No. _____

In the
Supreme Court of the United States

KEITH PUNTENNEY, ET AL.,
Petitioners,
v.

IOWA UTILITIES BOARD, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Iowa

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does a state's exercise of eminent domain satisfy the "public use" requirement of the Fifth Amendment's Takings Clause if the only benefits experienced within that state are incidental?

Can a state satisfy the "public use" requirement of the Fifth Amendment's Takings Clause merely by labeling the taking with a traditional category of public use, without engaging in the "public purpose" analysis outlined by *Kelo v. City of New London*, 545 U.S. 469 (2005)?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 DISCLOSURE

Petitioners Keith Puntenney; Laverne I. Johnson; Richard R. Lamb, Trustee of the Richard R. Lamb Revocable Trust; Marian D. Johnson by her agent Verdell Johnson; Northwest Iowa Landowners Association; and Iowa Farmland Owners Association, Inc. were plaintiffs-appellants below.

Hickenbottom Experimental Farms, Inc. and Prendergast Enterprises, Inc. were captioned as petitioners below but are not petitioners here.

Respondent Iowa Utilities Board was a defendant-appellee below. Respondents Office of Consumer Advocate and The Main Coalition were intervenors-appellees below. Respondent Dakota Access, LLC was an indispensable party-appellee below.

Sierra Club Iowa Chapter was a petitioner-appellant below, but is no longer party to this action.

Iowa Farmland Owners Association, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

RELATED PROCEEDINGS

There are no proceedings that are directly related to the case in this Court.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to review the judgment of the Supreme Court of Iowa.

OPINIONS BELOW

The opinion of the Supreme Court of Iowa (App. 1–58) is reported at 928 N.W.2d 829 (Iowa 2019). The opinion of the Iowa District Court for Polk County (App. 59–107) is unreported. The final decision of the Iowa Utilities Board (App. 109–292) is unreported but available at 2016 WL 943929 (Mar. 10, 2016).

JURISDICTION

The decision of the Supreme Court of Iowa was entered on May 31, 2019. On August 19, 2019, Justice Gorsuch extended the time for filing a petition for a writ of certiorari to September 30, 2019. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part: "nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

This case raises the question of whether a state may condemn private property and transfer it to another private actor when it is undisputed that no member of the state's public will be able to use or directly benefit from the use of the condemned property. The correct answer to that question is no. But courts in different

jurisdictions answer it differently. Because courts are sharply divided on *how* to answer that question, only this Court's intervention can bring much-needed clarity to this area of the law.

The Fifth Amendment's Takings Clause provides: "[n]or shall private property be taken for public use, without just compensation." U.S. Const., amend. V. And under *Kelo v. City of New London*, whether a taking is for a valid "public use" "turns on the question whether [the taking] serves a 'public purpose.'" 545 U.S. 469, 480 (2005).

Kelo concerned takings initiated to effectuate an economic development plan. The Court held that the City of New London's "carefully formulated economic development plan," which the City "believe[d] w[ould] provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue" "unquestionably serve[d] a public purpose." *Id.* at 484.

Despite approving the taking at issue, the *Kelo* majority recognized and reaffirmed the "long . . . accepted" rule that "the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B,* even though *A* is paid just compensation." *Id.* at 477. Further, the Court held it would be impermissible for the government to take property "under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." *Id.* at 478. The Court, however, held such considerations were inapplicable to the facts at hand: "The takings before us . . . would be executed pursuant to a 'carefully considered' development plan" and "[t]he

trial judge and all members of the Supreme Court of Connecticut agreed that there was no evidence of an illegitimate purpose in this case." *Id.* at 478.

