No. _____

IN THE SUPREME COURT OF THE UNITED STATES

BERNARD MORELLO and
WHITE LION HOLDINGS, L.L.C.

*Applicants,*

v.

SEAWAY CRUDE PIPELINE COMPANY, LLC,

*Respondent.*

Unopposed Application for Extension of Time to File
a Petition for A Writ of Certiorari to the Supreme Court of Texas

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## CORPORATE DISCLOSURE STATEMENT

WHITE LION HOLDINGS, L.L.C. has no parent corporation, and no publicly held company owns 10% or more of its stock.

## APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

To the Honorable Samuel Alito, Associate Justice of the United States Supreme Court and Circuit Justice for the Fifth Circuit:

1. Nature of the case below: Applicants own a large, valuable piece of property that has been held as an investment for future development. Applicants negotiated a 15-year tax abatement with local taxing authorities to keep the land taxed at agricultural valuation, rather than industrial/commercial, but allowed for termination upon application for permits by Applicant at any time. Although this land is already encumbered by a prior 1975 pipeline easement contract between Applicants and Respondent Seaway, was negotiated between the parties and subject to the condition that Respondent Seaway relocate the pipeline, either by changing the route or burying it deeper, when the land became ripe for commercial development. Over the past few years, Applicants' and neighboring lands have become viable for development and Respondent's potential liability under that contract became more significant. Respondent circumvented the strictures of the 1975 private easement through use of the power of eminent domain to obtain a new easement. To reduce the damage award due, Respondent used the tax abatement agreement which valued the land as agricultural and it argued that, due to the 15 year term of the abatement agreement, the property was agricultural at the time of the taking, that Applicants were barred from developing their land for 15 years, and therefore there could be no remainder damages.

On summary judgment following, Applicants challenged the determination by Respondent to take the particular parcel as a pretext, made in bad faith without a public meeting and with the designation of land to be taken delegated to independent contractors. Applicants also provided evidence of Respondents' prior easement contract with Applicants, and provided damage evidence on the cost to cure, the latter which was considerably higher than Respondents' tender in the court registry. The case pended for three years and when Respondent missed the deadline for designating its expert witnesses, sought to strike Applicants' experts and, simultaneously, offered to absorb the costs to cure as established by the Applicants' experts, but with financial and regulatory conditions attached that were impossible to achieve. Specifically, that Applicants be required to provide viable development plans, permits, proof of funding on which Respondent would solely determine as suitable before it would lower its pipeline to accommodate any development.

The trial court struck Applicants' experts proffered testimony as speculative because the court construed the tax abatement agreement as a 15 year bar to development, it found that Respondent's pleading amendment was a practical approach to handling the parties dispute, it entered judgment in favor of Respondent which included the financial and regulatory terms upon which it conditioned the

lower damage award to Applicants and refused to award Applicants' requested attorneys' fees. The court of appeals affirmed the trial court judgment and the Texas Supreme Court denied Applicants' petition for review and motion for rehearing.

2. Issues for Presentation. Pursuant to Supreme Court Rule 13.5, Applicants Bernard Morello and White Lion Holdings, LLC respectfully request a 60-day extension of time, until May 12, 2019, within which to file a petition for a writ of certiorari. The Supreme Court of Texas denied Applicants' petition for review of the published opinion of the lower court of appeals on May 31, 2019 and on July 17, 2019 Applicants filed a motion for rehearing for which on September 17, 2019, the high state court asked for a response. Respondent filed its response on November 22, 2019 and on November 26, 2019, the high court requested the court of appeals record. Ultimately, on December 13, 2019, the state Supreme Court denied Applicants' motion for rehearing. The opinion, a copy of which is attached, App., 1 on which the Supreme Court denied petition for review of same attached as App. 2. The opinion is reported at 585 S.W.3d 1 (Tex. App.—Houston [1st Dist.] 2018, pet. denied). This Court's jurisdiction would be invoked under 28 U.S.C. § 1257(a).

2. Absent an extension, a petition for a writ of certiorari would be due March 12, 2020. This application is being filed more than 10 days in advance of that date, and no prior application has been made in this case.

3. This appeal concerns a decision by the Supreme Court of Texas concerning an important federal question that stands in conflict with the decisions of other state courts of last resort, and federal court precedent that highest just compensation is a fact issue, requiring consideration of damages to the remainder and which presents an important question of federal law that has not been, but should be, settled by this Court.

4. Applicants seek review of the decision of the Supreme Court of Texas and lower appellate court concerning whether the state can delegate its power of eminent domain to a private pipeline, allowing it to obtain rights-of-way to transport crude oil through Texas in order to tie in a "public purpose/public use" as announced by this Court in *Kelo.* While purporting to follow the dissenting opinion from this Court's decision in *Kelo v. City of New London* , 454 U.S. 469 (2005), the Texas Supreme Court's decision to let stand the lower appellate court's analysis violated the Fifth Amendment's "public use" requirement as interpreted by all nine justices in *Kelo* because it mischaracterized the proposed pipeline as a common carrier and blessed a pretextual public purpose.

