No. 20-1214

In the

Supreme Court of the United States

FRED J. EYCHANER,

Petitioner,

v.

CITY OF CHICAGO, ILLINOIS,

Respondent.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, First District

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the individual right to ownership and use of private property. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing these issues, including *Murr v. Wisconsin*, 137 S.Ct. 1933 (2017); *Koontz v. St. Johns River Water Mgmnt. Dist.*, 570 U.S. 595 (2013); *Sackett v. Environmental Protection Agency*, 566 U.S. 120 (2012); and *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005).

SUMMARY OF ARGUMENT

One of the core principles of the American Founding is that individual rights are not granted by majorities or governments but are inalienable. Declaration of Independence ¶2, 1 Stat. 1. The Fifth Amendment seeks to capture a part of this principle in its announcement that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V.

In *Kelo v. City of New London, Connecticut*, 545 U.S. 469 (2005), this Court converted the public use requirement of the Fifth Amendment into a "public purpose" requirement and then stated that the Court

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[1] All parties were given notice and have consented to the filing of this amicus brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

must defer to the legislative judgment that there was, in fact, a public purpose for the confiscation of private property. *Id*. at 488-89. In effect, the Court converted the public use requirement into "little more than hortatory fluff." *Id*. at 497 (O'Connor, J., dissenting). By removing the requirement of public use and replacing it with deference to legislative judgments about public purpose, this Court authorized the government to take "property from A. and [give] it to B," something this Court previously thought well beyond the "rightful exercise of legislative authority." *Calder v. Bull*, 3 Dall. 386, 388 (1798).

The provisions of the Fifth Amendment were meant to protect the right of individuals to own and use private property. The Founders viewed the principal object of government as protecting such a right. This Court should grant review in this case to return to an original understanding that taking private property from one owner in order to bestow it on another is simply beyond the "rightful exercise of legislative authority."

REASONS WHY REVIEW SHOULD BE GRANTED

I. The Constitution Was Designed to Provide Robust Protections for Private Property Rights

The Fifth Amendment was adopted to protect the right of the individual to own and use and private property. Its purpose is not to protect government power to confiscate property. The focus should not be on the government's power to take, but rather the individual's right to keep. Therefore, amicus adopts Professor Donald Kochan's suggestion to refer to the

private property rights protection of the Fifth Amendment as the "Keepings Clause." Donald J. Kochan, *The ~~[Takings]~~ Keepings Clause: An Analysis of Framing Effects from Labeling Constitutional Rights*, 45 Florida State Univ. L. Rev. 1021, 1023 (2018). As Professor Kochan points out, we generally refer to rights preserving provisions of the Constitution by the rights they protect – such as the Free Press Clause rather than the Censorship Clause. *Id.* As this Court noted in *Murr*, the Constitution protects "the individual's right to retain the [property] interests and exercise the freedoms at the core of private property ownership." 137 S. Ct. at 1943. It is appropriate, therefore, to refer to the individual right at issue. Referring to the Fifth Amendment's "Keepings Clause" is one way to capture the purpose of the protection at issue and help maintain the focus on the individual right rather than the government power.

This Court has so often characterized the individual rights in property as "fundamental" that it is difficult to catalogue each instance. The Court has noted that these rights are among the "sacred rights" secured against "oppressive legislation." *Bartemeyer v. State of Iowa*, 85 U.S. 129, 136 (1873). These rights are the "essence of constitutional liberty." *Johnson v. United States*, 333 U.S. 10, 17 n.8 (1948). In a word, they are "fundamental." *In re Kemmler*, 136 U.S. 436, 448 (1890). Justice Washington noted that rights that are "fundamental" are those that belong "to the citizens of all free governments." *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823). He listed individual rights in property as one of the primary categories of fundamental rights. *Id.*

This Court in *Calder* found it impossible to imagine that the Constitution vested the legislature with the power to take property from one private owner to give to another. Such an action by the legislature would be "contrary to the first principles of the social compact" and could not be considered "a rightful exercise of legislative authority." *Calder*, 3 Dall. at 388. Constitutionally protected rights in property can in no way be viewed as a "poor relation" with other rights secured by the Bill of Rights. *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994); *see Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) (citing to John Locke, William Blackstone, and John Adams, the Court noted that "rights in property are basic civil rights").

