No. 19-607

In The
Supreme Court of the United States

WOODCREST HOMES, INC.,

Petitioner,

v.

CAROUSEL FARMS METROPOLITAN DISTRICT,

Respondent.

On Petition for a Writ of Certiorari to the Colorado Supreme Court

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

Respondent argues that the federal question in this case was not preserved, but Respondent acknowledges that Petitioner repeatedly invoked the U.S. Constitution and that the Colorado Supreme Court explicitly rejected Petitioner's argument. Moreover, Respondent ignores that Colorado interprets its relevant constitutional provision in lock-step with the U.S. Constitution; accordingly, there was no reason for either the Petitioner or the Colorado Supreme Court to analyze the U.S. Constitution separately. And Respondent does not even attempt to argue that the opinion below clearly states that it rests on state law grounds. The question is cleanly presented, and this Court's jurisdiction is clear.

Respondent also argues that there is no split of authority regarding how to interpret *Kelo*, but that is because Respondent has inexplicably chosen to ignore one half of the split outlined in the Petition. Rather than attempting to explain how the cases Petitioner cited are actually in harmony, Respondent simply chose not to cite any inconvenient cases. That is an implicit concession that the split is real.

ARGUMENT

A. This Court has jurisdiction.

1. Respondent claims that by "invok[ing] the Fifth Amendment only twice," Petitioner has failed to preserve its federal claim. Resp. Br. 13. This Court's jurisdiction, however, is not like the ghost Beetlejuice,

materializing only when invoked three times. See *Beetlejuice* (Warner Bros. Pictures 1988). All that is necessary to preserve a federal claim is "citing in conjunction with the claim the federal source of law * * * or a case deciding such a claim on federal grounds." *Howell* v. *Mississippi*, 543 U.S. 440, 444 (2005). And Petitioner did more than that. After it won in the Colorado Court of Appeals, which found that the taking in this case was not for a public use, it defended its lower-court victory in the Colorado Supreme Court with multiple citations to *Kelo* and explicit adoption of arguments made at greater length in an amicus brief.[1] That is more than enough to invoke the U.S. Constitution and is sufficient to confer jurisdiction.

The primary reason to reject Respondent's waiver argument is that the Colorado Supreme Court already has: Respondent expressly urged that court to find that Petitioner's federal arguments had been procedurally waived. But the Colorado Supreme Court did not do so. Having failed below, Respondent now invites this Court to find a waiver under Colorado law in the first instance. Resp. Br. 16–17 (arguing that under Colorado law, arguments not made below, boilerplate arguments and arguments advanced by amici are waived). That invitation should be rejected. This Court requires a "clear[] and express[]" finding of waiver in state court before it will find a federal claim foreclosed, and it

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[1] In Colorado, as in most jurisdictions, a party can defend a lower-court victory on any ground supported by the record as long as it does not seek to expand its rights under the judgment. *E.g.*, *Farmers Group, Inc.* v. *Williams*, 805 P.2d 419, 428 (Colo. 1991).

therefore has no obligation to find a state-law waiver that the state courts have not themselves identified. See *Harris* v. *Reed*, 489 U.S. 255, 266 (1989).

In any event, the Colorado Supreme Court not only refused to find the federal claim was waived, it explicitly addressed it. The opinion below expressly holds that "*Kelo* doesn't change any of this," under a bold heading that reads, "*Kelo* [d]oesn't [d]ictate a [d]ifferent [r]esult." App. 24–25.[2]

Respondent complains this express rejection of the Petitioner's federal claim cannot support this Court's jurisdiction because it does not reflect the state court's "considered judgment." Resp. Br. 19 (citing *Illinois* v. *Gates*, 462 U.S. 213, 223 (1983)).[3] To be sure, the Colorado Supreme Court's analysis is brief (and, as discussed below, wrong), but that is not relevant to this Court's jurisdiction. State court judgments are not insulated from review because they reject a federal claim

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[2] The intermediate court of appeals likewise explicitly discussed the Fifth Amendment. App. 37 (citing *Thompson* v. *Consol. Gas Utils. Corp.*, 300 U.S. 55, 80 (1937) ("implicit in the Fifth Amendment is a requirement that a governmental taking must be for a public, not private, purpose")).

[3] *Illinois* v. *Gates* was a case in which this Court, *sua sponte*, asked the parties to brief whether the relevant Fourth Amendment rule should be changed. After briefing, this Court concluded that it should not confront the question because no party had ever argued that the controlling rule should be changed and because the courts below had applied the existing rule without questioning its propriety. 462 U.S. at 217. The case does not stand for the proposition that this Court should decline to review federal issues because a state court's discussion of the issue was not long enough.

in a couple of breezy sentences rather than after pages of scholarly analysis. To the contrary, this Court has recognized that when state courts do not take federal claims seriously, that "is all the more reason for this Court to assert jurisdiction." *Nitro-Lift Techs., L.L.C.* v. *Howard*, 568 U.S. 17, 20 (2012).