Justice Kennedy, who concurred in the opinion and the judgment, provided the fifth vote and instructed that courts should "strike down" takings that, "by a clear showing," are "intended to favor a particular private party, with only incidental or pretextual public benefits." *Id.* at 491 (Kennedy, J., concurring). But while Justice Kennedy concluded that a "plausible accusation of impermissible favoritism" would warrant more intense scrutiny of the government's stated purpose, *id.*, he "underscore[d] aspects of the instant case" that convinced him no such heightened scrutiny was warranted. These aspects included that "[t]his taking occurred in the context of a comprehensive development plan meant to address a serious citywide depression"; "the projected economic benefits of the project cannot be characterized as *de minimis*"; "[t]he identities of most of the private beneficiaries were unknown at the time the city formulated its plans"; and "[t]he city complied with elaborate procedural requirements that facilitate[d] review of the record and inquiry into the city's purposes." *Id.* at 493.

Justice O'Connor, joined by three other Justices, dissented. Justice O'Connor agreed that "incidental public benefits" were insufficient to satisfy the "public use" requirement of the Takings Clause. *Id.* at 494 (O'Connor, J., dissenting). But she disagreed on the application of that standard to the facts at hand, concluding that "[t]o reason, as the Court does," that "public benefits resulting from the [post-taking]

ordinary use of private property" were enough "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." *Id.*

The entire Court in *Kelo* thus agreed that takings benefitting a private party with only pretextual or incidental benefits to the public are impermissible. But none of the opinions in *Kelo* purported to define the boundary between a permissible public-purpose taking and an impermissible incidental- or pretextual-benefit taking. As a result, lower courts have fixed the boundary at different locations—meaning that whether a taking passes constitutional muster depends on the jurisdiction where it takes place.

The facts of this case illustrate the problem perfectly, with a taking that provides public benefits far more incidental than those found to satisfy the Fifth Amendment in *Kelo*. The Iowa Utilities Board authorized the use of eminent domain to build a crude-oil pipeline that crosses Iowa, but will not pick up or drop off oil within Iowa's boundaries. It is undisputed that no member of the Iowa public can use the pipeline, nor will any member of the Iowa public ever benefit from it, except in the sense that the pipeline may eventually lead to lower prices for goods and services that depend on crude oil globally. The pipeline is, in all relevant respects, a private enterprise.

But, because the pipeline can be labeled a common carrier of oil (in that some "walk-up" shippers may be able to use it where the pipeline begins, in North Dakota), the Supreme Court of Iowa held that it fell

into a traditional category of public use and conducted *no* public purpose analysis under the Fifth Amendment. App. 40.

With this holding, the Iowa Supreme Court contributed to an entrenched split of authority. Lower courts are sharply divided on the question of how to analyze takings where the benefits to the public are asserted to be incidental or pretextual. Some focus on the degree to which there is an integrated development plan; others examine the intentions of the taking authority; yet others look to a weighing of public and private benefits. And at least two courts (including the court below) conduct *no* analysis on whether a stated public purpose is pretextual when the court can apply the label of a "traditional" public use. No approach has garnered majority support.

The Iowa Supreme Court also misapplied this Court's precedent in a way that will have devastating effects. Under that court's view, a mere label is sufficient to justify the transfer of private property from one private party to another, even if no "public purpose" is served.

Only this Court can put an end to the confusion and set the law right. Certiorari should be granted.

I. Procedural Background

A. Petitioners and the Dakota Access Pipeline

Respondent Dakota Access, LLC ("Dakota Access") initiated proceedings before the Iowa Utilities Board ("IUB") in 2014, disclosing its intent to build an

underground crude-oil pipeline from western North Dakota to Pakota, Illinois, a transportation hub from which the crude oil would subsequently be shipped. App. 5. The pipeline would cross Iowa from one corner of the state to another—totaling 343 miles of travel. *Id.*

Petitioners are Iowa landowners and Iowa landowner associations who have challenged the taking of their property for the purpose of building the subject pipeline. App. 4.

B. The Taking

The IUB held public meetings in each of the affected counties in December 2014. App. 5. Dakota Access then filed a petition with the IUB seeking authority to build the pipeline, and the authority to use eminent domain to secure rights-of-way for the proposed pipeline. *Id.*

Petitioners and various other groups intervened in the proceedings, and a hearing took place over multiple days in November and December 2015. App. 6. On March 10, 2016, the IUB issued a 159-page final decision and order approving the project and the use of eminent domain. In relevant part, it held that the use of eminent domain was not inconsistent with the Fifth Amendment to the Constitution. App. 8.

