No.

In the Supreme Court of the United States

FRED J. EYCHANER,
PETITIONER
v.
CITY OF CHICAGO, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is the possibility of *future* blight a permissible basis for a government to take property in an unblighted area and give it to a private party for private use?

2. Should the Court reconsider its decision in *Kelo v. City of New London*, 545 U.S. 469 (2005)?

LIST OF ALL PARTIES

The parties to the proceeding are Petitioner Fred J. Eychaner—the owner of the property in question—and Respondent City of Chicago.

The proceedings that are directly related to the case are as follows:

- *City of Chicago v. Fred J. Eychaner & Unknown Owners*, No. 1-19-1053, Appellate Court of Illinois. Opinion filed May 11, 2020.
- *City of Chicago v. Fred J. Eychaner & Unknown Owners*, No. 1-13-1833, Appellate Court of Illinois. Opinion filed January 21, 2015.
- *City of Chicago v. Fred. J. Eychaner & Unknown Owners*, No. 05-L-050792, Circuit Court of Cook County, Illinois. Judgment entered February 11, 2013, and December 26, 2018.

Under Illinois law, eminent domain proceedings are *in rem*, with the government naming in suit both the known owner of a parcel and any "Unknown Owners" who may claim an interest in the property. No unknown owner expressed an interest in the parcel here upon service by publication, as reflected in the Final Judgment Orders of the Circuit Court of Cook County, Illinois. App. 23a, 74a.

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Cases:

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99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F.Supp.2d. 1123 (C.D. Cal. 2001) ..... *passim*

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Beach–Courchesne v. City of Diamond Bar, 95 Cal.Rptr.2d 265 (Cal. Ct. App. 2000) 21, 34

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City of Norwood v. Horney, 853 N.E.2d 1115 (2006) ..... *passim*

County of Hawaii v. C & J Coupe Family Ltd. P'ship, 242 P.3d 1136 (Haw. 2010) 24, 34

County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004) 18, 34

Page(s)

Cases—continued:

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Washington v. Glucksberg,
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65 ILCS 5/11-74.4-2 7

65 ILCS 5/11-74.4-3 ..... 7, 8, 21

65 ILCS 5/11-74.4-4 7

Other Authorities:

Cliff Albright, *Gentrification is Sweeping Through America. Here Are the People Fighting Back*,
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William Baude, *Rethinking the Federal Eminent Domain Power*,
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Dana Berliner, *Looking Back Ten Years After Kelo*,
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Michael Conklin & Louis S. Nadelson, *Supreme Court Coverage: Using Kelo and Citizens United to Measure Media Bias*,
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The Federalist No. 54 (James Madison),
(Jacob E. Cooke ed., 1961) 27

Page(s)

Other Authorities—continued:

The Federalist No. 70 (Alexander Hamilton), (Jacob E. Cooke ed., 1961) 27

Taylor Haines, Note, *"Public Use" or Public Abuse? A New Test for Public Use in Light of Kelo*, 44 Seattle Univ. L. Rev. 149 (2020) 27

Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 Cornell L. Rev. 1 (2006) 30

Alberto B. Lopez, *Revising Kelo and Eminent Domain's "Summer of Scrutiny"*, 59 Ala. L. Rev. 561 (2008) 26

Yxta Maya Murray, *The Takings Clause of Boyle Heights*, 43 N.Y.U. Rev. of L. & Soc. Change 109 (2019) 34, 35

Justice John Paul Stevens (Ret.), *Kelo, Popularity, and Substantive Due Process*, 63 Ala. L. Rev. 941 (2012) 26, 31, 32

Debra Cassens Weiss, *Scalia Lumps Kelo Decision with Dred Scott and Roe v. Wade*, ABA J. (Oct. 19, 2011), ... 26

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review the judgment of the Appellate Court of Illinois.

OPINIONS BELOW

The decision of the Supreme Court of Illinois denying a petition for leave to appeal issued on September 30, 2020 and is unreported. App. 1a. The Appellate Court of Illinois, First District, First Division, issued two opinions challenged in this Petition. The second, dated May 11, 2020, is not yet reported but is available at 2020 WL 2322731. App. 2a–22a. The first, dated January 21, 2015, is reported at 26 N.E.3d 501 (2015). App. 27a–73a. The opinion of the Circuit Court of Cook County, Illinois, County Department, Law Division, Tax and Miscellaneous Remedies Section, denying Petitioner's challenge to the constitutionality of the taking issued on August 21, 2006, and is unreported. App. 77a–91a.

JURISDICTION

The Supreme Court of Illinois denied leave to appeal on September 30, 2020. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

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

INTRODUCTION

The City of Chicago took property from private party A to give to private party B for private use. It did so because it needed B's support for a new manufacturing district that included the properties of both A and B. Before B demanded A's land as a condition for its political support, the City saw no need to use eminent domain for the manufacturing district. Unable to establish that the area was blighted, the City instead justified the taking as necessary to prevent *future* blight.

Nothing about this sequence of events comes close to satisfying the Fifth Amendment's requirement that governments take private property only "for public use." This Court has never held that avoiding future blight is a valid basis for taking property. The Illinois court decisions that sustained the taking conflict with other state and federal cases that reject the prevention of future blight as a cognizable public purpose. And they provide a dangerous roadmap for municipalities to take property based on speculative, future harms. As this case shows, such speculation often turns out to be unfounded: Rather than becoming blighted, the property and area in question have soared in value in the years since the taking was announced, yet the City keeps trying to effectuate it.

Petitioner asks this Court to invalidate the taking and make clear that the "public use" limitation of the Takings Clause still means something. To the extent the taking here could be viewed as permissible under *Kelo v. City of New London*, 545 U.S. 469 (2005), the Court should reconsider that decision and narrow or overrule it.

I. FACTUAL BACKGROUND

Fred Eychaner owns a tract of land in Chicago's River West neighborhood, two blocks north of a factory belonging to the Blommer Chocolate Company ("Blommer"). In 2005, to secure Blommer's support for a zoning change, the City of Chicago (the "City") condemned Eychaner's property to give it to Blommer. The City based the taking on a finding that the area was at risk of future blight.

A. Blommer refuses to support the City's PMD.

In 1999, the City proposed creating an approximately 75-acre Planned Manufacturing District ("PMD"), encompassing both Eychaner's and Blommer's properties (see Figure 1 below). R.A. 2187–88, 2192, 2286.[1] The goal of the PMD was to protect the 2,800 industrial jobs in the area and to encourage manufacturers to invest in their facilities. R.A. 2188. The PMD also aimed to prevent residential encroachment on existing manufacturing facilities, by barring residential uses within its bounds. Prior to the PMD, manufacturing and non-manufacturing uses were allowed in the area.