5. The state held that the exercise of eminent domain did not violate the Takings Clause of the Fifth Amendment to the U.S. Constitution by reasoning that the private pipeline qualified as a common carrier, rendering the taking for a "public necessity" solely within the condemnor's discretion. App. at *13-14. It is well-known

in Texas that the "common carrier pipeline industry currently has no regulatory oversight on the power to condemn." Nick Laurnet, *Texas Advanced Oil, Gas & Energy Resources Law, II. Denbury Green*, 2016, at 2-3. Thus, to exercise the power to condemn private property, a private, for-profit pipeline company purporting to be a common carrier must only make an internal determination that public convenience and necessity require that private property be taken. *See, e.g., Anderson v. Teco Pipeline Co.,* 985 S.W.2d 559, 565-66 (Tex. App.—San Antonio 1998, pet. denied) ("Therefore, once a company establishes that its right to condemn is derived from these articles and that its board of directors determined that the taking was necessary, a court should approve the taking unless the landowner demonstrates fraud, bad faith, abuse of discretion, or arbitrary and capricious action."). This determination is made exclusively by the pipeline company and is typically made by the company's board of directors in a private, non-public meeting, if they even hold a meeting at all. Laurnet, at 2-3. Once pipeline companies decide to condemn, they can move extremely fast in taking the property, sometimes in as little as sixty-four days.[1] Further, in the case at bar, neither the trial court nor appeals court considered as significant that the determination of the location and amount of land, as well as depth of entrenchment of the pipeline was actually made by the private board of directors but was delegated to a private contractor.

6. Under present practice in Texas and most other states, a landowner's only challenge to a pipeline company's determination of the route of the pipeline and what other property rights will be taken is limited to showing the determination was "made in bad faith or was arbitrary, capricious, or fraudulent"--an obviously onerous burden. *See Anderson v. Clajon Gas Co.,* 677 S.W.2d 702, 705 (Tex. App.—Houston [1st Dist.] 1984, no writ). Additionally, when the controversy involves the amount of damages, the landowner must have the financial wherewithal to obtain representation to fight against the pipeline business. As of now, because of the state court's holding in this case, landowners are only entitled to attorney's fees when the condemnors change only the amount of the land taken but not when a condemnor materially changes the compensation facts or places, (here, by the filing of an amended petition), various financial and regulatory terms upon a landowners' remaining use of the land taken. Yet, in *Mayor and City Council of Baltimore v. Valsamaki*, 397 Md. 222, 916 a.2d 324 (Md. App. 2007) that court held when quick take condemnation is sought, courts should seriously consider whether the condemnor is using the power merely to gain a procedural advantage.

7. Additionally, both the state high court and lower appellate court upheld without constitutional significance that a self-declared common carrier pipeline may

[1] The pipeline company's ability to quick-take, without any involvement from the affected landowner at all is unique to Texas, "as most other condemning authorities must go through a lengthy process with public involvement almost every step of the way." *Id.*

use eminent domain in order to escape the consequences of its own prior contract with a condemnee. When confronted with this situation, the state courts said, essentially, "so what?" A desire to save money, is not illegal. What the courts failed to appreciate, however, is there is a fundamental difference between (1) a condemnor choosing to condemn a particular easement because constructing a pipeline on that land will be cheaper, and (2) a condemnor choosing to condemn a particular easement because doing so will allow it to escape the costly obligations of a contract that it had previously negotiated with the landowner. The latter is illegal. Respondent used the power of eminent domain to obtain a new easement unburdened by the responsibilities it undertook in the 1975 contract.

8. The illegality of the taking in this case is bolstered by the additional constitutional provision: the Contract Clause, which prohibits states from "impairing the Obligation of Contracts." Although this Supreme Court has, in the last 100 years, departed from the original understanding of the Contract Clause, there is one circumstance where the Clause retains full force—when the state is trying to escape its own deals. The Contract Clause underscores the illegitimacy of using government power to advance narrow, private objectives.