2. Respondent's complaints about the brevity of federal analysis below is misplaced for another reason: At least with regard to the question at issue in this case, Colorado interprets its public-use clause in lock-step with the federal clause. Respondent's brief is premised on the idea that the public-use requirements of the Colorado and U.S. Constitutions are entirely distinct, such that any argument or analysis of one constitution has no bearing on the other. But Colorado "has interpreted the Colorado takings clause as consistent with the federal clause." *Animas Valley Sand and Gravel, Inc.* v. *Board of Cty. Comm'rs of Cty. of La Plata*, 38 P.3d 59, 64 (Colo. 2001).[4] Accordingly, Respondent's complaints that Petitioner only invoked the Fifth Amendment twice and that the Colorado Supreme Court did not give the federal constitution enough "considered judgment" does not make much sense. As a matter of Colorado law, there is no

[4] In some contexts Colorado has interpreted its Takings Clause as more protective than the Fifth Amendment, see *Public Service Co. of Colorado* v. *Van Wyk*, 27 P.3d 377, 388 (Colo. 2001), and Colorado courts have also recognized that when reviewing public-use determinations, Colorado courts should not defer to legislative determinations of public use. See *Larson* v. *Chase Pipe Line Co.*, 514 P.2d 1316, 1317 (Colo. 1973). These distinctions between Colorado and federal law are not relevant to this case.

difference between a federal public-use argument and a state public-use argument, and so there was no reason below for Petitioner's briefs to distinguish between the two once it had invoked both.

There can be no question that this case has always been about whether the taking at issue is for a public or private purpose. The Colorado Supreme Court discussed the question extensively, see App. 13–21, and any argument by the parties or analysis by the Colorado courts about that question applies equally to both constitutions. Accordingly, there has been no lack of "thorough lower court opinions," or "concrete adverseness." Resp. Br. 20–21.

Indeed, in cases such as this, where a state interprets its own constitution in lock-step with the U.S. Constitution, this Court has hinted that it may not even be necessary for a litigant to identify a claim as federal in order to preserve it. See *Howell* v. *Mississippi*, 543 U.S. 440, 444 (2005). There can be little question, therefore, that where the constitutional provisions are coextensive and both the Petitioner and the court explicitly invoked federal law, the question is properly before this Court.

3. Even if the decision below had been less clear that it was addressing Petitioner's federal claim, this Court would nonetheless be entitled to presume jurisdiction. When a state court decision appears "interwoven with federal law," *Michigan* v. *Long*, 463 U.S. 1032, 1040 (1983), this Court will presume federal jurisdiction unless there is a "plain statement" to the contrary.

Id. at 1044. There is no such "plain statement" in the decision below. Thus, even if there were some ambiguity regarding whether the Colorado Supreme Court's decision was based on state or federal law, that ambiguity would have to be resolved in favor of federal jurisdiction.

Indeed, the reasons for applying this presumption are significantly more compelling in this case than in *Long* itself. In *Long*, this Court was concerned that a state court may have erroneously overprotected individual rights, beyond what the U.S. Constitution requires. Here, by contrast, Respondent is suggesting that Colorado may have interpreted its own constitution as providing *less* protection than the U.S. Constitution—a holding that would be academic in any case (such as this one) where the property owner explicitly invoked federal law. If this Court requires a clear statement before assuming that a state means to provide more protection for individual rights, then it should certainly require such a statement before assuming that a state means to provide less. See *Kansas* v. *Carr*, 136 S. Ct. 633, 647 (2016) (Sotomayor, J., dissenting) (arguing that *Michigan* v. *Long* should not be applied to prevent states from "overprotect[ing] its citizens"); *Harris* v. *Reed*, 489 U.S. 255, 267 (1989) (Stevens, J., concurring) (agreeing with the application of *Michigan* v. *Long* only because this was a case in which the presumption favored individual rights).

B. Respondent misstates the legal issue.

Respondent suggests that the decision below conflicts neither with this Court's decision in *Kelo* v. *City of New London*, 545 U.S. 469 (2005), nor with the decision of any other state court of last resort. On Respondent's view, the only inquiry required by this or any other court is whether the condemnor's asserted use is sincere—that is, "whether the land will be used as claimed." Resp. Br. at 24 (quoting App. 16). This inquiry, says Respondent, is consistent with *Kelo*, (Resp. Br. at 24–26), consistent with the decisions of the high courts of other states, (Resp. Br. 28–30), and is, in any event, a fact-bound inquiry unworthy of this Court's review. Resp. Br. 26–27.