Blommer objected to its factory's placement in the PMD. At a meeting in January 2000, Blommer raised concerns about the lack of a buffer between its factory and residential development outside the PMD. R.A. 2218–20. Blommer claimed that the area already experienced tension between residential and industry tenants because its factory produced a chocolate smell, and that the tension would increase over time with increased residential development surrounding the PMD. *Id.*

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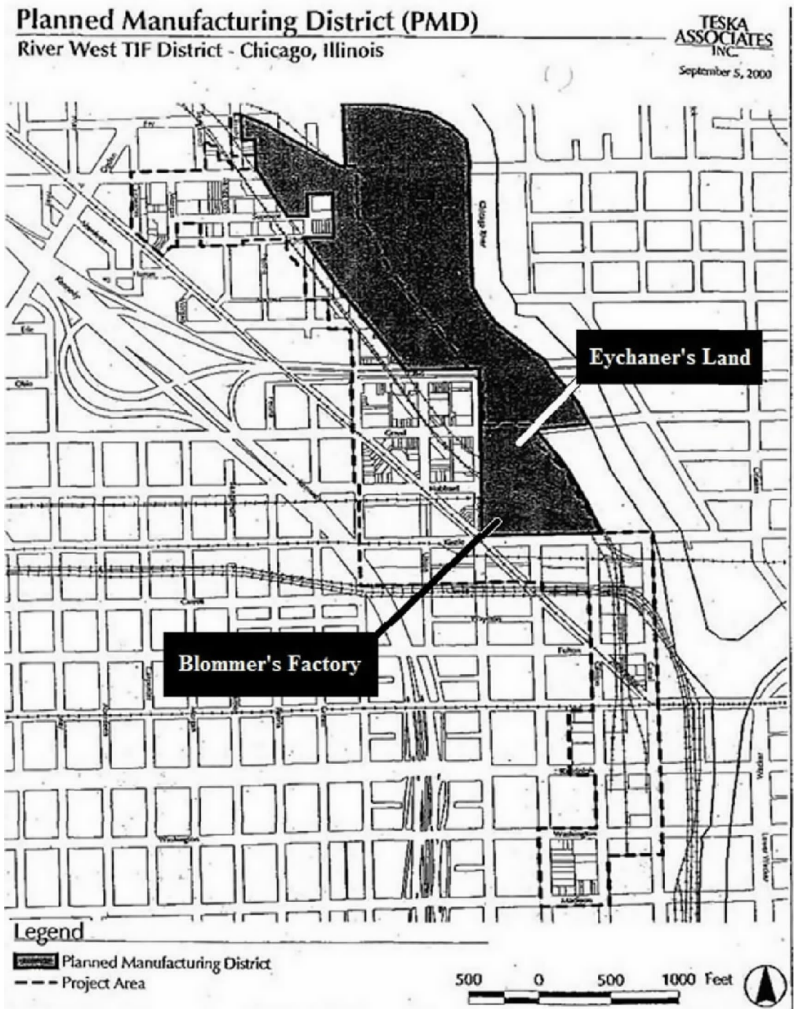
[1] References to the record on appeal before the Appellate Court of Illinois are denoted herein with an "RA" citation.

Figure 1 (R.A. 3937–38)



Blommer reiterated its concerns in correspondence with the City in February 2000. R.A. 1926–28. It argued that its inclusion in the PMD did not fulfill "the purpose of the PMD to protect manufacturing businesses from residential development." R.A. 1926. It claimed that

neighboring residents would find its manufacturing operations "intolerable," that it would be forced to relocate, and that its inclusion in the PMD would decrease the sale value of its property. R.A. 1927.

Blommer's campaign continued at another meeting in March 2000. R.A. 2284, 2289–2300. Blommer proposed two solutions: Either expand the PMD to prevent residential development near the factory, or exclude Blommer from the PMD so Blommer could more easily sell the land and leave Chicago. R.A. 2290–91.

Blommer's refusal to support the PMD and threat to leave Chicago presented a significant political problem. At the time, Blommer was a private, family-owned company, had been in Chicago since 1939, and had grown to generate annual revenues of approximately $350 million.[2] R.A. 2291, 6545–46.

B. To appease Blommer and secure its support for the PMD, the City agrees to give Blommer more land.

Given Blommer's political clout, the City looked for ways to appease the company. Members of the City's Plan Commission told Blommer: "[T]he point of the matter is we do not want the Blommer Chocolate Company to leave Chicago. . . . We're not going to let you leave." And the Commissioner of the Chicago Department of Planning and Development (the "DPD Commissioner") acknowledged that Blommer's "public support for this action [was] crucial in getting this measure through the legislative process." R.A. 1200.

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[2] In 2018, Fuji Oil Holdings, Inc., of Japan, acquired Blommer. R.A. 7588.

To satisfy Blommer, the DPD Commissioner agreed to help the company "create a larger 'industrial campus' as a means to internalize its loading operations, limit traffic impacts on adjacent streets, and provide room to expand." R.A. 1200. He offered to pursue creation of a tax-increment finance district "to finance public infrastructure improvements and any potential acquisitions." *Id.*

Blommer acted quickly to hold the DPD Commissioner to his promises. It hired an architect to draw up a site plan to expand its campus. In June 2000, it wrote to the DPD Commissioner laying out its plan for an expanded campus, including the City's acquisition of Eychaner's land and conveyance of it to Blommer for $1. R.A. 1310–14.

In a July 2000 memorandum to the Mayor, the City wrote that Blommer "seems to be negotiating as if they have us over [a] barrel." R.A. 1322. The City recommended proceeding with the PMD while continuing to negotiate with Blommer, cautioning that otherwise the company would "go public with its concerns. The only other option is to change the boundaries to exclude them. That will create a slippery slope for all the others who want out of the PMD." *Id.*

Ultimately, the City and Blommer reached an agreement. The City promised "to do the very best [it could] to help [Blommer] create a buffer" between itself and residential development outside the PMD. R.A. 2430. In exchange, Blommer withdrew its opposition to the PMD. *Id.* In September 2000, the Plan Commission passed a resolution recommending the PMD, R.A. 1149–53, and the City Council passed an ordinance adopting it, R.A. 1176.

C. To take Eychaner's property and give it to Blommer, the City designates the area as at risk of future blight.

The creation of a PMD did not give the City authority to take Eychaner's property by eminent domain. Instead, the City relied upon the Tax Increment Allocation Redevelopment Act, 65 ILCS 5/11-74.4-1 et seq. (West 2004) ("TIF Act").

