No. 19-447

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

REPLY BRIEF FOR THE PETITIONERS

EDUARDO E. SANTACANA
Counsel of Record
JAY RAPAPORT
KEKER, VAN NEST & PETERS LLP
633 Battery Street
San Francisco, CA 94111
(415) 391-5400
esantacana@keker.com

Counsel for Petitioners

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTE

REPLY BRIEF FOR THE PETITIONERS

I. This case squarely implicates an issue on which lower courts have split.

As the Petition shows, although the Court unanimously agreed in *Kelo v. City of New London*, 545 U.S. 469 (2005) that takings require more than pretextual or incidental public purposes, the various opinions in *Kelo* did not provide guidance on what constitutes a pretextual or incidental public purpose, and lower courts are in disarray on the appropriate test. Rather than confront that split in authority, Respondent largely tries to avoid it. To do so, Respondent seeks to frame this case as concerning "whether the Takings Clause allows condemnation of property for a common carrier that supports the market for a commonly used product," while dismissing post-*Kelo* decisions as concerning the "separate question" of "pretext." Brief in Opposition ("BIO") 13. "Pretext," as Respondent defines it, is a matter of "hidden, invalid motive" that is not at issue here. BIO 14–15.

That distinction, however, finds no purchase in *Kelo* itself or the decisions that have sought to interpret it. A majority of the Court in *Kelo* recognized that takings serve no valid public purpose if the public benefits are entirely "incidental" to a private purpose. *See Kelo*, 545 U.S. at 490 (Kennedy, J., concurring); *id.* at 494 (O'Connor, J., dissenting). No opinion in *Kelo* purported to define "pretext" in the sense that Respondent uses the term.

At least one court has thus concluded that if a "property is being transferred to another private party, and the benefits to the public are only 'incidental' ***or*** 'pretextual,' a 'pretext' defense may well succeed." *Franco v. Nat'l Capital Revitalization Corp.*, 930 A.2d 160, 173–74 (D.C. 2007) (emphasis added).

To be sure, other courts have said, as Respondent implies here, that "bad faith" takings do not pass muster under *Kelo*, *see New England Estates, LLC v. Town of Branford*, 988 A.2d 229, 252 n.27 (Conn. 2010), and that courts assessing a taking's purpose must "look beyond government findings and declarations," *Cty. of Hawaii v. C & J Coupe Family Ltd. P'ship*, 242 P.3d 1136, 1148 (Haw. 2010). But that is only one of several ways in which lower courts have interpreted *Kelo*. And these approaches not only differ from one another, but also, in most instances, from that of the court below. Courts have looked, variously, at motive, planning-related factors, and the balance of public versus private benefits. Where courts have looked at these factors, their analyses have focused on issues *other* than whether the public use might be called "traditional." *See generally* Pet. 10–15.

The Supreme Court of Iowa took another path entirely. When the court found the purpose of the proposed taking valid, it rejected Petitioners' argument that "no Iowa business or consumer will actually use the pipeline to deliver or receive crude oil" as "too formalistic." Pet. App. 42. In so holding, the court—like the Second Circuit—necessarily found that applying the label of a traditional public use obviated any potential concerns about a stated public purpose.

Pet. 15–16. The implications of that ruling are breathtaking when one considers just how expansive the concept of a "traditional public use" has become. *See Goldstein v. Pataki*, 516 F.3d 50, 52, 59 (2d Cir. 2008) ("multibillion dollar development project" including stadium for professional sports team encompassed some "blighted area[s]" and thus "represent[ed] a 'classic example of a taking for a public use'") (quoting *Rosenthal & Rosenthal, Inc. v. N.Y. State Urban Dev. Corp.*, 771 F.2d 44, 46 (2d Cir. 1985)). But regardless of merit, that approach differs radically from how other courts have approached the issue of public purpose under *Kelo*.