The IUB denied petitions for rehearing after it issued its final order, on April 28, 2016. App. 9.

C. Judicial Review in Iowa District Court

Petitioners filed petitions for judicial review of the IUB's decision in the District Court for Polk County in May 2016. App. 9. On February 15, 2017, the district court denied the petitions for judicial review, rejecting Petitioners' challenge that the exercise of eminent domain was unconstitutional because it did not constitute a "public use" under the Fifth Amendment to the U.S. Constitution. App. 10–11.

Petitioners appealed the district court's decision, and the Iowa Supreme Court took jurisdiction. App. 11.

II. The Iowa Supreme Court's Decision

The Iowa Supreme Court issued its decision on May 31, 2019, affirming the district court's ruling in all respects. App. 1–58. While purporting to reject "economic development" as a valid public purpose, the court nonetheless rejected Petitioners' Fifth Amendment challenge on the ground that the pipeline constitutes a common carrier. App. 30–51. The court surmised that, because the pipeline would reserve ten percent of its capacity for "walk-up" shippers in North Dakota, it qualified as a common carrier under the Federal Energy Regulatory Commission's definition of common carrier, and therefore qualified as a common carrier under Iowa law. App. 28–30. This common-carrier holding supplied the basis for the court's determination that the taking satisfied the Fifth Amendment. App. 40.

Relying on Justice O'Connor's comment in her *Kelo* dissent that "the sovereign may transfer private

property to private parties, often common carriers, who make the property available for the public's use—such as with a railroad, a public utility, or a stadium," *Kelo*, 545 U.S. at 498 (O'Connor, J. dissenting), the court reasoned that the pipeline qualified as a "traditionally valid public use[]," App. 40. The court rebuffed Petitioners' argument that, regardless of the common-carrier status of the pipeline, "no Iowa business or consumer will actually use the pipeline to deliver or receive crude oil," dismissing the argument as "too formalistic." App. 42. Instead, the court held, contrary to settled Fifth Amendment principles, that use by Iowans was not a prerequisite to a common-carrier taking, since Iowa depends on petroleum products, and the pipeline would reduce the cost of such products in the open market. App. 44.

The court did not otherwise engage in any analysis of whether the taking was for a public purpose, as *Kelo* requires. Instead, because the court concluded that transferring land to an entity that has common carrier status *per se* satisfies the Takings Clause, it rejected Petitioners' Fifth Amendment challenge.

Justice Wiggins, writing for himself and Justice Appel, concurred in part and dissented in part. Justice Wiggins agreed that Iowa should apply Justice O'Connor's *Kelo* dissent, but he disagreed that the pipeline qualified as a common carrier for purposes of the constitutional analysis because "[i]nherent" in the common-carrier rule "is that the condemning sovereign's public be able to use the taken property," and the pipeline at issue here cannot be used by members of the Iowa public. App. 52.

Petitioners now timely petition this Court for review of the Iowa Supreme Court's decision.

REASONS FOR GRANTING THE WRIT

I. Courts are split on how to evaluate whether a taking for use by a private entity has a pretextual or incidental public purpose under the Takings Clause.

This case provides an ideal vehicle to provide lower courts with much-needed guidance on the circumstances under which a state may transfer property from one private party to another where the purported benefits of a taking are pretextual or incidental to the public served by the authority performing the taking.

All Members of the *Kelo* Court agreed that the Takings Clause does not permit the forced transfer of property to a private entity for "pretextual" or "incidental" public purposes. The majority recognized that the City of New London "would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party," "[n]or would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." 545 U.S. at 477–78. Similarly, Justice Kennedy, in his concurrence, wrote that "transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause." *Id.* at 490 (Kennedy, J., concurring). And Justice O'Connor—joined by three other Justices—

similarly concluded that "incidental public benefits" were insufficient to show a valid public purpose under the Takings Clause. *Id.* at 494 (O'Connor, J., dissenting).