The TIF Act "declare[s] that in order to promote and protect the health, safety, morals, and welfare of the public, that blighted conditions need to be eradicated and conservation measures instituted, and that redevelopment of such areas be undertaken." 65 ILCS 5/11-74.4-2. It permits municipalities, "[w]ithin a redevelopment project area," to acquire property "by purchase, donation, lease or eminent domain" as "reasonably necessary to achieve the objectives of the redevelopment plan and project." 65 ILCS 5/11-74.4-4.

The TIF Act distinguishes between areas presently blighted and those at risk of future blight. A "blighted" area is "any improved or vacant area within the boundaries of a redevelopment project area" where "buildings or improvements are detrimental to the public safety, health, or welfare because of a combination of 5 or more" factors "reasonably distributed throughout the improved part of the redevelopment project area." 65 ILCS 5/11-74.4-3. A conservation area, by contrast, is "not yet a blighted area." *Id.* But it "may become a blighted area," because at least 50% of its structures have an age of 35 years or more, and it has "a combination of 3 or more" of the same

statutory factors without regard to how frequently they occur in the area. *Id.*[3]

To determine the appropriate designation here, the City's Community Development Commission took steps to create the River West Tax Increment Financing Redevelopment Project Area ("River West TIF"), which would encompass most of the PMD—including Blommer's factory and Eychaner's land. R.A. 1069–1136. The City hired a private firm to conduct an eligibility study. *Id.* The study evaluated the condition of properties in the River West TIF. It determined that 88% of buildings in the area were 35 years old or older. R.A. 1114. It found that the area was not blighted, but that it met the statutory criteria for several future-blight indicators: deterioration, code violations, excessive vacancies, lack of community planning, and lagging property values. R.A. 1113, 1131. Thus, it found that the area qualified as a "conservation area" under the TIF Act. R.A. 1131.

Based on the study, the Community Development Commission recommended that the City Council adopt the plan for the River West TIF on January 10, 2001, R.A. 201, and the City Council passed an ordinance doing so that same day, R.A. 197. The Council determined that the area "may become a blighted area." R.A. 240.

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[3] The factors include "dilapidation; obsolescence; deterioration; code violations; illegal uses; excessive vacancies; lack of ventilation, light, or sanitary facilities; inadequate utilities; excessive land coverage and overcrowding of structures; deleterious land use; the need for environmental clean-up; lack of community planning; and declining land values." 65 ILCS 5/11-74.4-3.

D. The City approves the taking over Eychaner's objection.

In February 2002, Blommer offered to purchase Eychaner's land for $824,980. R.A. 1426. Eychaner declined. Two months later, the City notified Eychaner that it was considering taking his property. R.A. 1434.

The Community Development Commission held a public meeting in May 2002, where Eychaner's counsel objected to the taking. R.A. 1454–62. The Commission recommended the taking over this objection. R.A. 1462.

On June 19, 2002, the City Council authorized the taking. The Council determined that the area was not presently "commercially blighted," but was a conservation area at risk of future blight. App. 83a, 89a. The City Council found that the prevention of such future blight was the "public purpose" authorizing the taking. *Id.*[4]

On February 8, 2006, the City Council approved an agreement with Blommer under which the City would acquire Eychaner's property and convey it to Blommer for redevelopment. R.A. 1473.

E. The City continues to pursue the taking after the PMD is repealed and the blight fails to materialize.

On July 26, 2017, the Commission adopted a new ordinance repealing the PMD zoning. The new ordinance created a "North Branch Industrial Corridor Conversion Area," which included Blommer's factory and Eychaner's

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[4] Initially, the Council mistakenly wrote that "the acquisition [was] necessary and required for the home rule public purpose of improving a commercially blighted area." App. 81a. The Council subsequently confirmed that this was a scrivener's error, and that the area was not presently blighted but only at risk of future blight. App. 89a.

property, and replaced the PMD with "Downtown Service" zoning that permitted more dynamic, mixed uses of land within the area. R.A. 8207–47. Despite this development and the long-unresolved taking and resulting lack of a buffer, Blommer has maintained its chocolate factory in the same location.

The possible future blight cited by the City to justify the taking in 2005 has never materialized. Rather, as Eychaner explained in obtaining a new valuation for the property in 2017, there was a "surge in development and market demand in the area." R.A. 6713. After the repeal of the PMD and despite Blommer's continued operations in what is now a mixed-use area, Eychaner's land has experienced "a substantial and material increase in value." *Id.*

II. PROCEDURAL HISTORY

On August 24, 2005, the City filed an eminent domain complaint to condemn Eychaner's property, relying on the TIF Act. R.A. 74–80, 102–08. Eychaner filed an objection (called a traverse in the state courts), arguing that the City's exercise of eminent domain was prima facie unconstitutional under the United States and Illinois constitutions. R.A. 135–38. The trial court denied the traverse, App. 77a–91a, but granted Eychaner's motion to certify an interlocutory appeal on the question of whether the taking was constitutionally permitted. R.A. 642. The Appellate Court declined to take the interlocutory appeal. R.A. 661. On January 28, 2013, a jury returned a verdict that just compensation for Eychaner's property was $2,500,000. App. 75a.

Eychaner appealed, again challenging the constitutionality of the taking. R.A. 6040–42. He argued that preventing future blight was not a cognizable public purpose, and that its invocation here was a mere pretext for appeasing Blommer. *Id.*

On January 21, 2015, the Appellate Court affirmed in relevant part, holding that the City "may use the power of eminent domain to prevent future blight in a conservation area." App. 57a. (quoting *People ex rel. Gutknecht v. City of Chicago*, 121 N.E.2d 791, 793 (Ill. 1954)). The court also held, relying upon *Kelo v. City of New London*, 545 U.S. 469 (2005), that because the taking was connected to the PMD, it was not "a sham" and was "a sound use of eminent domain." App. 60a–61a. The Court reversed in part on other grounds and remanded for a new trial on compensation.

On December 18, 2018, the jury in the new trial found that $7,100,000 was just compensation for Eychaner's property. App. 24a. The increased valuation reflected the fact that, instead of becoming blighted, the area steadily rose in value, particularly after the repeal of the PMD. R.A. 6713.

Eychaner appealed again, raising the same constitutional challenges as before. R.A. 8393–95. The Appellate Court held that "[t]he law-of-the-case doctrine precluded the trial court, and now precludes us, from reconsidering the denial of Eychaner's traverse." App. 4a. It also found that the PMD's repeal and replacement with a mixed-use district in 2017 did not undermine the City's basis for the taking. It held that the new mixed-use district and the River West TIF "together carry out the purpose of promoting the economic revitalization of a conservation area"

and thus "that the taking still serves a constitutionally permissible public use." *Id.* at 4a, 18a.

