public use" under the Fifth Amendment. *Id.* at 484.

This case does not involve use of eminent domain for economic development, and Behm makes no argument that it does. Nor could he. North Dakota is one of several states that exercised its authority to place "further restrictions on its exercise of the taking power," *Kelo*, 545 U.S. at 489, by enacting legislation and passing a constitutional amendment to explicitly prohibit use of eminent domain to promote economic development. *See* N.D. Const. Art. 1, Section 16 ("For purposes of this section, a public use or a public purpose does not include public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health."); N.D. Cent. Code § 32-15-01.

Rather, this is a run-of-the-mill eminent domain case involving a utility easement, which, as detailed below, is well supported by over a century of this Court's precedent. *See* 545 U.S. at 498 (O'Connor, J., dissenting). Simply put, if Behm and his amicus seek to undue *Kelo*, this is not the case to accomplish it.

III. The North Dakota Supreme Court's Decision Is Consistent With This Court's Eminent Domain Precedent.

A. The North Dakota Supreme Court's Determination that the Proposed Pipeline Is a "Public Use" Was Correct.

This Court has long been deferential to legislative judgments about what constitutes a public use. For over a century, "public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power." *Kelo*, 545 U.S. at 483. This Court has "made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'" *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) (quoting *United States v. Gettysburg Electric R. Co.*, 160 U.S. 668, 680 (1896)).

In the North Dakota Legislature's reasoned judgment, the installation of a natural gas pipeline by a public utility is an appropriate public use. *See* N.D.C.C. § 32-15-02(10) (listing "pipelines and works and plants for supplying or conducting gas . . . for the use of any county, city, or the inhabitants thereof" as a recognized public use justifying the use of eminent domain). This remains true even if the portion of the pipeline under dispute is intended to serve a single customer. *Montana-Dakota Utilities Co. v. Behm*, 2019 ND 139, ¶ 10, 927 N.W.2d 865. The public use is especially obvious in this this case, given that BNSF, the customer the pipeline will serve, is itself a common

carrier. *See* N.D.C.C. § 32-15-01(2) ("Private property may not be taken for the use of, or ownership by, any private individual or entity, *unless that property is necessary for conducting a common carrier or utility business*" (emphasis added)).

The North Dakota legislature's judgment is not only reasonable, it is nearly universal. This Court has long recognized that a public utility or common carrier supplying services to customers is a public use. *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30 (1916); *National Railroad Passenger Corporation v. Boston & Maine Corp.*, 503 U.S. 407 (1992). While Behm seeks to overturn the majority's decision in *Kelo*, he overlooks that a point of unanimous agreement was the "straightforward and uncontroversial" public use by "a railroad [and] a public utility." *Kelo*, 545 U.S. at 498 (O'Connor, J., dissenting); *see also Id.* at 512 (Thomas, J., dissenting) (characterizing common carriers as "quasi-public entities" and explaining common carrier condemnations are "'public uses' in the fullest sense of the word"). This is a very common public purpose for purposes of state eminent domain statutes, and necessarily so since all benefit from both public utilities and railroads.[3]

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[3] Several Western States have statutes almost identical to North Dakota's that provide that a utility company providing gas line is a "public use" for purposes of eminent domain. *See, e.g.,* Nev. Rev. Stat. Ann. § 37.010; Mont. Code Ann. § 70-30-102; Utah Code Ann. § 78B-6-501; Idaho Code Ann. § 7-701; Alaska Stat. Ann. § 09.55.240.

The analysis is unchanged simply because a public utility is using the property to deliver services to a single customer as opposed to many. In *Kelo*, Justice Thomas explained that a utility or carrier supplying services to a customer is a public use because it is grounded in the rationale that they are "quasi-public entities" that are "regulated by law and compelled to serve the public" and the public can "legally use and benefit from them equally." *Kelo*, 545 U.S. at 512 (Thomas, J., dissenting). Accordingly, lower courts have therefore uniformly rejected Behm's contention and agreed with the North Dakota Supreme Court's conclusion that "where, as here, eminent domain is exercised by a utility business, 'condemnation for service to a single industrial customer does not forestall a finding that the taking is for a public use.'" *Behm*, 2019 ND 139, ¶ 9 (citation and brackets omitted). *See, e.g., Handley v. Cook*, 252 S.E.2d 147 (W. Va. 1979) (power company supplying power to a single customer a public use); *Carolina Tel. & Tel. Co. v. McLeod*, 364 S.E.2d 399 (N.C. 1988) (telephone service to single customer a public use); *Serv. Co. of Colorado v. Shaklee*, 784 P.2d 314, 318 (Colo. 1989) ("As long as every member of the public has an equal right with all others, on equal terms, to the use of the [utility services], it matters not that every person is not actually benefited thereby."); *Dyer v. Texas Electric Service Co.*, 680 S.W.2d 883 (Tex. App. 1984) (electric service to single customer a public use); *Komposh v. Powers*, 244 P. 298 (Mont. 1926), *aff'd*, 275 U.S. 504 (1927) (road serving a single farm a public use).