To the extent Respondent acknowledges the existence of a split in authority, its scattered attempts to diminish the depth of that split are unpersuasive. Take, for example, Respondent's suggestion that some cases that examined objective, planning-related factors are "inapposite" here. BIO 16. That is not entirely true: as Respondent notes, the "Iowa [Utilities] Board knew [Respondent's] identity at the time of its decision," BIO 17, and at least one court has suggested that such knowledge is a necessary precondition to challenging a taking's public purpose, *see Carole Media LLC v. N.J. Transit Corp.*, 550 F.3d 302, 311 (3d Cir. 2008) ("Indeed, this case cannot be the textbook private taking involving a naked transfer of property from private party *A* to *B* solely for *B's* private use and benefit because there is no allegation that NJ Transit, at the time it terminated Carole Media's existing licenses, knew the identity of the successful bidder for the long-term licenses at those locations."). But even ignoring whether any particular objective-planning

factor is or is not present here, this Court's guidance on whether such factors control (or at least influence) the analysis required by *Kelo* is much-needed and may be outcome-determinative.

Similarly, Respondent gains no traction with its straw-man argument that no "case[] adopt[s] the rule that a taking must always be supported by a comprehensive development plan like the one at issue in *Kelo*." BIO 17 (quoting Pet. 11) (internal marks omitted). Petitioners have never suggested otherwise, but instead noted—correctly—that multiple courts read *Kelo* to treat the extent and nature of pre-taking planning as critical. *See* Pet. 11–13. Here, too, the Court's guidance on whether and how much weight that factor gets is warranted, even if "there is no dispute" that the Iowa Utilities Board held extensive hearings. BIO 17.

By contrast, Respondent's assertion that no case "contemplates any further scrutiny where, as here, the defendant's *actual motive* is a traditional public use" is entirely circular. BIO 17 (emphasis in original). The problem is *how* to make the determination that a particular taking is, in fact, motivated by a "traditional public use." And not all courts agree that simply applying the label of a traditional public use suffices. *See Cty. of Hawaii*, 242 P.3d at 1152 (even in "considering a condemnation action for the purpose of constructing a public road, there is no mechanical formula for determining public use") (quoting *Cty. of Hawaii v. C & J Coupe Family Ltd. P'ship*, 198 P.3d 615, 643 n.32 (Haw. 2008)). Indeed, the vast majority

of cases look to factors other than a proposed use's label to guide the public-purpose inquiry. *See* Pet. 10–15.

Finally, Respondent's argument that there is no conflict over whether "incidental" public benefits satisfy the public-purpose test lacks merit. BIO 18. *Franco* holds that

> a reviewing court must focus primarily on benefits the public hopes to realize from the proposed taking. 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.

Franco, 930 A.2d 160 at 173–74. That is the language of balancing competing interests, and stands in stark contrast to not just other decisions, but the formalistic approach of Supreme Court of Iowa. That split in authority warrants this Court's attention.

II. The Supreme Court of Iowa violated both *Kelo* and the *Kelo* dissent.

A. Respondent's common-carrier logic would stretch the Fifth Amendment to the breaking point.

The parties agree that all nine Justices in *Kelo* subscribed to the rule that a state may use eminent domain to benefit a traditional common carrier. But Respondent makes the same mistake the Supreme Court of Iowa made by relying solely on the *status* of the Dakota Access pipeline as a "common carrier" without inquiring as to whether the pipeline would serve the public of Iowa.

Kelo acknowledged 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." 545 U.S. at 477. But the *sine qua non* of such a rule is public *use by the public*. Pet. 18–19. A private party using eminent domain to transport its goods across state lines without permitting any member of that state to enjoy them necessarily cannot satisfy that test. If it could, any private enterprise could take advantage of eminent domain to ship its goods across the country—via private roads, private rail networks, private pipelines, and other private means of transport—without regard for the public uses or benefits to be enjoyed (or detriments suffered) in the states through which the goods pass. Nothing in *Kelo* or in any case cited by Respondent could be read to grant states (and the private businesses to which they delegate eminent-domain power) such sweeping dominion over private property.