Eychaner petitioned for leave to appeal to the Supreme Court of Illinois. He argued that under both the federal and state constitutions, "the prevention of future blight is too speculative a justification to constitute a proper public use or purpose for the taking of private property from one individual to give to another." App. 95a. He also argued that the future blight designation was a pretext for the taking. *Id.* Finally, he asserted that insofar as *Kelo v. City of New London*, 545 U.S. 469 (2005), could be read to permit the taking here, "*Kelo* lacks clarity, has been significantly criticized, and is inconsistent with prior U.S. Supreme Court precedent." *Id.* On September 30, 2020, the Supreme Court of Illinois denied Eychaner's petition. App. 1a.

REASONS FOR GRANTING THE PETITION

I. THE DECISIONS BELOW EXCEED THIS COURT'S TAKINGS JURISPRUDENCE AND CONFLICT WITH STATE AND FEDERAL CASES REJECTING FUTURE BLIGHT TAKINGS.

The City justified taking Eychaner's property and giving to Blommer based on possible future blight in the surrounding area. Even this Court's modern takings precedents have not approved the exercise of eminent domain on such a remote and speculative basis. And the decisions

below conflict with other state and federal courts enjoining future blight takings as incompatible with the Public Use Clause.[5]

A. This Court has only permitted blight takings based on a finding of *present* blight.

This Court has only once addressed the permissibility of a taking to remedy blight. In *Berman v. Parker*, 348 U.S. 26 (1954), the Court upheld the constitutionality of a federal statute that allowed for the elimination of "slums" and "blighted areas that tend to produce slums" in Washington, D.C. *Id.* at 35. Even though the redevelopment plan called for property to be taken for private use, the Court held that elimination of blight constituted a "public purpose" satisfying the Public Use Clause. *Id.* at 33–35.

While the statute at issue in *Berman* did not contain an explicit definition of "blight," the area of redevelopment there was, by any definition, blighted. "Surveys revealed that in [the relevant area], 64.3% of the dwellings were beyond repair, 18.4% needed major repairs, only 17.3% were satisfactory; 57.8% of the dwellings had outside toilets, 60.3% had no baths, 29.3% lacked electricity, 82.2% had no wash basins or laundry tubs, 83.8% lacked central heating." *Id.* at 30. Based on these conditions, "the District's Director of Health [determined] it was necessary to redevelop [the relevant area] in the interests of public health." *Id.*

Nothing in the Court's decision in *Berman* permitted takings based on the mere possibility of future blight. In

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[5] As numerous courts and commentators have done, this petition refers to the "public use" requirement of the Fifth Amendment as the "Public Use Clause."

explaining that municipalities could address aesthetic blight in addition to public health concerns, the Court was clear that they needed to be present and stark concerns: "Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. . . . They may also be an ugly sore, a blight on the community which robs it of charm, which make it a place from which men turn." *Id.* at 32–33.

Similarly, in explaining that the legislature could redevelop non-blighted properties in a blighted area, the Court was clear that the area itself had to be presently blighted: "Property may of course be taken for this redevelopment which, standing by itself, is innocuous and unoffending. But we have said enough to indicate that it is the need of the area as a whole which Congress and its agencies are evaluating." *Id.* at 35.

Here, neither Eychaner's property *nor* the surrounding area were blighted at the time of the City's invocation of eminent domain. *See supra* at 7–8. And they certainly have not become blighted in the sixteen years since, but have instead skyrocketed in value after the City abandoned the PMD that initially prompted it to buy Blommer's support with Eychaner's land. *See supra* at 10.

B. This Court's other takings precedents do not support future blight takings.

Since *Berman*, the Court has twice addressed the meaning of the Public Use Clause in a case involving real property. Neither case involve a blight finding. But like *Berman*, both cases sustained takings to redress present and significant harms, rather than the mere possibility of future ones. Neither decision authorizes a private use taking based on a mere possibility of future public harm.

In *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), Hawaii's government had for two centuries attempted and failed to break up a land oligopoly originating from the State's historical feudal land ownership. That oligopoly, where half of Hawaii was owned by 72 private landowners, was "skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare." *Id.* at 232. To address these "social and economic evils of a land oligopoly traceable to their monarchs," Hawaii's legislature permitted the use of eminent domain to redistribute land in areas where the "land market" was "malfunctioning." *Id.* at 241–42. The Court upheld the statute, finding that the oligopoly "created artificial deterrents to the normal functioning of the State's residential land market and forced thousands of individual homeowners to lease, rather than buy, the land underneath their homes." *Id.* at 242.

In *Kelo v. City of New London*, 545 U.S. 469, 473 (2005), a municipality took several parcels of property pursuant to an economic development plan. As the Court recognized, the area in question suffered from serious problems: "Decades of economic decline led a state agency in 1990 to designate the City a 'distressed municipality.'" It had an unemployment rate "nearly double that of the State," and a shrinking population. *Id.* The Court

upheld the taking, deferring to the municipality's "determination that the area was sufficiently distressed to justify a program of economic rejuvenation." *Id.* at 483.[6]

C. The decisions below conflict with other cases enjoining future blight takings.

The courts below were not the first to examine the constitutionality of future blight takings. Other courts, when confronted with the issue, have barred such takings, holding that prevention of future blight is not a cognizable "public use" under the Fifth Amendment.

In *City of Norwood v. Horney*, 853 N.E.2d 1115 (2006), the Ohio Supreme Court reviewed a proposed taking that would transfer several properties to a private developer. As Blommer did here, the beneficiary in *City of Norwood* asked the municipality to use eminent domain to obtain the properties. *Id.* at 1143–44. The municipality then sought a reason to justify the taking, labeling the neighborhood a "deteriorating area." *Id.* at 1125–27. Like the

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[6] In a footnote, *Kelo* stated that "[t]he public use described in *Berman* extended beyond [removal of blight] to encompass the purpose of developing that area to create conditions that would prevent a reversion to blight in the future." *Kelo*, 545 U.S. at 484 n.13 (citation omitted). But such future considerations were only relevant in *Berman* because the plan in question addressed *present* blight, by redeveloping an entire neighborhood rather than just the individual blighted properties. *See Berman* 348 U.S. at 35 (noting the "need of the area[s] as a whole" and holding that "community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building").