But despite agreeing that pretextual or incidental public purposes are improper, the various *Kelo* opinions did not provide guidance to lower courts as to *what* constitutes a pretextual or incidental public purpose. And so, lower courts, left to their own devices, have fractured on the appropriate test—with the decision below reinforcing an entrenched split in authority. There is thus "no consensus in sight on this crucial issue." Ilya Somin, *The Judicial Reaction to Kelo*, 4 Alb. Gov't L. Rev. 1, 3 (2011).

A. Multiple courts permit inquiries into subjective intent underlying a taking.

In states such as Hawaii and Connecticut, courts shun the formalistic approach employed by the Iowa Supreme Court. The Supreme Court of Hawaii has explicitly declined to adopt any "*per se* pretext rule" and authorized courts to "look beyond government findings and declarations in deciding whether the stated public purpose was pretextual." *Cnty. of Hawaii v. C & J Coupe Family Ltd. P'ship*, 242 P.3d 1136, 1148 (Haw. 2010). Likewise, the Supreme Court of Connecticut—whose judgment this Court reviewed in *Kelo*—has held "that a government actor's bad faith exercise of the power of eminent domain is a violation of the takings clause." *New England Estates, LLC v. Town of Branford*, 988 A.2d 229, 252 (Conn. 2010). The court expressly distinguished *Kelo* on the ground that *Kelo* "did not involve any allegations that the city of

New London acted in bad faith in taking private property." *Id.* at 253 n.28.

Under this approach, merely applying the label of a traditional public use will not end the Takings Clause inquiry. As the Supreme Court of Hawaii put it, "the single fact that project is a road does not per se make it a *public* road," and even in "considering a condemnation action for the purpose of constructing a public road, there is no mechanical formula for determining public use." *Cty. of Hawaii*, 242 P.3d at 1152 (quoting *Cty. of Hawai'i v. C & J Coupe Family Ltd. P'ship*, 198 P.3d 615, 643 n.32 (2008)).

B. Multiple courts assess a taking's purpose by focusing on the nature of pre-taking planning.

Other courts, taking their cue from descriptions of the pre-takings planning process in *Kelo*, treat *objective* planning-related factors as critical, if not dispositive, proof of a taking's real purpose.

For example, multiple courts have found it significant that the taking in *Kelo* was pursuant to a "comprehensive" development plan with "thorough deliberation." *Kelo*, 545 U.S. at 484. In one such case, the Supreme Court of Pennsylvania held a township had not properly exercised eminent domain when condemning a farm to provide public recreational space. In reaching this conclusion, the court noted that *Kelo* "placed great weight upon the existence of a 'carefully considered' development," and held that "[c]learly, evidence of a well-developed plan of proper scope is significant proof that an authorized purpose

truly motivates a taking." *Middletown Twp. v. Lands of Stone*, 939 A.2d 331, 338 (Pa. 2007) (quoting *Kelo*, 545 U.S. at 478)). Concluding that "there must be some substantial and rational proof by way of an intelligent plan that demonstrates informed judgment to prove that an authorized public purpose is the true goal of the taking," the court rejected the proffered purpose because "[t]he record does not support any finding of a condemnation proceeding informed by intelligent judgment or a concrete plan to use the . . . farm for the authorized purpose of recreation." *Id.* at 340.

Courts in other states have also read *Kelo* to put great weight on the concreteness and thoroughness of pre-takings planning. The Supreme Court of Rhode Island, for example, has rejected a stated public purpose as pretextual after finding that the "exhaustive preparatory efforts [in *Kelo*] . . . stand in stark contrast to [the Rhode Island Economic Development Corporation's] approach in the case before us." *R.I. Econ. Dev. Corp. v. The Parking Co., L.P.*, 892 A.2d 87, 104 (R.I. 2006).