This rule applies with even more force in sparsely populated states like North Dakota, where utility

service to single customers is the norm and necessary. *Kelo*, 545 U.S. at 482 (explaining that this Court's "jurisprudence has recognized that the needs of society have varied between different parts of the Nation" and emphasizing the "great respect" owed to state legislatures in discerning local need). Indeed, rural residents "would be horrified" to learn that necessary services—such as water, power, electricity, or more particularly relevant today, broadband internet—would no longer be "forthcoming due to a recalcitrant adjacent landowner." *Mountain Valley Pipeline, LLC v. McCurdy*, 793 S.E.2d 850, 860 (W. Va. 2016).

Behm also asserts that the public use in this case was established "solely on the private company's own determination that there is a public use." Pet. ii. That misconstrues North Dakota law and the state supreme court's decision in this case. The North Dakota Legislature, not MDU, established that a gas pipeline installed by a utility is a public use. Pet. App. 7. Perhaps what Behm meant to say was that the court deferred to MDU's determination that the gas line was *necessary* to accomplish that authorized public use under state law. As MDU notes below, however, whether a public use is necessary goes beyond what the Fifth Amendment requires and is a creature of state law, not federal law, and thus not a concern for this Court. In any event, that determination was subject to judicial review, and the North Dakota Supreme Court affirmed MDU's determination that the easement across Behm's property was necessary. Pet. App. 12-13.

In short, Behm's contention that "the concept of public use must be more than just the use for one of [a utility's] customers" (Pet. 10) is not in accord with this Court's framework for determining what constitutes a public use under the Fifth Amendment. The focus of the Constitution is on the nature of the "use" to which the property is put rather than the number of persons served by the use. Considering this Court's precedent and the deference due the legislative branch, the North Dakota Supreme Court correctly concluded MDU's pipeline was a public use.

B. The Federal Constitution Leaves Necessity Determinations to the Legislative Branches and the North Dakota Supreme Court's Determination that the Pipeline Is Necessary under North Dakota Law Is Not Reviewable by this Court.

Under the federal Constitution, the question of whether the taking is necessary is "not one of a judicial character, but rather one for determination by the lawmaking branch of the government." *Backus v. Fort St. Union Depot Co.*, 169 U.S. 557, 568 (1898). Absent from the Takings Clause is any language requiring necessity as condition to condemnation. Once a court finds the use is a public use, the "judicial function is exhausted; that the extent to which such property shall be taken for such use rests wholly in the legislative discretion, subject only to the restraint that just compensation must be made." *Shoemaker v. United States*, 147 U.S. 282, 298 (1893).

Behm cites *National Railroad Passenger Corporation v. Boston & Maine Corp.*, 503 U.S. 407, 426 (1992), to support his argument that the entity exercising eminent domain must show not only "public use," but also that the taking is necessary. The case does not help Behm because it was interpreting statutory language, not applying the Fifth Amendment. It involved construction of 45 U.S.C. § 562(d), which required a condemning authority to show that property was "required for intercity rail passenger service." It therefore has no application to cases invoking the Fifth Amendment's Takings Clause. *Id.* Even so, the case is still unhelpful to Behm. The Court's interpretation of "required" in that statute was almost identical to the North Dakota Supreme Court's interpretation that a taking is "necessary" under the state constitution and statutes governing eminent domain if it is "reasonably suitable and usable for the authorized public use." Pet. App. 11

Unlike the federal Constitution, the North Dakota Constitution and North Dakota statute do impose a necessity condition to condemnation. N.D. Const. art. I, § 16; N.D.C.C. § 32-15-01(2). This Court, however, does not have authority to review the North Dakota Supreme Court's conclusions under either for error. *Del Castillo v. McConnico*, 168 U.S. 674, 679 (1898). Thus, insofar as Behm bases his contention "that property cannot be taken unless absolutely necessary" (Pet. 11) on the federal Constitution he is mistaken; insofar as he bases his contention on the North Dakota Constitution or North Dakota law his contention is unreviewable by this Court.

CONCLUSION

For the foregoing reasons, this Court should deny the petition.

Respectfully submitted,

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