"conservation area" here, a "deteriorating area" in Norwood was defined by city code as not presently blighted, but which bore certain indicators placing it at risk of future blight. *Id.* at 1144.[7]

The Ohio Supreme Court, relying on the Public Use Clause as well as a comparable provision in Ohio's constitution, held that the taking was both void for vagueness and substantively unconstitutional. It determined that "[a] municipality has no authority to appropriate private property for only a contemplated or speculative use in the future." *Id.* at 1145. Although the court "adhere[d] to a broad construction of 'public use,'" it held "that government does not have the authority to appropriate private property based on mere belief, supposition, or speculation that the property may pose such a threat in the future." *Id.* Thus, the Ohio Supreme Court held as a matter of law that a "'deteriorating area' cannot be used as a standard

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[7] Like the TIF Act, Norwood Code 163.02(c) lists factors that can qualify an area as "likely to deteriorate or is in danger of deteriorating into a blighted area." Those factors include: "incompatible land uses"; "nonconforming uses;" "lack of adequate parking facilities;" "faulty street arrangements;" "inadequate community and public utilities;" "diversity of ownership;" "tax delinquency;" "increased density of population without commensurate increases in new residential buildings and community facilities;" "high turnover in residential or commercial occupancy;" "lack of maintenance and repair of buildings;" and "repeated instances of building, health, fire or other life safety code violations."

for a taking, because it inherently incorporates speculation as to the future condition of the property into the decision on whether a taking is proper." *Id.* at 1146.[8]

Likewise, in *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F.Supp.2d. 1123 (C.D. Cal. 2001), the district court sustained a challenge under the Public Use Clause to the exercise of eminent domain based on future blight. The factual circumstances were eerily similar to this case. A powerful landowner—there, Costco—threatened to leave unless it could acquire plaintiff's land. *Id.* at 1126. When efforts to purchase the land on the open marked failed, the municipality exercised eminent domain. *Id.* at 1126–27. The municipality claimed that the loss of Costco "would cause 'future blight,'" and that "preventing 'future blight' is an adequate public use within the meaning of the Takings Clause." *Id.* at 1130.

The district court rejected this argument. After noting that there was no "*existing blight*," and that "the sole reason for condemning the property was Costco's unilateral demand for expansion into the space occupied by 99 Cents," *id.* at 1129–30, the court held that the taking "violate[d] the Public Use Clause of the Fifth Amendment." *Id.* at 1131. As it explained, the municipality "cannot exercise [its redevelopment powers] to condemn property that is *not blighted* solely to prevent some unidentifiable 'future blight' that may never even materialize." *Id.*

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[8] Similarly, in *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), the Michigan Supreme Court—relying on the "public use" requirement of the state constitution—rejected a taking based on a speculative future public purpose. *See id.* at 777 ("The speculative need for property . . . lack[s] any of the urgency of a necessary condemnation.") (internal quotation marks omitted).

The Ninth Circuit did not review the merits of the *99 Cents* decision due to intervening events which mooted the case. *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 60 F. App'x 123 (9th Cir. 2003). But this Court in *Kelo* cited with approval the district court's decision in *99 Cents*, as an example of the "unusual exercise of government power [that] would certainly raise a suspicion that a private purpose was afoot." *Kelo*, 545 U.S. at 487, 487 n.17.

II. PERMITTING TAKINGS TO PREVENT FUTURE BLIGHT WOULD EVISCERATE WHAT IS LEFT OF THE PUBLIC USE CLAUSE.

The possibility of future blight is a far lower threshold than the present harms this Court accepted as justification for eminent domain in *Berman*, *Midkiff*, and *Kelo*. It is also inherently more conjectural. Allowing the taking power to be so easily triggered in order to give property to a private user would eviscerate what is left of the Public Use Clause, and would permit governments in the mine run of cases—as here—to take property from private party A and give to private party B simply because B has more political clout than A.

A. The Public Use Clause is a substantive limitation on the takings power.

This Court has historically recognized the Public Use Clause as a substantive right of property owners, not a mere procedural box for governments to check. In *Calder v. Bull*, 3 U.S. (3. Dall.) 386, 388 (1798), the Court spelled out what governments could not do, including violating "the right of private property." In describing "acts which the Federal, or State, Legislature cannot do, without exceeding their authority," the Court listed as an express

example "a law that takes property from A. and gives it to B." *Id.* More than two hundred years later, *Kelo* claimed to reaffirm this understanding. *Kelo*, 545 U.S. at 477 ("[T]he 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.").

"[S]ubstantive constitutional rights" are "actions governmental officials may not take no matter what procedural protections accompany them." *Hudson v. Palmer*, 468 U.S. 517, 541 n.4 (1984) (Stevens, J., concurring in part and dissenting in part). When a right enumerated by the Bill of Rights "includes a substantive component," it "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)). Because the Public Use Clause is a substantive right, there must be "a role for courts to play in reviewing a legislature's judgment of what constitutes a public use." *Midkiff*, 467 U.S. at 240.

B. Future blight is a low and conjectural threshold that would allow governments to take almost any property.

As other courts have recognized, the possibility of future blight is a low threshold and necessarily conjectural. Permitting the exercise of eminent domain on such a basis would dramatically expand the takings power.

"To permit a taking of private property based solely on a finding that the property is deteriorating or in danger of deteriorating would grant an impermissible, unfettered power to the government to appropriate." *City of Norwood*, 853 N.E.2d at 1146. After all, the threat of future blight is present, to one degree or another, in every neighborhood or area. *See 99 Cents*, 237 F.Supp.2d at 1131 ("In

[the government's] view, then, no redevelopment site can ever be truly free from blight because blight remains ever latent, ready to surface at any time.")

Compare the showing that triggered eminent domain in *Berman* to that here. In *Berman*, 64.3% of the "dwellings were beyond repair" and an additional 18.4% needed "major repairs." 348 U.S. at 30. By contrast, the River West TIF evaluated how many buildings within the manufacturing district were in a state of "dilapidation" and found that "[n]o structures in the [r]elevant area display this extreme physical state." R.A. 1114. In other words, in *Berman*, over 80% of buildings needed either to be torn down or major repairs. In the area in question here, not a single building was in such condition.

The statutory standards for a risk of future blight under the TIF Act, and comparable laws, are easily met. Those standards include that at least 50% of the structures in an area have an age of 35 years or more, and that the area has 3 or more factors as commonplace as "code violations" or as amorphous as "deterioration," "obsolescence," or "lack of community planning." 65 ILCS 5/11-74.4-3. Courts confronted with such ubiquitous indicators have rejected assertions of present blight. *See, e.g.*, *Beach–Courchesne v. City of Diamond Bar*, 95 Cal.Rptr.2d 265, 279 (Cal. Ct. App. 2000) ("If the showing made in [this] case were sufficient to rise to the level of blight, it is the rare locality in California that is not afflicted with that condition."); *Birmingham v. Tutwiler Drug Co.*, 475 So.2d 458, 466 (Ala. 1985) (sustaining takings challenge where the area alleged to be blighted "was typical of much of downtown Birmingham"). Future blight takings create an end-run around such limitations,

because most areas that do not qualify as presently blighted could be characterized as at risk of future blight.

