No. 20-1214

IN THE

Supreme Court of the United States

FRED J. EYCHANER,

Petitioner,

v.

CITY OF CHICAGO,

Respondent.

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

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BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a taking pursuant to a development plan that would revitalize the economy, protect existing industry, reduce land use conflicts, and prevent blight in a rapidly declining area is permissible.

2. Whether the Court should reconsider *Kelo v. City of New London*, 545 U.S. 469 (2005).

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BRIEF FOR RESPONDENT IN OPPOSITION

In the proceedings below, petitioner Eychaner challenged the taking only under the Illinois Constitution and it is not clear the lower courts resolved a federal question, thus raising a substantial doubt regarding the Court's jurisdiction. At any rate, neither question warrants review. This case does not present the permissibility of future-blight takings because Chicago acquired petitioner's vacant lot pursuant to a comprehensive economic development plan no different from the one in *Kelo v. City of New London*, 545 U.S. 469 (2005), and for

purposes indistinguishable from those in *Berman v. Parker*, 348 U.S. 26 (1954), not merely to prevent future blight. There is also no sound reason to reconsider *Kelo*. Not only have most States revised their eminent domain laws since *Kelo*, but the decision is consistent with the Court's century-old takings jurisprudence providing a workable rule on which state and local governments have relied. The petition should be denied.

STATEMENT

A. Chicago's plan to revitalize the economy through the PMD and the River West TIF district.

1. In 1999, Chicago began crafting two overlapping development projects in a heavily-industrialized area near the Chicago River northwest of the "Loop"—Chicago's central business district. At around that time, the area had nine industrial firms, including a processing plant of Blommer Chocolate Company ("Blommer"). C. 204, 767. [1] These companies provided approximately 2,800 jobs, including about 1,900 industrial jobs. C. 767. The area also contained petitioner's land, which had stood vacant for decades and remains so to this day. Pet. App. 38a-39a.

[1] We cite the common-law record from appeal no. 19-1053 below.

City officials discussed plans for the two related development projects at a community meeting in January 2000. C. 757-58, 767. The first development project was to designate part of the area as a Planned Manufacturing District ("PMD"), which is designed to "encourage industrial investment" and "promote growth and development of the city's industrial employment base," Municipal Code of Chicago, Ill. § 17-6-0401 (2014). As explained at the community meeting, the PMD would "protect the 2800 jobs" and "strengthen the industrial users in the area." C. 757. The PMD would also create a "buffer" zone between the nine incumbent industrial facilities and new, nearby residential developments, which would reduce land use conflicts in the area. C. 782; *see also* C. 757, 760-61. The City Council approved the PMD in September 2000. C. 1176-83.

The second development project involved establishment of a tax-increment financing ("TIF") district in the River West area encompassing part of the PMD, "[t]o support th[e] policy" aims of the PMD, "to create incentives" for the industrial users in the PMD to invest in improvements, and to combat "the decaying nature of the infrastructure." C. 758, 767, 807-08. Under Illinois' TIF Act, establishment of a TIF district empowers municipalities to create "redevelopment plan[s]," 65 Ill. Comp. Stat. 5/11-74.4-4(k), which are "comprehensive program[s]" whereby a municipality would pay "redevelopment project costs" to fight deterioration and thereby promote the local economy, *id.* 5/11-74.4-3(n). Municipalities

may also exercise eminent domain in a TIF district to advance redevelopment goals. *Id.* 5/11-74.4-4(c).

Establishing the River West TIF district entailed two important steps. First, the City determined that the area was eligible for a TIF district. To be a TIF district, the relevant area must either be blighted or require "conservation"—i.e., the area is "rapidly declining and may soon become blighted … if [its] decline is not checked"—based on statutorily defined "blighting factors." 65 Ill. Comp. Stat. 5/11-74.4-3(a), (b). A study commissioned by the City conducted a field survey of the subject properties, as well as additional research at the county and city offices, and found that the River West area was a "conservation area" based on five statutory blighting factors: "deterioration of structures and surface improvements, presence of structures below minimum code standards, excessive vacancies, lack of community planning and lag in growth of Equalized Assessed Value." C. 240-49; *see* Pet. App. 87a. The study also found that those factors were "reasonably distributed through the entire Project Area," in which 91 of 103 buildings are 35 years old or older. C. 240; *see* Pet. App. 87a. A TIF district, the study concluded, would "induce private investment and arrest blighting factors" in this conservation area through tax-increment financing, resulting in (among other things) "stronger economic vitality," "increased construction and long-term employment opportunities," and "replacement of inappropriate

uses, blight, and vacant properties with viable, high-quality developments." Pet. App. 41a.