This Court did not invent the idea of the ownership and use of private property as a fundamental right. The individual rights in private property are a cornerstone of the liberties enshrined in the Constitution.

Although there was little mention of a fear of federal confiscation of property during the ratification debates, James Madison included the Keepings Clause in the proposed Bill of Rights based on the protections included in the Northwest Ordinance. *See* THE BILL OF RIGHTS, ORIGINAL MEANING AND CURRENT UNDERSTANDING, (Eugene W. Hickcok, Jr., ed.) (Univ. Press of Virginia 1991) at 233. The Northwest Ordinance of 1787 included the first analog of the Bill of Rights and it expressly protected property from government confiscation. Robert Rutland, THE BIRTH OF THE BILL OF RIGHTS (Northeastern Univ. Press 1991) at 102. The drafters of the individual rights provisions of the Northwest Ordinance took their cue from the 1780 Massachusetts Constitution. *Id*. at 104.

While Madison may have used the language of the Massachusetts Constitution in crafting protections for individual rights in property, those protections, were firmly grounded in the Founders' theory of individual liberty and government's obligation to protect that liberty. The rights guaranteed in the Constitution are not gifts from government, revocable at will. Instead, they are natural rights endowed by the Creator. It is the purpose of just government to protect those rights. This is the theory of government that animates our Constitution.

The importance of individual rights in property predated the Declaration of Independence and the American Constitution. Blackstone noted that property is an "absolute right, inherent in every Englishman … which consists of the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land." William Blackstone, 1 COMMENTARIES ON THE LAWS OF ENGLAND Bk. 1, Ch. 1 at 135 (Univ. of Chicago Press 1979) (1765). From the pronouncement that "a man's house is his castle" (Sir Edward Coke, THIRD INSTITUTE OF THE LAWS OF ENGLAND at 162 (William S. Hein Co. 1986) (1644)) to William Pitts' argument that the "poorest man" in the meanest hovel can deny entry to the King (*Miller v. United States*, 357 U.S. 301, 307 (1958)), the common law recognized the individual right in the ownership and use of private property. Blackstone captures the essence of this right when he notes that the right of property is the "sole and despotic dominion … over external things of the world, in total exclusion of the right of any other person in the universe." Blackstone, COMMENTARIES, *supra*, Bk. 2, Ch. 1 at 2. The individual

rights in private property are part of the common law heritage that our Founders brought with them to America.

Alexander Hamilton argued that the central role of property rights is the protection of all of our liberties. If property rights are eliminated, he argued, the people are stripped of their "security of liberty. Nothing is then safe—all our favorite notions of national and constitutional rights vanish." Alexander Hamilton, *The Defense of the Funding System*, in 19 THE PAPERS OF ALEXANDER HAMILTON 47 (Harold C. Syrett ed., 1973). This idea was also endorsed by John Adams: "Property must be secured, or liberty cannot exist." John Adams, *Discourses on Davila*, in 6 THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed., 1851). Our nation's Founders believed that all which liberty encompassed was described and protected by their property rights. Noah Webster explained in 1787: "Let the people have property and they will have power that will forever be exerted to prevent the restriction of the press, the abolition of trial by jury, or the abridgment of many other privileges." Noah Webster, *An Examination into the Leading Principles of the Federal Constitution* (Oct. 10, 1787), *reprinted in* 1 THE FOUNDERS' CONSTITUTION (Philip B. Kurland and Ralph Lerner, eds., Univ. Chicago Press 1987) 597.