Finally, developments in this case since the PMD's inception confirm that prevention of future blight is an unduly speculative purpose. The area has not succumbed to the claimed risk of future blight. Far from it: property values have skyrocketed. *See supra* at 10. The increasing valuation of Eychaner's property—from a rejected City offer of $824,980 in 2002, to a just compensation verdict of $2.5 million in 2013, to a new just compensation verdict of $7.1 million in 2018—reflects this upward trajectory. App. 24a, 75a. A property owner in an area that is neither blighted nor in economic distress should have the right to bet on his property's future, not have it be taken from him because the government claims a more pessimistic view.

C. At minimum, this Court should clarify that future blight takings are subject to heightened scrutiny for pretext.

In *Kelo*, the Court pointed to the fact that the government had "carefully formulated an economic development plan that it believes will provide appreciable benefits to the community" as the reason to defer to the state's determination of public use. 545 U.S. at 483. But *Kelo* recognized at least some limits to such judicial deference. In particular, the majority confirmed that governments cannot "take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." *Id.* at 478. And Justice Kennedy, who supplied the fifth vote for the *Kelo* majority, wrote separately to note that:

> My agreement with the Court that a presumption of invalidity is not warranted for economic development takings in general, or for the particular

> takings at issue in this case, does not foreclose the possibility of a more stringent standard of review than that announced in *Berman* and *Midkiff* might be appropriate for a more narrowly drawn category of takings.

Id. at 493 (Kennedy, J., concurring).

At the very least, this Court should take this case to hold that takings premised on future blight or other speculative future harms are subject heightened scrutiny, including for pretext. The decisions below show why.

While the Illinois courts reviewed the taking for pretext, they declined to find one simply because the state followed appropriate procedures. Thus, the Appellate Court held that the PMD—"a well-developed, publicly vetted, and thoughtful economic development plan"—showed that the public purpose was not a "sham." App. 58a. But the PMD did not call for any takings, and had been proposed years *before* the City saw any need to take anyone's property. It was not until Blommer insisted on obtaining Eychaner's property as a condition for supporting the PMD that the City looked to eminent domain.

The Appellate Court also noted that "Eychaner does not contest the designation of the River West TIF as a conservation area." App. 57a. That is beside the point. The pretext question is not whether the City's low threshold for possible future blight has been met; it is whether the City invoked that low threshold only after it already wanted to take the property for another purpose. That is unquestionably what happened here, as even the Appellate Court recognized: "Blommer's objection to its inclusion in the PMD created a roadblock to the City's plan, which the City removed when it agreed to aid and fund the expansion of Blommer's campus." *Id.* at 61a.

Then, when the City repealed the PMD in 2017—and thereby eliminated the basis for Blommer's demand for Eychaner's land—the City still pursued the taking. And it did so in reliance on the old River West TIF that had found a risk of future blight *16 years earlier*. Yet the Appellate Court still found no pretext and held "that the taking still serves a constitutionally permissible public use." App. 4a.

If no more is required to satisfy the Public Use Clause, it is hard to imagine what substantive bar remains on private use takings. Several state and federal courts have refused to read *Kelo* as going so far. "*Kelo* recognized that there may be situations where a court should not take at face value what the legislature has said." *Franco v. Nat'l Cap. Revitalization Corp.*, 930 A.2d 160, 169 (D.C. 2007). A court's review must be a substantive one, focusing on "benefits the public hopes to realize from the proposed taking" to evaluate whether they are "substantial," rather than the mere presence of a plan asserting public purpose. *Id.* at 173–74. After all, the "government will rarely acknowledge that it is acting for a forbidden reason." *Id.* at 169. Thus, courts must "look beyond government findings and declarations in deciding whether the stated public purpose was pretextual." *County of Hawaii v. C & J Coupe Family Ltd. P'ship*, 242 P.3d 1136, 1148 (Haw. 2010). The Illinois courts below did not do that.

Future blight takings are particularly apt for heightened scrutiny. Reliance on future blight is a relatively "novel theory of public use," and in such cases "[j]udicial review is even more imperative." *City of Norwood*, 853 N.E.2d at 1140. Even *Kelo* cited the district court opinion in *99 Cents*—which struck down a taking premised on "future blight"—as an example of an "aberration" that may

evince apparent governmental pretext and should be viewed "with a skeptical eye." 545 U.S. at 487 n.17.

Finally, the fact that the taking here was effectuated to keep a powerful private entity "satisfied" based on that entity's "unilateral demand for expansion" is another reason to apply heightened scrutiny. *99 Cents Only Stores*, 237 F.Supp.2d at 1129–30; *see also Aaron v. Target Corp.*, 269 F.Supp.2d 1162, 1175 (E.D. Mo. 2003) (citing *99 Cents* to invalidate a purported blight taking that was done to appease Target) ("condemnation actions by governmental entities designed to appease private entities amount to unconstitutional takings for purely private purposes"). When the land to be taken (here, Eychaner's) and the private beneficiary (here, Blommer) are identified long before the justification for the taking (here, the TIF), courts should apply greater scrutiny. *See Carole Media LLC v. N.J. Transit Corp.*, 550 F.3d 302, 311 (3d Cir. 2008); *Kelo*, 545 U.S. at 478 n.6.

III. THE COURT CAN USE THIS CASE TO RECONSIDER THE *KELO* PRECEDENT.

As shown above, the taking here involved different legal and factual circumstances than *Kelo*. But if the Court is not inclined to view those differences as dispositive, it should revisit *Kelo* and narrow or overrule it.

The Court has observed that, while its "precedents . . . warrant our deep respect as embodying the considered views of those who have come before," *stare decisis* "has never been treated as 'an inexorable command.'" *Ramos v. Louisiana*, 140 S.Ct. 1390, 1405 (2020). The doctrine "is at its weakest" where, as here, "we interpret the Constitution." *Id.* Specifically, the Court has "identified several factors to consider in deciding whether to overrule a past

decision, including [a] the quality of its reasoning, [b] the workability of the rule it established, [c] its consistency with other related decisions, [d] and reliance on the decision." *Knick v. Twp. of Scott*, 139 S.Ct. 2162, 2178 (2019). Each favor reconsideration of *Kelo*.

A. *Kelo*'s reasoning has been widely criticized.

Even at the time of *Kelo*'s publication, commentators described the ruling as "probably the most universally despised Supreme Court decision in decades." Alberto B. Lopez, *Revising* Kelo *and Eminent Domain's "Summer of Scrutiny"*, 59 Ala. L. Rev. 561, 562 (2008). And the opinion continues to top lists of the most criticized Supreme Court decisions today. *See, e.g.*, Michael Conklin & Louis S. Nadelson, *Supreme Court Coverage: Using* Kelo *and* Citizens United *to Measure Media Bias*, Neb. L. Rev. Bull. (June 27, 2018), https://perma.cc/8B3K-GYKM.