Similarly, the Court of Appeals of Maryland has held that where "the only 'plan' for the [property to be taken] is that a private developer will possibly, at some future time, create a plan that the City [of Baltimore] might approve," the taking would not "fully comport with the holdings of the Supreme Court in *Kelo*" or *Berman v. Parker*, 348 U.S. 26 (1954), which "were conducted pursuant to comprehensive development plans that were in place prior to the takings." *Mayor & City Council of Baltimore City v. Valsamaki*, 916 A.2d 324, 352 (Md. 2007). The court even implied that

a planning process was a necessary precondition of a taking: "It is virtually impossible to determine the extent of the public/private dichotomy when no one knows the who, what, and whether of the future use of the property," "[n]or can a property owner challenge the public use aspect of a plan for a property until there is a plan in place for the use of that property." *Id.* at 353.

The United States Court of Appeals for the Third Circuit has focused on planning-related issues, but views the critical question as one of timing. In that court's view, what matters is whether the identity of the private entity that will benefit from a taking is known before condemnation. Absent that, the court has held, there "cannot be the textbook private taking involving a naked transfer of property private party *A* to *B* solely for *B's* private use and benefit." *Carole Media LLC v. N.J. Transit Corp.*, 550 F.3d 302, 311 (3d Cir. 2008).

Here, too, merely applying the label of a "traditional public use" would not end the public purpose inquiry. Instead, ***other*** factors—the extent of pre-taking planning or the time at which the identity of the taking's beneficiary becomes known—are elevated.

C. At least one court weighs public and private benefits against each other.

Taking yet another tack for assessing the true nature of a taking's purpose, the District of Columbia Court of Appeals has "conclude[d] that a reviewing court must focus primarily on benefits the public hopes to realize from the proposed taking." *Franco v. Nat'l*

Capital Revitalization Corp., 930 A.2d 160, 173 (D.C. 2007). This framework appears to contemplate a balancing test:

> If 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. On the other hand, if the record discloses (in the words of the trial court) that the taking will serve "an overriding public purpose" and that the proposed development "will provide substantial benefits to the public," the courts must defer to the judgment of the legislature. Harder cases will lie between these extremes.

Id. at 173–74.

In adopting this test, the court dismissed the notion of inquiring into government actors' subjective intent (an approach allowed by courts in Hawaii and Connecticut) because "there are formidable barriers to discovering the motives and intentions of individual legislators." *Id.* at 173 (footnotes omitted). The court also declined to adopt a test that turned on whether "the identities of the benefiting private parties were known before the taking was authorized," (the position of the Third Circuit), or the existence of a "comprehensive plan for redeveloping the area" (the critical factor for courts in Pennsylvania, Maryland, and Rhode Island). *Id.* at 175. In the court's view, "nothing in *Kelo* suggests" that these factors "set constitutional standards." *Id.*

Under the District of Columbia's approach, the stated purpose of a taking—and whether that stated purpose can be labeled a traditional public use—does not decide the inquiry. Instead, courts must carefully weigh the extent of private and public benefits against each other. In a case like this, where the only benefits to the Iowa public are undisputedly incidental, the taking's validity ought not pass muster.

D. Two courts engage in no pretext analysis at all when a project can be labeled a traditional public use.

Finally, at least two courts, including the court below, hold there is no need to assess a taking's purpose so long as the planned project falls into what the court views as a traditional public use.

In the context of a "multibillion dollar development project" that included a "new stadium for the New Jersey Nets," the United States Court of Appeals for the Second Circuit dismissed allegations of pretext because the project would encompass blighted areas, and "the redevelopment of a blighted area, even standing alone, represents a 'classic example of a taking for a public use.'" *Goldstein v. Pataki*, 516 F.3d 50, 52, 59 (2d Cir. 2008) (quoting *Rosenthal & Rosenthal, Inc. v. N.Y. State Urban Dev. Corp.*, 771 F.2d 44, 46 (2d Cir. 1985)). That stated purpose, the court reasoned, obviated the need for a pretext analysis: "where, as here, a redevelopment plan is justified in reference to several classic public uses whose objective basis is not in doubt," the court's only function was to determine if the state "rationally could have believed that the [taking] would promote its

objective." *Id.* at 63–64 (quoting *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 242 (1984) (emphasis omitted)).