None of this is correct. The premise of Respondent's argument is that what matters is whether it sincerely intended to use the condemned property for the stated use—so long as the stated public use is sincere rather than "a post-hoc public-use justification," a taking passes constitutional muster. Resp. Br. 26 (quotation marks omitted). That is certainly the law in Colorado, but as demonstrated in the Petition, that is not the law this Court articulated in *Kelo*, and it is not the law in at least six states.

First, in *Kelo*, this Court stressed that the Fifth Amendment forbids government "from taking [private property] for the purpose of conferring a private benefit on a particular private party." 545 U.S. at 477. In other words, the question is not (as Respondent would have it) simply whether a condemnor's purpose is

actually to build the thing it says it wants to build. The question is whether the condemnor is building that thing *for the purpose of benefitting a private party*. And if that is the test, the Colorado Supreme Court erred here by holding that it makes no difference that Respondent was created for the sole purpose of condemning land that a private developer needed in order to fulfill its agreement with a nearby town. See Pet. 8–10. Respondent simply ignores that part of *Kelo*.

Second, Respondent similarly ignores the jurisdictions that have taken that part of *Kelo* seriously. While Respondent claims that the split of authority identified in the Petition is "illusory" (Resp. Br. 28), its brief achieves the sense of illusion only by literally ignoring one side of the asserted split.

As explained at length in the Petition, many jurisdictions look not just to *what* a condemnor is doing, but to *why*—and courts in those jurisdictions reject takings that are sincerely in pursuit of apparent public uses but that are pursuing them at the behest of or for the benefit of private interests. In *County of Hawaii* v. *C & J Coupe Family Ltd.*, for example, the Hawaii Supreme Court did not question whether the County sincerely intended the land it took to be used for a road. 198 P.3d 615, 620 (Haw. 2008). It reversed the lower court's decision upholding the taking, however, because it believed Hawaii courts had a duty under *Kelo* "to look behind an eminent domain plaintiff's asserted public purpose under certain circumstances." *Id.* at 638. Because (as here) there was reason to believe that the land was being taken primarily in order to facilitate a

private developer's soon-to-be-constructed development, the Hawaii Supreme Court remanded the case for consideration of whether "the decision to condemn the subject property for the construction of a public bypass road was a mere pretext for its actual purpose to bestow a private benefit on" the developer who needed the road for its development. *Id.* at 649. The Petition discusses *C & J Coupe* at length. Pet. 16–17. The Brief in Opposition omits it entirely.

So, too, with other jurisdictions that have held that an inquiry into the purpose of a taking extends beyond whether the property will actually be put to its asserted use. In *Rhode Island Economic Development Corporation* v. *The Parking Company, LP*, the Rhode Island Supreme Court did not dispute that the condemned property would actually be used for government-owned public parking—but it nonetheless rejected the taking because its *true purpose* was to extinguish a disadvantageous lease agreement. 892 A.2d 87, 105 (R.I. 2006). Similarly, in *Middletown Township* v. *Lands of Stone*, the Supreme Court of Pennsylvania rejected a condemnation in which the town planned to use the condemned land as a public park because it found the "true purpose" of the taking was to stymie the land's development. 939 A.2d 331, 338 (Pa. 2007). The same analysis would apply here, where the condemnation is concededly aimed at taking land to be used for utilities and other uses incident to a private development, but where the true purpose of the taking is quite plainly to benefit the private corporation that created and controls Respondent.

Respondent does not explain why these cases do not amount to a split of authority. Indeed, *it does not cite any of them*. Instead, it says no split exists and tries to prove this by citing only one side of the split. This is easily seen: The Petition breaks down the asserted split of authority in a two-column chart. Pet. 15. The brief in opposition cites every case in the right-hand column of that chart and none of the cases in the left-hand column. Compare Pet. 15 with Resp. Br. 28–30. To be sure, if one ignores all of the cases going in the other direction, Respondent is right that the split of authority appears to be "illusory." Resp. Br. 28. But the other cases exist, and Respondent apparently has no answer for them.

Third, and finally, nothing in this case turns on any factual dispute. The parties agree that "Century * * * had always planned to use Parcel C for road, water, and sewer improvements." And Respondent does not dispute that, while it is nominally a "public entity," (Resp. Br. 27), it is a public entity that was created by, controlled by, and answerable solely to a single private company that created it for the purpose of exercising eminent domain in furtherance of its own business interests. In Colorado, that second fact does not matter. App. 15–16. But in many other jurisdictions—jurisdictions ignored by Respondent—it would. That legal dispute should be resolved by this Court.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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