But this fundamental right in property loses much of its force without the "public use" restriction on the power of eminent domain. Instead of a fundamental, natural right, individuals are left with merely a license that can be revoked at the whim of the legislature. Under *Kelo*, the legislature defines what is a

public purpose and the courts must defer to the legislature's judgment. The Constitution provides no protection. This Court should grant review in this case to restore the "public use" limitation on the power of eminent domain.

II. Review Should Be Granted to Restore the Requirement of "Public Use" Consistent with the Original Meaning of the Keepings Clause

The "public use" limitation on the power of eminent domain is critical to the protections of private property in the Fifth Amendment. *See Kelo*, 545 U.S. at 506 (Thomas, J., dissenting) ("Though one component of the protection provided by the Takings Clause is that the government can take private property only if it provides 'just compensation' for the taking, the Takings Clause also prohibits the government from taking property except "for public use.'"). Merely paying "just compensation" does not empower the government to confiscate property for transfer to another private owner. Justice Thomas's research on the original meaning of "public use," and more recent scholarship utilizing corpus linguistics, demonstrate the key protections intended by the "public use" limitation on the power of eminent domain.

A. Justice Thomas's original public meaning research in *Kelo* shows that the requirement of public use was meant to limit government power to take private property.

In his dissenting opinion in *Kelo*, Justice Thomas's research found that "the Public Use Clause, originally understood, is a meaningful limit on the

government's eminent domain power." *Id.* at 506 (Thomas, J., dissenting). He argued that "[t]he most natural reading of the Clause is that it allows the government to take property only if the government owns, or the public has a legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever." *Id.* at 508. Justice Thomas based this reading off several originalist sources, including dictionary definitions, etymology, intratextualism, other founding-era documents, the common law, and early American practice. *See id.* at 508-12.

For instance, looking at the 1773 edition of Samuel Johnson's *A Dictionary of the English Language*, Justice Thomas concluded that "[a]t the time of the founding, dictionaries primarily defined the noun 'use' as '[t]he act of employing any thing to any purpose.'" *Id.* at 508 (quoting 2 S. Johnson, A Dictionary of the English Language 2194 (4th ed. 1773)). Turning to etymology, he found that "[t]he term 'use,' . . . 'is from the Latin *utor*, which means to use, make use of, avail one's self of, employ, apply, enjoy, etc.'" *Id.* (quoting J. Lewis, Law of Eminent Domain § 165, p. 224, n. 4 (1888)). From these sources, Justice Thomas concluded that "[t]he term 'public use,' then, means that either the government or its citizens as a whole must actually 'employ' the taken property." *Id.* at 508-09.

Justice Thomas did concede that "another sense of the word "use" was broader in meaning, extending to "[c]onvenience" or "help," or "[q]ualities that make a thing proper for any purpose." *Id.* at 509 (quoting Johnson, at 2194). But he argued that "read in context, the term 'public use' possesses the narrower meaning." *Id.* To establish that context, he first applied "intratextualism," wherein one interprets a term

in the Constitution based on how that same term is used elsewhere in the document. *See* Akhil Reed Amar, *Intratextualism,* 112 Harv. L. Rev. 747, 748 (1999). And Justice Thomas determined that "[e]lsewhere, the Constitution twice employs the word 'use,' both times in its narrower sense." *Id*. *See also* U.S. CONST. art. I, § 10 ("[T]he the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States."); U.S. CONST. art. I, § 8 (granting power to Congress to "raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years"). Therefore, he concluded, the "same word in the Public Use Clause should be interpreted to have the same meaning." *Id*. Justice Thomas also looked to the Constitution's text to contrast the phrase "public use" with the phrase "general Welfare," observing that "[t]he Framers would have used some such broader term if they had meant the Public Use Clause to have a similarly sweeping scope." *Id*. He also found that "[o]ther founding-era documents made the contrast between these two usages still more explicit," such as state constitutions and the Northwest Ordinance. *Id*. at 509-10. Additionally, reading the Clause broadly "also unnecessarily duplicates a similar inquiry required by the Necessary and Proper Clause." *Id*. at 511. Hence, the Constitution's text . . . suggests that the Takings Clause authorizes the taking of property only if the public has a right to employ it, not if the public realizes any conceivable benefit from the taking." *Id*. at 510.