Respondent blithely suggest that it is perfectly normal for a state to take private property for "public use" but never permit any member of the public to actually use it. *See* BIO 20. That is at odds with longstanding precedent, including the precedent of this Court, *see Kohl v. United States*, 91 U.S. 367, 373–74 (1875), which observes that eminent domain "is a right belonging to a sovereignty to take private property for its ***own*** public uses, and not for those of another" (emphasis added). Courts have long understood that a taking 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***." *Grover Irrigation & Land Co. v. Lovella Ditch, Reservoir & Irrigation Co.*, 131 P. 43, 53–54 (Wyo. 1913) (emphasis added). "This thought runs through all the cases discussing the question of public use, or a use permitting or justifying the taking of private property by eminent domain." *Id.*; *cf. also In re Opinion of the Justices*, 190 A. 425, 429 (N.H. 1937) (interpreting state constitution, holding state could not employ eminent domain to transfer land to electric utilities for the purpose of supplying electricity to another state because "[i]n such transmission beyond the state," the utilities "are serving no public purpose, but are engaged in private industry").

Adhering to this well-settled rule is not, as Respondent seeks to make it, an attempt to require use by the "general public" as a precondition for eminent domain, and it certainly does not require "overrul[ing] decades of precedent and part[ing] from the reasoning of all nine *Kelo* justices." BIO 20–21. The pipeline here cannot be used by Iowans *whatsoever*. This sets the

taking at issue apart not just from *Kelo*, but from the raft of pipeline cases cited by Respondent. In each of those cases, the pipelines served the people of the state in which the takings were performed.[1] As noted above, where a utility fails to serve the public of the state performing the taking, the use of eminent domain is held unconstitutional. To hold otherwise would run afoul of *Kelo*'s prohibition on takings "for the purpose of conferring a private benefit on a particular private party." 545 U.S. at 477–478.

The Supreme Court of Iowa, however, did just that. Its labeling of the Dakota Access pipeline as a common carrier was the beginning and end of its analysis, and it rejected the argument that a pipeline that runs through Iowa without stopping is not the type of traditional common carrier contemplated by this Court's precedent. Respondent cites no case holding otherwise.

---

[1] *See Ohio Oil Co. v. Fowler*, 100 So. 2d 128, 129 (Miss. 1958) (intrastate pipeline); *Peck Iron & Metal Co. v. Colonial Pipeline Co.*, 146 S.E.2d 169, 170 (Va. 1966) (same); *Ralph Loyd Martin Revocable Tr. Declaration Dated First Day of Apr. 1994 v. Ark. Midstream Gas Servs. Corp.*, 377 S.W.3d 251, 255 (Ark. 2010) (same); *Crawford Family Farm P'ship v. TransCanada Keystone Pipeline L.P.*, 409 S.W.3d 908, 911 (Tex. App. 2013) (pipeline terminated in Texas); *EQT Gathering, LLC v. A Tract of Prop. Situated in Knott Cty., Ky.*, 970 F. Supp. 2d 655, 663 (E.D. Ky. 2013) (reaffirming "the uncontroversial proposition that property cannot be constitutionally condemned unless it will be put to a public use"); *Sunoco Pipeline L.P. v. Teter*, 63 N.E.3d 160 (Ohio Ct. App. 2016) (gas pipeline's origin was in Ohio).

B. Respondent mischaracterizes the Supreme Court of Iowa's discussion of other purported public benefits.

To be sure, a "traditional public use" is not the only avenue to approve of eminent domain; public purposes with non-incidental public benefits, such as those in *Kelo*, suffice as well. But the Supreme Court of Iowa refused to approve of this pipeline on such grounds, and for good reason.

To justify the undisputedly incidental benefits to Iowans of the pipeline here, Respondent engages in a lengthy exegesis of Justice Kennedy's jurisprudence to lower the public-purpose bar. Respondent argues that Justice Kennedy's rejection of takings with "incidental" public benefit is just another way of referring to improper motivation. BIO 21–22. But Justice Kennedy in *Kelo* warned against takings "with only incidental ***or*** pretextual public benefits," 545 U.S. at 490 (emphasis added)—which indicates he understood "incidental" to refer to the magnitude of public benefits. In any case, even if, as Respondent speculates, Justice Kennedy "long used the word 'incidental' to distinguish unintended benefits from those that motivated a policy," it simply does not follow that he found totally incidental benefits to the public sufficient to justify a taking. BIO 21–22. To the contrary, the foundation of the decision in *Kelo* is the rule that a taking must "serve[] a 'public purpose.'" 545 U.S. at 480.