Similarly, in this case, the Supreme Court of Iowa recognized that *Kelo* forbids "the legislature [from] empower[ing] A to take B's home just because A planned to erect something new on the lot," App. 39 n.4, but concluded there was no Takings Clause problem because "this case falls into [one of] the . . . categor[ies] of traditionally valid public uses cited by Justice O'Connor: a common carrier akin to a railroad or a public utility," App. 40. Even though it was undisputed that "no Iowa business or consumer will actually use the pipeline to deliver or receive crude oil," App. 42, the court still found the pipeline served a valid public purpose because of its earlier determination that "the pipeline is a common carrier with the potential to benefit all consumers of petroleum products, including three million Iowans," App. 42.

II. The Supreme Court of Iowa erred in concluding that a "traditional public use" *per se* satisfies the Fifth Amendment without engaging in the "public purpose" analysis mandated by *Kelo*.

A. The Supreme Court of Iowa improperly relied on the formalistic "common carrier" label to ignore the "public purpose" test.

The Court in *Kelo* held that the question of whether a taking is permitted by the Fifth Amendment "turns on the question whether the [taking authority's] development plan serves a 'public purpose.'" 545 U.S.

at 480. While this test "afford[s] legislatures broad latitude in determining what public needs justify the use of the takings power," *id.* at 483, it is not toothless. The Court forbade takings "for the purpose of conferring a private benefit on a particular private party" and takings performed "under the mere pretext of a public purpose, when [the government's] actual purpose was to bestow a private benefit." *Id.* at 478.

Thus, the Court cautioned against a "one-to-one transfer of property" from one private party to another "executed outside the confines of an integrated development plan" and "for the sole reason that [the latter] will put the property to a more productive use and thus pay more taxes." *Id.* at 487. The Court noted that such a taking would constitute an "aberration[]" and an "unusual exercise of government power [that] would certainly raise a suspicion that a private purpose was afoot." *Id.* at 487 & n.17.

Here, the Iowa Supreme Court eschewed the entirety of the *Kelo* majority's public purpose analysis. Indeed, the court purported to disagree with the *Kelo* majority opinion, holding, as other states have done, that "Justice O'Connor's dissent provides a more sound interpretation of the public-use requirement." App. 39. In casting aside the *Kelo* majority, the Iowa court reasoned that "[i]f economic development alone were a valid public use, then instead of building a pipeline, Dakota Access could constitutionally condemn Iowa farmland to build a palatial mansion" so long as it required workers to build it and it resulted in additional tax revenue. *Id.*

But, in purporting to apply the *Kelo* dissent, the court applied no test at all, and consequently fell below the constitutional minimum set by the majority. While the court looked askance at the pipeline's purported "trickle-down benefits of economic development," App. 41, it nevertheless blessed the taking without applying any of the public purpose analysis adopted by the *Kelo* majority. Instead, the court found that the pipeline satisfied the Fifth Amendment because it constituted, in the court's view, a traditional public use: that of a common carrier such as a railroad or public utility. App. 42.

In concluding that a state need not look beyond the mere label of "common carrier" when analyzing the constitutionality of a taking, the court not only misinterpreted Justice O'Connor's dissent, but violated the guidance of the *Kelo* majority opinion.

Kelo requires an analysis of whether the proposed taking serves a public purpose in the community where the taking is performed. 545 U.S. at 484–87. Nothing in *Kelo* permits a state merely to label a taking a "traditional public use" without further analysis. The *Kelo* majority did acknowledge that a state may perform a taking for "future 'use by the public'" such as railroad takings, because railroads are obligated by "common-carrier duties." *Kelo*, 545 U.S. at 477. But such a finding would require an actual "use by the public." As discussed more fully below, the pipeline here cannot be used by any member of the Iowa public—a fact the court below conceded.

Nor did the dissent in *Kelo* bless the formalistic approach taken by the court below. Justice O'Connor

did observe that "the sovereign may transfer private property to private parties, often common carriers, who make the property available for the public's use—such as with a railroad, a public utility, or a stadium." *Id.* at 498 (O'Connor, J. dissenting). But, again, it is conceded here that no public use of the pipeline is possible by members of the Iowa public. And the cases on which Justice O'Connor relied for support make clear that public *use* is the touchstone of any finding that a common carrier may enjoy the benefits of eminent domain. *See Nat'l R.R. Passenger Corp. v. Bos. & Maine Corp.*, 503 U.S. 407, 422 (1992) (holding a federal taking by the Interstate Commerce Commission for a passenger railroad was a "public use"); *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30, 32 (1916) (holding a taking by Tallapoosa county for an electric utility that served the same community was a "public use").