The late Justice Stevens, author of *Kelo*'s majority decision, acknowledged that it was "the most unpopular opinion that [he] wrote during" his tenure. Justice John Paul Stevens (Ret.), Kelo, *Popularity, and Substantive Due Process*, 63 Ala. L. Rev. 941, 941 (2012). Justice Scalia singled out *Kelo* as one of the Court's "very few mistakes of political judgment," describing the case's holding as "stretch[ing] beyond the text of the Constitution" and "provoking overwhelming public criticism and resistance." Debra Cassens Weiss, *Scalia Lumps* Kelo *Decision with* Dred Scott *and* Roe v. Wade, ABA J. (Oct. 19, 2011), https://perma.cc/5ER6-F2NV.

i. *Kelo* conflicts with historical understanding.

At the Founding, the framers "wished to recognize an individual's right to property as fundamental." Taylor Haines, Note, *"Public Use" or Public Abuse? A New Test for Public Use in Light of* Kelo, 44 Seattle Univ. L. Rev. 149, 154 (2020). In Federalist 70, Alexander Hamilton described as essential "the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice." The Federalist No. 70, at 471 (Jacob E. Cooke ed., 1961). Likewise, in Federalist 54, James Madison asserted that "government is instituted no less for the protection of the property, than of the persons, of individuals." The Federalist No. 54, at 370 (Jacob E. Cooke ed., 1961).

This perspective was codified in the Takings Clause. Near the time of the founding, the Court described the Takings Clause's limitations as so fundamental that "[i]t is against all reason and justice, for a people to entrust a Legislature with such powers." *Calder*, 3 U.S. (3. Dall.) at 388.

This perspective also shaped early takings practice. "[F]or the first seventy-five years of the Republic"—from 1789 to 1864—"there had *never* been a purely federal taking inside a state." William Baude, *Rethinking the Federal Eminent Domain Power*, 122 Yale L.J. 1738, 1761 (2013) (emphasis added). In fact, "federal eminent domain was generally thought unconstitutional, because eminent domain was [so] great of a power." *Id.* at 1824. Even in the decades after 1864, there were very few federal takings authorized—and those that were authorized applied

to a narrow set of uses, typically related to the construction of hospitals, streets, or railroads. *Id.* at 1761; *accord Kelo*, 545 U.S. at 512–13 (Thomas, J., dissenting).

Hence, only states and localities used eminent domain during much of the 18th and 19th centuries. And, as Justice Thomas has observed, generally the "States employed the eminent domain power to provide quintessentially public goods, such as public roads, toll roads, ferries, canals, railroads, and public parks." *Id.* at 512 (Thomas, J., dissenting). Even such use was "sparse." *Id.*

This understanding was reflected in *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226 (1897), which incorporated the Takings Clause against the states. At issue there was whether property could be taken to widen a street; in other words, for an unquestionably public use. *Id.* at 228–29. In finding in the affirmative, the Court cautioned that it would not "hesitate to adjudge void any statute declaring that the homestead now owned by A. should no longer be his, but should henceforth be the property of B." *Id.* at 237 (internal quotation marks omitted).

ii. *Kelo* is not faithful to constitutional text.

In addition to departing from the original understanding, *Kelo* is inconsistent with the text of the Constitution itself. The Fifth Amendment expressly states that owners of "private property" cannot have it "taken for public use, without just compensation." U.S. Const. amend. V. The amendment thus "imposes two conditions on the exercise of [governmental] authority: the taking must be for a 'public use' and 'just compensation' must be paid to the owner." *Brown v. Legal Found. of Washington*, 538 U.S. 216, 231–32 (2003). As shown above, the Public Use Clause was applied literally for more than a century after the Founding.

The *Kelo* majority argued that, in the twentieth century, the Court began "embrac[ing] [a] broader and more natural interpretation of public use as 'public purpose.'" 545 U.S. at 479, 480. But this embrace was not without limits. Neither *Berman* nor *Midkiff* called for general deference to private use takings. Rather, as Justice O'Connor observed, those cases recognized limited instances where private use takings satisfied the Public Use Clause. *Id.* at 500 (O'Connor, J., dissenting) ("The Court's holdings in *Berman* and *Midkiff* were true to the principle underlying the Public Use Clause."). As explained *supra* at 13, *Berman* recognized the propriety of takings to address areas affected by clear and severe blight, and *Midkiff* allowed the state government to redress a unique and extreme land oligopoly, *see supra* at 15.

By contrast, *Kelo's* "policy of deference to legislative judgments," 545 U.S. at 480, risks abdicating judicial enforcement of the Public Use Clause. "If the Public Use Clause served no function other than to state that the government may take property through its eminent domain power—for public or private uses—then it would be surplusage." *Id.* at 507 (Thomas, J., dissenting); *see also id.* at 494 (O'Connor, J., dissenting) (*Kelo* "effectively . . . delete[s] the words 'for public use' from the Takings Clause of the Fifth Amendment."); *accord Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it."). This is particularly so if *Kelo* can be stretched to defend takings—like the one at

issue here—that justify private use by deference to governmental findings of speculative, future public harms.[9]

iii. *Kelo* does not provide a workable rule to limit governmental power.

In deferring to governmental plans to take property for economic development, *Kelo* failed to provide a workable rule to limit government overreach. *Kelo* did not, for instance, require governments to consider less restrictive means to accomplish their stated purpose. *Cf. Holt v. Hobbs*, 574 U.S. 352, 365 (2015) ("If a less restrictive means is available for the Government to achieve its goals, the Government must use it.") (alteration omitted). Nor did it require governments to show that eminent domain was necessary to overcome a "strategic holdout" problem—in other words, that market transactions between private parties were not a viable alternative. *See* Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 Cornell L. Rev. 1, 18 (2006).

Consider this case. There is no dispute that the City seeks to take from Eychaner and give to Blommer. There is no question that Blommer will benefit from such action.

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[9] As Justice Thomas observed in his *Kelo* dissent, the Court surely would not afford governments such deference in interpreting other substantive rights. "We would not defer to a legislature's determination of the various circumstances that establish, for example, when a search of a home would be reasonable, *see, e.g.*, *Payton v. New York*, 445 U.S. 573, 589–590 (1980), or when a convicted double-murderer may be shackled during a sentencing proceeding without on-the-record findings, *see Deck v. Missouri*, 544 U.S. 622 (2005)." *Kelo*, 545 U.S. at 518; *see also District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008) (rejecting legislative deference when issue involves "a specific, enumerated right").