Second, the City prepared a development plan for the River West TIF area ("TIF Plan"). C. 202-38. The TIF Plan noted that "businesses and developers are less inclined to invest" in or near a conservation area and thus the City needs to "revitalize[]" the area "through a coordinated public and private enterprise effort of reinvestment, rehabilitation and redevelopment of uses compatible with a strong, stable area." C. 203, 209. The TIF Plan was "intended to provide the financial mechanism necessary to implement the goals and objectives of th[e] [PMD], along with other tools to encourage the appropriate redevelopment of compatible uses on adjacent sites." C. 204-05.

In September 2000, the City submitted the TIF Plan and the TIF eligibility study to the Community Development Commission ("Commission"), which the City Council established to oversee development projects in TIF districts. C. 177-96. After careful deliberation, the Commission recommended that the City Council adopt the plan, noting that the River West Area "has not been subject to growth and development through investment by private enterprise and would not reasonably be expected to be developed without the adoption of the [TIF] Plan." C. 272-73. In January 2001, the City Council enacted ordinances approving the TIF Plan and establishing the River West area as a TIF district. C. 197-201.

2. After the City began pursuing the PMD and the River West TIF district but before the City Council approved either project, the City held multiple hearings and meetings to engage stakeholders that might be affected by the two projects. At one such hearing, in March 2000, Blommer voiced an objection to being included in the City's proposed PMD. C. 862-73. Blommer explained that its principal land use conflict with nearby residential users was traffic caused by truck staging from its "seven days a week, 24 hours a day" operations and that the proposed PMD would not solve that problem because Blommer was located at the outer boundary of the PMD, leaving Blommer without enough buffer. C. 865. Blommer proposed extending the PMD further south to provide an adequate buffer, and suggested that without an adequate buffer it would like to be excluded from the PMD so that it could sell its facility unencumbered by a use restriction and relocate. C. 863-66. Blommer also met separately with a developer to discuss cooperation on establishing a buffer zone to the south of its facility. C. 970-71.

In a subsequent meeting with City officials, Blommer and the officials discussed the additional possibility of Chicago using funds made available from the TIF district to assist Blommer in creating a "larger industrial 'campus'" for truck staging that would better alleviate traffic congestion and thereby reduce conflicts with residential users. C. 1187-88. Satisfied by both Chicago's and the developer's commitments "to help create this buffer," C. 1014,

Blommer withdrew its objection and the City Council enacted the PMD, C. 1176-78.

Part of the suggested expansion was to build a new truck staging area on four acres of vacant and underutilized property north of Blommer's facility, which included petitioner's property. C. 1354-79. To implement the expansion, Blommer submitted a detailed redevelopment proposal to Chicago. *Id.* The proposal explained that Blommer's campus expansion would benefit Chicago through "job retention and creation," "redevelopment of the Site," and "long-term expansion of the real estate tax base." C. 1360. At that time, Blommer employed approximately 150 people in Chicago, including 115 manufacturing jobs. C. 1361. The proposal also noted that the campus expansion would ensure the PMD's goal of "retention/expansion of the City's industrial base" while serving "as a 'buffer zone'" to reduce land use conflicts "between the existing industrial area and residential development." C. 1362.