Under either the majority or dissenting opinions in *Kelo*, the Iowa Supreme Court was required to determine whether the pipeline would, in fact, serve a public purpose in Iowa. Because the court chose to ignore the majority opinion and misapplied the dissenting opinion, its holding runs afoul of *Kelo*.

B. The Dakota Access pipeline provides, at most, incidental benefits within Iowa.

The Iowa Supreme Court's failure to engage in the public purpose analysis, opting instead to rely on the formalistic "common carrier" label to bless the taking, obscured the fact that no public purpose will, in fact, be served by the pipeline. The court conceded that "no Iowa business or consumer will actually use the

pipeline to deliver or receive crude oil," but, ironically, the court dismissed Petitioners' objection on this ground as "too formalistic." App. 42. Instead, the court reasoned that the Iowa public would enjoy, as a result of the pipeline, "longer-term, reduced prices on refined products and goods and service dependent on crude oil and refined products." App. 24. This sleight of hand essentially adopts a finding of incidental economic benefits and blesses a taking premised on such meager benefits so long as the taking also benefits an entity that can be labeled a common carrier.

Neither the law nor the record support such a holding. The Iowa Supreme Court should have taken seriously the objection that the pipeline would not serve any public purpose *in Iowa*. Courts, including this Court, have long held that the exercise of eminent domain is circumscribed by the rule that a taking may be performed only for the benefit of the taking authority's community. *See Kohl v. United States*, 91 U.S. 367, 373–74 (1875) ("The proper view of the right of eminent domain seems to be, that it is a right belonging to a sovereignty to take private property for its own public uses, and not for those of another."); *see also Adams v. Greenwich Water Co.*, 83 A.2d 177, 182 (Conn. 1951) ("[N]o state is permitted to exercise or authorize the exercise of the power of eminent domain except for a public use within its own borders."); *Grover Irrigation & Land Co. v. Lovella Ditch, Reservoir & Irrigation Co.*, 21 Wyo. 204 (1913) (holding the exercise of eminent domain must "have some substantial relation to a public purpose and the public interest and welfare of the state wherein the land to be taken is located.").

Indeed, in *Kelo* itself, this Court approved the taking in large part because of the "appreciable benefits to the community" where the taking took place. 545 U.S. at 483.

Nothing in the law prevents, for example, a *federal* taking that benefits the United States as a whole. But Iowa's power to use eminent domain is constrained by the public purposes it may serve within the state's boundaries; its use of eminent domain to benefit private parties for private benefit felt solely in other states does not satisfy *Kelo*'s "public purpose" test, nor the "public use" requirement of the Fifth Amendment.

III. This case presents an ideal vehicle for dispelling this confusion.

This case presents the Court with the opportunity to clarify *Kelo* and settle the longstanding dispute over the level of scrutiny a taking should be afforded where the purported benefits to the public are incidental or pretextual. Because the Iowa court purported to apply a protective approach to property rights, but instead violated every opinion in *Kelo*, this case presents a unique opportunity to course-correct. Absent review, states may continue to apply *Kelo* inconsistently, leading to constitutionally inadequate protection of private property rights.

The danger of the Iowa court's analysis in today's modern economy is palpable. In this case, a wealthy pipeline operator secured a delegation of eminent domain power from the State of Iowa to build a private pipeline across that state. While the State of Iowa has deemed the construction of oil pipelines in the public

interest generally, its constitutional power of eminent domain does not stretch so far as to permit what is, in essence, an interstate common carrier to ship oil under the private property of state landowners without any use or benefit conveyed to the community of that state. This Court should intervene in the widening dispute over the way to apply *Kelo* to make clear that courts following Iowa's approach violate the Fifth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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