And there is no question that the original development plan—the PMD—did not contemplate any takings. It was only *after* Blommer demanded land that the City rationalized a taking as serving a public purpose. Rather than taking property from a holdout, the City *rewarded* the potential PMD holdout, Blommer, by giving it Eychaner's land. If the mere existence of the PMD were enough to justify that taking under *Kelo*'s economic development rationale, then it is hard to imagine any private taking that could not be justified in a similar manner.

B. *Kelo* erroneously relied on due process case law.

Regarding consistency with prior decisions, the Court need look no further than the statements of Justice Stevens, who authored *Kelo*. Following his retirement, Justice Stevens acknowledged that the majority opinion "incorrectly" relied on cases interpreting the Fourteenth Amendment's Due Process Clause, *not* the Fifth Amendment's Takings Clause. Justice John Paul Stevens (Ret.), Kelo, 63 Ala. L. Rev. at 946. He cited pre-incorporation cases, such as *Davidson v. New Orleans*, 96 U.S. 97 (1877), and *Scott v. Toledo*, 36 F. 385 (N.D. Ohio 1888), as examples of this incorrect reliance. *See* 63 Ala. L. Rev. at 947 nn. 32, 33.

As noted above, the Fifth Amendment's Takings Clause (as applied to the federal government) and the Fourteenth Amendment's Due Process Clause (as applied to state and local governments) proceeded along separate tracks until incorporation in 1897. As to the Fifth Amendment: from 1789 to 1864, there had *never* been a federal taking inside a state, and from 1864 to 1897, the federal eminent domain power was rarely exercised. Baude, 122 Yale L.J. at 1761. As to the Fourteenth Amendment, state use of the eminent domain power was generally "sparse"

before incorporation, although some governments did "test[] the limits of their state-law eminent domain power." *Kelo*, 545 U.S. at 512–13 (Thomas, J., dissenting). These more expansive uses were "hotly contested," and one of the purposes of incorporation was to rein them in and harmonize them with the restrictive, substantive constraints of the Fifth Amendment. *Id.* at 513–15.

Justice Stevens argued that the error was ultimately harmless, given the *Berman* and *Midkiff* decisions, 63 Ala. L. Rev. at 947 at 946–50, but this is not so. As explained above, *Berman* and *Midkiff* recognized specific instances where private uses satisfied a public purpose. Both targeted extreme issues—widespread blight in Washington, D.C., and a historic and intractable land situation in Hawaii. They did not purport to replace the Public Use Clause with a general rule of deference to governmental redevelopment plans. *See Kelo*, 545 U.S. at 500 (O'Connor, J., dissenting).

C. Reliance interests do not help *Kelo*.

Reliance interests should not bar this Court from reconsidering *Kelo*. Rather, they counsel in favor of reexamination. Since *Kelo*'s publication, at least forty-four states changed their laws to create additional barriers to the use of eminent domain. Dana Berliner, *Looking Back Ten Years After* Kelo, 125 Yale L.J. F. 82, 94 (2015). Consequently, reconsideration of *Kelo* presents far fewer reliance interests than a case where a federal constitutional interpretation was broadly adopted at the state level.

To be sure, some states, like Illinois, have relied on *Kelo* without limitation. *See*, *e.g.*, *Hampton v. Metro. Water Reclamation Dist. of Greater Chicago*, 57 N.E.2d 1229, 1236 (Ill. 2016). These jurisdictions have interpreted their

own takings laws to extend to the limits of *Kelo*'s interpretation of the Fifth Amendment. But this fact alone should not bar reconsideration. Were it otherwise, the Court would almost never revisit a decision expanding government power at the expense of individual rights. After all, it is natural to expect at least *some* governments to rely on this Court's decisions expanding their powers over their residents, even if those decisions are unpopular.

In other areas of constitutional jurisprudence, this Court has looked to trends in state law to inform federal constitutional meaning. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 570 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), because "[o]ver the course of the last decades, States with same-sex prohibitions have moved toward abolishing them"). Given the negative legislative reaction to *Kelo* in the vast majority of states, the presence of holdout *Kelo* adherents such as Illinois does not support leaving the decision in place.

IV. THIS CASE IS AN IDEAL VEHICLE TO EXAMINE THE IMPORTANT AND RECURRING QUESTIONS PRESENTED.

The questions presented here all have been preserved below. In his initial traverse, Eychaner argued that the City's exercise of eminent domain was prima facie unconstitutional under the United States and Illinois constitutions. Eychaner appealed three times to the Appellate Court of Illinois. R.A. 400–02, 6040–42, 8393–95. He argued that preventing future blight was not a cognizable public purpose, and that its invocation here was a pretext for appeasing Blommer. The Appellate Court reached the merits of his arguments, holdings that future blight takings were constitutional and that the taking here was not

pretextual. App. 19a–20a, 58a. In petitioning the Supreme Court of Illinois, Eychaner again argued that the prevention of future blight was too speculative a justification to constitute a proper public use or purpose, and that the taking of his property on that purported basis was pretexual. App. 95a. He even argued that, if the taking here were permitted by *Kelo*—as the Appellate Court had suggested—*Kelo* lacked clarity and is inconsistent with prior U.S. Supreme Court precedent. *Id.*

Moreover, this case is not a one-off. Other decisions cited in this petition—such as *City of Norwood*, *99 Cents*, and *Aaron*, *see supra* at 16–18, 25; *Franco* and *County of Hawaii*, *see supra* at 24, *Beach-Courchesne* and *Tutwiler Drug Co.*, *see supra* at 21, and *County of Wayne*, *see supra* at 18 n.8—show that courts continue to confront questionable takings that require meaningful judicial scrutiny. Yet this Court has not invalidated a physical taking under the Public Use Clause in a lifetime, leading many to fear that the Clause is effectively a dead letter.

Aggressive municipalities continue to push the envelope. Chicago is not alone in this regard. For example, the city of Atlanta is seeking, through the use of eminent domain, to displace residents from the working class Peoplestown neighborhood so that the city can build "a Japanese garden" and "gazebos for community gatherings." Cliff Albright, *Gentrification is Sweeping Through America. Here Are the People Fighting Back*, The Guardian (Nov. 10, 2017), https://perma.cc/3LXF-RFP2. Similar efforts are underway in Los Angeles's Boyle Heights neighborhood, where city-sponsored gentrification has led to "exercises of eminent domain [that] often

harm poor people and people of color." Yxta Maya Murray, *The Takings Clause of Boyle Heights*, 43 N.Y.U. Rev. of L. & Soc. Change 109, 128 (2019).

This petition presents an ideal vehicle for the Court to make clear that the Public Use Clause is a meaningful limitation on governmental power, and that its enforcement rests with the courts entrusted to interpret the Constitution—not merely with the governments that are supposed to be constrained by it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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