10. This Court cautioned in *Kelo* that "transferring citizen A' 's property to citizen B for the sole reason that citizen B will put the property to a more productive use" would constitute an "unusual exercise of government power" and an "aberration[]" that was not presented by that case. 545 U.S. at 486–87 & n.17. The majority explained that eminent domain cannot be exercised "under the mere pretext of a public purpose," *Id.* at 478, and Justice Kennedy's concurrence, which supplied the crucial fifth vote, emphasized that the Fifth Amendment prohibits the transfer of private property from one private party to another for only "incidental or pretextual public benefits," *Id.* at 490 (Kennedy, J. concurring). This appeal presents an opportunity for this Court to clarify *Kelo* regarding the prohibition on states performing pretextual takings with only incidental public benefits. State courts of last resort have developed inconsistent tests for evaluating an allegedly pretextual taking, generating considerable confusion and creating an urgent need for this Court to further elucidate the "public use" requirement of the Takings Clause.[2]

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[2] *See, e.g.,* Ilya Somin, *The Judicial Reaction to* Kelo , 4 Alb. Gov't L. Rev. 1, 3 (2011) ("[S]tate courts have been all over the map in their efforts to apply *Kelo's* restrictions on 'pretextual' takings"); *Cty. of Hawaii v. C & J Coupe Family Ltd. P'ship* , 119 Haw. 352, 384 (2008) (applying a "predominantly private benefit" test); *Franco v. Nat' l Capital Revitalization Corp.* , 930 A.2d 160, 173 (D.C. 2007) (testing for pretext by comparing public and private benefits); *Middletown Twp. v. Lands of Stone* , 939 A.2d 331, 337 (2007) (focusing on "the real or fundamental purpose" of the taking); *Mayor & City Council of Baltimore City v. Valsamaki* , 916 A.2d 324, 352 (2007) (focusing on whether the government exercised eminent domain according to an established development plan).

12. Applicants' Bases for Additional Time: The undersigned counsel, Jacqueline Lucci Smith, represented Applicants in the state court proceedings, assisted by her senior attorney Joseph Watts. However, on February 4, 2020, Mr. Watts' and the Lucci Smith law firm severed their relationship. As a result, Mrs. Smith has undertaken lead representation in additional cases previously handled by the departing counsel. In addition to the new cases she will now handle, Mrs. Smith has had numerous appellate deadlines and trials scheduled, including, but not limited to the following matters:

a. February 3 through February 5, 2020, trial in *HouReal v. RCI,* Cause No. 2014-71688 in the 270th District Court, Harris County, Texas.

b. Pretrial conference set for January 14, 2020 with trial scheduled January 21, 2020 (continued to April 13, 2020), motion for partial summary judgment February 18, 2020, Con-149-150, *Lone Star NGL Pipeline LP v Lois St. Pe and Julie L Graves*; in the County Court of Liberty County, Texas. In addition, the trial court will undertake three *Daubert* challenges and motion for summary judgment on March 9, 2020. This case is preferentially scheduled to commence on May 18, 2020.

c. Amendment of pleadings January 15, 2020 and trial set March 30, 2020, Cause No. CV-0080494; *The State of Texas v Irma Patelis, Individually, and as Trustee of all Trusts Created Under the Last Will and Testament of Chris Patelis*; in the County Court at Law No. 3 of Galveston county, Texas.

d. Cause No. D-1-GN-19-007063, *Karl Plehn vs. Nationstar Mortgage d/b/a Mr. Cooper*, in the 98th District Court, Travis County, Texas. January 21, 2020 conference call among opposing counsel in effort to discuss settlement, document reviews of mortgage account history, Fannie Mae servicing guidelines, IRS tax lien laws in ongoing discussions weekly since January 2020 among counsel for Mr. Cooper and foreclosure purchaser in pending lawsuit for void and/or wrongful foreclosure.

e. February 14, 2020, hearing on rehearing on motion to vacate default, and February 20, 2020 motion to extend brief deadline, Cause No. 2011-75448; *Ella Park Terrace Civic Club, v Jose M. Gallegos*; in the District Court of Harris County, Texas 55th Judicial District.

f. Trial set for March 23, 2020, *Melanie Liska v. Mayra Salinas*, Cause No. 113089 Harris County Court at Law No. 4, Harris County, Texas.

g. Motion for Rehearing filed February 18, 2020 with response due in *White Lion Holdings et al v. Insgroup, Inc.*, et al, No. 01-18-00851-CV in the First Court of Appeals, Harris County, Texas.

h. Preparation of discovery responses due January 22, 2020, Cause No. 19-05-06051, *Garduno v. Zion Builders*, in the 284th District Court, Montgomery County, Texas.

Ms. Smith has worked diligently on the issues she wishes to present in the proposed petition. The additional 60 days will ensure that Mrs. Smith properly presents Applicants' issues for this Honorable Court's consideration in whether to grant a Writ of Certiorari in this matter. In short, this extension of time is sought not for delay but so that justice can be done.

Wherefore, Applicants respectfully request that an order be entered extending the time to file a petition for a writ of certiorari to May 12, 2020.

February 26, 2020

Respectfully submitted,

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## CERTIFICATE OF CONFERENCE

On February 25, 2020, I sent Thomas J. Forestier, lead counsel for Respondent and he responded that he is unopposed.

By: */s/ Jacqueline Lucci Smith*
Jacqueline Lucci Smith

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on counsel of record below via by e-service, e-mail and/or first-class mail on this 28th day of February 2020.

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By: */s/ Jacqueline Lucci Smith*
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