Neither of the two purported benefits of the pipeline identified by Respondent—reduced price of petroleum products and safer transportation of oil, BIO 25—meet that standard. As to price, if Respondent's argument

were taken to its logical conclusion, *all* economic activity that may result in lower international prices in goods enjoyed by the state would meet the eminent-domain standard. Nothing in *Kelo* could be read to stretch the Fifth Amendment so far. *Cf. Grover*, 21 Wyo. at 204 ("The irrigation of land in a neighboring state, and so also the building of a railroad in that state . . . may no doubt result in some benefit to the people of this state, but only in the general way that one state is benefited by the growth in industrial activities, population, and wealth of an adjoining state . . . . To accept that, however, as a sufficient reason for taking land in this state under the power of eminent domain . . . would abandon the principle upon which the right to exercise the power for irrigation and other analogous purposes has been asserted and maintained.").

Finally, Respondents argue the public benefit of condemning land in Iowa to operate its pipeline is that its former method of shipping oil would be less likely to harm Iowans through oil spills and other accidents. BIO 22–23. Nowhere in the Iowa court's decision did the court bless such an argument. No authority supports the argument that a private entity can choose to engage in activity that endangers a state's citizens and then seek to use eminent domain on the grounds that the "public purpose" served will be that the entity will place the state's residents at less risk. Setting one's house on fire and then touting the public benefits of supplying the water to put it out should earn no points in this Court's constitutional math.

III. Respondents' claims that this case is otherwise a poor vehicle lack merit.

Respondent's remaining arguments are unconvincing.

First, Respondent is wrong to suggest that this case presents no federal question because the Supreme Court of Iowa purported to follow the *Kelo* dissent—as testified by the pages and pages Respondent devotes to addressing questions of federal law in its brief. BIO 26–27. Regardless of what the majority below purported to do, the effect of its ruling was to disregard *Kelo*'s requirement that courts verify takings serve a public purpose. State courts cannot evade this Court's precedents merely by giving lip service to them.

Second, nothing in Petitioners' argument "would require the [C]ourt to overturn *Kelo* and turn back decades of precedent" by imposing a general use-by-the-public test. BIO 27. As Petitioners have made clear, the problem with the taking here is that *no* member of the Iowa public can use it. *Kelo* did not deal with such a situation, and longstanding precedent treats such takings as improper. *Kohl*, 91 U.S. at 373–74.

Third, there is no "jurisdictional uncertainty" in the form of potential mootness. BIO 27–29. "A case becomes moot only when it is impossible for a court to grant 'any effectual relief whatever' to the prevailing party." *Knox v. Serv. Employees Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) (quoting *Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000). That is not the case here. As the Supreme Court of Iowa recognized, even

though the pipeline has been built, "a decision in this case would [not] lack force or effect" because "[a]lthough dismantling of the pipeline would not be feasible, the [Iowa Utilities Board] still has the authority to impose other 'terms, conditions, and restrictions' to implement a ruling favorable to petitioners." Pet. App. 21 (quoting Iowa Code § 479B.9). It takes no imagination to envision terms or conditions that could be imposed on remand that would at least mitigate the injury Petitioners are suffering—such as, for example, a requirement that Respondent pay trespass damages if it wishes to continue enjoying the privilege of using Petitioners' property. *See* Pet. App. 19. In any event, even if mootness is a question of federal law, *see* BIO 28, the "ultimate expositor[]" of Iowa law has concluded that Iowa law provides an effective remedy, and this Court must abide by that interpretation, *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

EDUARDO E. SANTACANA
Counsel of Record
JAY RAPAPORT
KEKER, VAN NEST & PETERS LLP
633 Battery Street
San Francisco, CA 94111
(415) 391-5400
esantacana@keker.com
Counsel for Petitioners