Justice Thomas found further support for this reading in the "Constitution's common-law back-

ground." *Id*. Looking at Blackstone, Kent, and founding-era cases, he concluded that "nuisance law" was the common law's "express method of eliminating uses of land that adversely impacted the public welfare," and that commentators and courts "carefully distinguished the law of nuisance from the power of eminent domain." *Id*. Finally, Justice Thomas discovered that "[e]arly American eminent domain practice largely bears out [the narrower] understanding of the Public Use Clause." *Id*. at 511.

B. Recent corpus linguistic scholarship on "public use" confirms Justice Thomas's original understanding research.

Recent scholarship using a tool Justice Thomas did not have at his disposal in 2005 confirms his findings. *See* Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. Penn. L. Rev. 261, 311-316 (2019). That tool is the Corpus of Founding-Era American English (COFEA).[2] COFEA, "is designed to represent general written American English from the founding era of the United States of America (i.e., 1765-1799)." *See* https://lcl.byu.edu/projects/cofea/. The version Lee and Phillips used contained about 140,000,000 words taken from three main databases. The First is the Founders Online from the National Archives, which contains letters, diaries, and other personal records of six prominent founders (including letters to them by non-founders). *See* https://founders.archives.gov/. The second source of texts for COFEA comes from the Evans Bibliography of Early American Imprints, which contains books, pamphlets, and periodical publications printed in the United

[2] *See* https://lawcorpus.byu.edu/cofea/concordances/search.

States during the time period. *See* https://lcl.byu.edu/projects/cofea/. The third source consists of legal documents from Hein-Online. *Id.*

By using COFEA, Lee and Phillips were able to do something that Justice Thomas could not—see how the entire term "public use" was being used rather than looking up its constituent words in a dictionary. After all, as they note, "the communicative content of a phrase isn't always the sum of its parts." Lee & Phillips, *Data-Driven Originalism*, at 283. And by relying on COFEA, Lee and Phillips could take a more representative sample of American English usage to more clearly determine the term's original public meaning.

They recorded the sense of a random sample of 125 instances of "public use"[3] from each of the Founders Online and HeinOnline texts, and 85 instances from the Evans texts.[4] *See id.* at 313-14 n.170. Lee and Phillips found that the "direct sense that Justice Thomas argued for is much more common than the broader, indirect sense that the *Kelo* majority adopted." *Id.* at 314. Specifically, "the likelihood of *public use* being used in the direct [or narrow] compared to the indirect [or broad] sense ranges from 5.7 times (Evans), to 29.3 times (Founders), to 97.8 times ([Hein]) more likely." *Id.* at 315. The authors further observe that "given that the Constitution is a legal text, the fact that in the legal materials of COFEA (as well as the Founders' letters) the direct sense is even more common than the indirect sense compared to ordinary materials is further evidence as to what the

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[3] They technically searched for the following variations: "public use," "public uses," "publick use," and "publick uses."

[4] They only found 86 instances in the Evans texts, and had to drop one for quoting the Constitution. *See id.* at 313 n.170.

Constitution's communicative content is for the term *public use*." *Id*. Thus, while admitting that they "can only speak of probabilities here, the evidence is strong that Justice Thomas was correct: when the Constitution uses the term *public use* it means the government, military, or public owns or directly employs the item for a purpose, rather than the indirect-, broad-benefit sense the *Kelo* majority proposed." *Id*. at 315-16.

There is no basis for concluding that the City's confiscation of petitioner's property served a public use. If the public use language in the Fifth Amendment is to be something more than mere "hortatory fluff," this Court should grant review in this case to reexamine its holding in *Kelo*.

CONCLUSION

The Court should grant review to reexamine and overrule its decision in *Kelo* and restore the requirement of public use before a government can exercise the power of eminent domain.

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