Blommer offered to purchase petitioner's vacant lot to build the truck staging area, but petitioner refused. C. 1426-31. Chicago then proposed to acquire the lot through eminent domain. C. 1434. The Commission deliberated on the City's request for eminent domain, including by holding a public meeting, and recommended that the City Council authorize the acquisition. C. 1444-62. In June 2002, the City Council enacted an ordinance

authorizing the taking, finding that acquisition of petitioner's lot was necessary "to achieve the objectives of" the TIF Plan, C. 295—which included economic development and the reduction of land use conflicts, C. 204-05—and for the "public purpose of improving a commercially blighted area," C. 296. The City Council also later approved an agreement between the City and Blommer that required Blommer to carry out the campus expansion according to the City's TIF Plan. C. 1478.

B. Proceedings below.

1. With the City Council's authorization, Chicago sued in August 2005 to acquire petitioner's lot through eminent domain. C. 74-80.[2] Petitioner filed a traverse challenging the condemnation under both the federal and state Constitutions. C. 135-38. He recognized that the taking was for "economic development," which *Kelo* and other decisions of this Court allowed. C. 308-09. But petitioner argued that the Illinois Constitution prohibited "eminent domain for economic redevelopment on property that is neither blighted nor a slum." C. 309. The Circuit Court rejected that argument and noted that although petitioner's traverse had referenced the federal Constitution, petitioner had "confined" his arguments

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[2] Contrary to petitioner's assertion, Pet. ii, this was not an *in rem* proceeding. Under Illinois law, where the defendant is the property owner, the case is not *in rem*. *Village of Algonquin v. Lowe*, 954 N.E.2d 228, 233-34 (Ill. App. Ct. 2011).

"to the public use requirement under the Illinois takings clause." Pet. App. 84a n.1.

After a trial on just compensation, petitioner appealed to the Illinois Appellate Court. Pet. App. 27a. He again conceded that the federal Constitution permitted economic development takings and argued only that the Illinois Supreme Court had "chart[ed] a narrower path in this area [by] impos[ing] public use requirements that are stricter than the federal baseline." Appellant Reply Br. 7, Illinois Appellate Court, No. 1-13-1833 (filed July 21, 2014) (quotation marks omitted) ("Appellant Reply Br."); *see* Appellant Opening Br. 17-18, Illinois Appellate Court, No. 1-13-1833 (filed Feb. 3, 2014) ("Appellant Opening Br."). The appellate court held that the taking was permissible. Pet. App. 49a-62a. The court reasoned that "a telling feature of sound public use in the context of economic redevelopment is the existence of a well-developed, publicly vetted, and thoughtful economic development plan." Pet. App. 58a. The court noted that "[s]uch a plan was present in *Kelo*" and in this case. Pet. App. 58a-59a. Among other things, the court explained, the City's development plan sought "to reduce blighting factors, prevent blight, foster the City's industrial base, prevent conflicts between residential and industrial uses, and retain existing industry," all of which "constitute valid public uses." Pet. App. 60a. And because "[t]he taking of Eychaner's land to expand Blommer's industrial campus land furthers each of

these goals," the court concluded that the taking was "a sound use of eminent domain." Pet. App. 60a-61a.

The Illinois Appellate Court also rejected petitioner's attempt to "cast[] aspersions" on the taking by implying that the City's agreement to help expand Blommer's campus was "the impetus behind both the PMD and River West TIF." Pet. App. 61a. To the contrary, the court noted, "the City conceived of the PMD and River West TIF as part of an economic revitalization plan." *Id.* And petitioner had cited "no evidence that the River West TIF and PMD were set up as a sham to take his property." Pet. App. 60a. The court noted further that petitioner "does not contest the designation of the River West TIF as a conservation area." Pet. App. 57a, 60a-61a. Given these circumstances and the findings that the taking "aligns with the goals of the City's economic development plan," the court held that the taking was constitutional and affirmed the denial of petitioner's traverse. Pet. App. 61a-62a.

2. The appellate court did agree with petitioner that a new trial on compensation was required. Pet. App. 49a. Before the second trial, Chicago replaced the PMD with the "North Branch Framework," a mixed-use zoning area designed to bring "public benefits from more flexible private redevelopment regulations, especially involving new jobs, riverfront enhancements, open space development, new transit options, and an enhanced tax base." C. 8071, 8073.

Following the second trial, petitioner sought reconsideration of the taking's permissibility on the ground that the City had abandoned the PMD. C. 7590-7600. The Circuit Court denied petitioner's motion because the evidence of the North Branch Framework had been available before the second trial, making reconsideration inappropriate, and because it would not change the constitutionality of the taking anyway. C. 8382-87. The court explained that the North Branch Framework was consistent with the City's broader goals of promoting economic revitalization while fostering existing industry and combating blighting conditions, so the taking pursuant to those goals continued to serve a permissible public use. C. 8383-87. The appellate court affirmed the circuit court's conclusions, Pet. App. 13a-21a, noting that "the North Branch Framework and the River West TIF plan together carry out the purpose of promoting the economic revitalization of a conservation area" and that a taking advancing that and other related purposes, such as reducing land use conflicts, is constitutional, Pet. App. 18a-19a, 21a. The court also held that its prior decision upholding the taking constituted the law of the case. Pet. App. 13a. The Illinois Supreme Court denied leave to appeal. Pet. App. 1a.

REASONS FOR DENYING THE PETITION

The Court should deny review for multiple independent reasons. As an initial matter, petitioner challenged the taking at issue only under

the Illinois Constitution, and it is far from clear that the lower courts resolved any federal claim, thus raising a substantial doubt about whether the Court has jurisdiction.

In any event, there is no sound basis to grant certiorari on the questions presented. Although petitioner asks the Court to decide whether future blight is a permissible basis for a taking, this case does not present that question because the City did not take petitioner's land solely or even primarily to prevent future blight. Rather, the City decided to acquire the land pursuant to a comprehensive economic development plan no different from the plan in *Kelo*. And insofar as the City sought to prevent blight and reinvigorate the economy as part of the broader development plan, this Court has held those uses to be permissible in *Berman* and *Kelo*. Petitioner identifies no case that held otherwise on federal grounds in comparable circumstances.

Nor is there any reason to reconsider *Kelo*. States have substantially revised their eminent domain laws to restrict takings since *Kelo*, minimizing any need to revisit that decision. *Kelo* is also consistent with the Court's longstanding takings jurisprudence that has preserved ample latitude for legislatures—institutions best positioned to account for local needs—to determine what is appropriate public use. And reconsidering *Kelo* could threaten significant reliance interests by casting doubt on

important projects with broad public benefits whose plans were put in place years ago.

I. IN THE STATE COURTS, PETITIONER CHALLENGED THE TAKING ONLY UNDER THE ILLINOIS CONSTITUTION.

This Court reviews only those state court judgments involving, as relevant here, "any title, right, privilege, or immunity … claimed under the [federal] Constitution." 28 U.S.C. § 1257(a). To satisfy this requirement, a federal question must have been "either raised or squarely considered and resolved in state court." *Illinois* v. *Gates*, 462 U.S. 213, 218 & n.1 (1983) (emphasis omitted). It is doubtful that those requirements are satisfied here.

Petitioner did not raise a federal claim before the Illinois Circuit or Appellate Court, instead challenging the taking only under the Illinois Constitution. Although petitioner alleged in his traverse that the taking violated both the state and federal Constitutions, he argued only that article I, section 15 of the Illinois Constitution "forbids the condemnation here." C. 309. Petitioner acknowledged that *Kelo* and other decisions of this Court did not affect the analysis because, in his view, the state Constitution was more restrictive than federal limits. C. 308-09. Likewise, petitioner conceded on appeal that *Kelo* approved of economic development takings as a federal constitutional matter but argued that the Illinois Supreme Court

had "charted a narrower path in this area [by] 'impos[ing] "public use" requirements that are stricter than the federal baseline.'" Appellant Reply Br. 7; *see* Appellant Opening Br. 17-18.

Unsurprisingly, the Illinois courts also resolved petitioner's *state* takings claim. The circuit court rejected his argument that the taking violates the Illinois Constitution without addressing *Kelo* or any of this Court's takings cases; indeed, the court noted that although petitioner's "traverse challenge[d] the taking under the Fifth and Fourteenth Amendment[s] to the United States Constitution," his arguments were "confined to the public use requirement under the Illinois takings clause." Pet. App. 84a n.1. The appellate court similarly analyzed the condemnation primarily under Illinois decisions. Pet. App. 54a-62a.

To be sure, the appellate court discussed *Kelo*, noting that it was "[g]uided," in part, by *Kelo*, which had "found no issue with this kind of taking." Pet. App. 53a-54a. The court also noted that the taking was part of a broader development plan, like the taking in *Kelo*. Pet. App. 58a-59a. But it is far from clear whether the court was resolving a federal question. *Cf. Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (the Court will not undertake review if the state court made clear that it was "choos[ing] merely to rely on federal precedents as it would on the precedents of all other jurisdictions"); Pet. App. 54a-62a (citing cases from the District of Columbia, Rhode

Island, New York, and Kansas). After all, petitioner had presented only a state constitutional challenge in his briefing. *See Webb v. Webb*, 451 U.S. 493, 501 (1981) ("there should be no doubt from the record that a claim under … the *Federal* Constitution was presented in the state courts").

All of that presents complicated issues regarding the Court's jurisdictional limits and the balance of state and federal authority. Tellingly, the petition does not describe with clarity "when the federal questions sought to be reviewed were" purportedly "raised," "the method or manner of raising them," "and the way in which they were passed on" by the state courts, as required by this Court's Rule 14.1(g)(i). *See* Pet. 1, 10-11. The Court would need first to assure itself of jurisdiction, and even assuming the jurisdictional hurdle could be resolved, the Court would be better served by awaiting a case in which the federal question was squarely litigated below.

II. THIS CASE DOES NOT PRESENT A QUESTION CONCERNING THE TAKING OF PROPERTY SOLELY BECAUSE OF FUTURE BLIGHT AND INSTEAD FALLS SQUARELY WITHIN CIRCUMSTANCES THE COURT HAS UPHELD AGAINST TAKINGS CHALLENGES.

A. Chicago did not decide to take petitioner's vacant lot merely to prevent future blight.

Petitioner asks the Court to review whether "the possibility of *future* blight [is] a permissible basis for a government to take property in an unblighted area and give it to a private party for private use." Pet. i. But petitioner gets the fundamental premise of that question wrong: Chicago did not pursue the taking merely to prevent future blight. Thus, this case does not raise the permissibility of future-blight takings at all.

Chicago decided to acquire petitioner's vacant lot pursuant to a comprehensive development plan of the River West area. That plan sought to revitalize the economy, maintain the manufacturing base in the neighborhood, reduce land-use conflicts, and address blighting concerns. *See* Pet. App. 58a-62a. In the proceedings below, petitioner acknowledged that the taking was for "economic development." *E.g.*, Appellant Opening Br. 11; *see id.* at 12 ("Defendant's

property is being taken … in the name of economic redevelopment."). He even conceded that *Kelo* allows such takings. *See* Appellant Opening Br. 17-18; Appellant Reply Br. 7; *see also* C. 308. The Illinois Appellate Court accordingly recognized the taking for what it actually is—an action in furtherance of "a well-developed, publicly vetted, and thoughtful economic development plan"—and held that it was permissible as "sound public use." Pet. App. 58a-59a.

That preventing further blighting conditions was one reason for the plan does not inject the question petitioner seeks to present. This Court has never required prevention or remediation of blight (or future blight) for a permissible taking. Rather, even where a local government is "not confronted with the need to remove blight," its "determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to … deference." *Kelo*, 545 U.S. at 483. Chicago made that determination, as well as finding that the area had numerous blighting conditions hindering investment. Chicago's purposes of economic development, retention of industry, and reduction of land-use conflicts "all constitute valid public uses," Pet. App. 60a, and the case presents no occasion to decide whether future blight alone is a permissible basis for a taking.

B. The taking is in the heartland of the Court's takings jurisprudence.

Properly contextualized, the taking here falls squarely within the public-use takings the Court has authorized in *Kelo* and *Berman*.

1. A sovereign may take private property for "public use" with "just compensation." U.S. Const. amend. V. To satisfy the "public use" requirement, the property need not itself "be put into use for the general public." *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984). For more than a century, this Court has instead "defined [public use] broadly, reflecting [a] longstanding policy of deference to legislative judgments." *Kelo*, 545 U.S. at 480. Accordingly, "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." *Midkiff*, 467 U.S. at 241.

The Court has applied those principles to uphold takings to further economic development and to remove and prevent blight. In *Berman*, the Court upheld a taking to effectuate redevelopment of the "slums" or "blighted areas" of Washington D.C. 348 U.S. at 28 & n.1. The Court acknowledged that the legislation authorizing takings did not define "slums" or "blighted areas." 348 U.S. at 28 n.1. But the legislature, as "the main guardian of public needs," had determined that it was "important to redesign the

whole area so as to eliminate the conditions that cause slums" and to prevent "revert[ing] again to a blighted or slum area," so it sought to take property and build "schools, churches, parks, streets, and shopping centers" to "diversif[y] … future use." *Id.* at 32, 34-35. The Court deferred to that judgment and held the taking permissible, emphasizing the broad "discretion of the legislative branch." *Id.* at 31-32, 35-36.

In *Kelo*, the Court held that the City of New London could take property pursuant to its economic development plan of the Fort Trumbull area. None of the properties at issue was "blighted or otherwise in poor condition." 545 U.S. at 475. But the city determined that the Fort Trumbull area had become "sufficiently distressed" and thus prepared a "comprehensive" plan to create jobs, generate tax revenue, and help revitalize the downtown area. *Id.* at 483-84. The Court held that those were permissible public uses because "[p]romoting economic development is a traditional and long-accepted function of government" and "there is no basis for exempting economic development from our traditionally broad understanding of public purpose." *Id.* at 484-85. Indeed, it would be "incongruous to hold that the [c]ity's interest in the economic benefits to be derived from the development of the Fort Trumbull area has less of a public character than" the interest in "transforming a blighted area into a 'well-balanced' community through redevelopment" in *Berman*. *Id.* And because "the entire plan"

"unquestionably serves a public purpose," the Court concluded that the individual takings also satisfied the public use requirement, particularly given "the comprehensive character of the plan" and "the thorough deliberation that preceded its adoption." *Id.* at 484.

The condemnation here is plainly permissible under these cases. Chicago pursued the taking pursuant to development plans just like in *Kelo* and *Berman*. The plan in *Kelo* was "'projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city.'" 545 U.S. at 472. Likewise, Chicago's development plan was designed to grow the City's industrial base and retain jobs, thereby revitalizing an area that was rapidly declining. *See* C. 212-14. In *Berman*, too, the redevelopment plan sought "diversification in future use" of the area by building, among other things, shopping centers, which is plainly targeting economic development. 348 U.S. at 34-35. Chicago similarly sought to "foster its industrial and commercial base while maintaining a diversified economy" through the PMD and relatedly the River West TIF. Pet. App. 58a-59a; *see also* Pet. App. 13a, 17a-21a.

Moreover, the City Council determined that taking petitioner's vacant lot was necessary to achieve the purposes of its development plan. C. 295-96. As the Illinois Appellate Court noted, the "the City, in good faith, consider[ed] the public use of taking

Eychaner's land" and found the taking to be "in conformance with the goals of the [TIF] Act, the PMD, and River West TIF to check future blight, to minimize the conflict between residential and industrial uses, and promote the economic revitalization of a conservation area." Pet. App. 59a-60a. There is no reasonable argument that the taking is not rationally related to the City's development goals.

2. Petitioner's arguments to the contrary are meritless. Petitioner tries to distinguish *Kelo* and *Berman* on the theory that those cases involved "present" blight or harm. Pet. 13-16. Setting aside that preventing blight was only one basis among many for the taking here, petitioner is wrong that only removal of existing blight (or harm) is allowed under this Court's precedent. *Berman* itself recognized that the development plan in that case would not only remove blight but prevent "revert[ing] again to a blighted or slum area." 348 U.S. at 34; *see id.* at 35 (the redevelopment plan sought to forestall "the birth of future slums"). And the Court roundly rejected petitioner's narrow view of *Berman* in *Kelo*: rather than involving only "the initial removal of blight," the Court noted, the "public use described in *Berman* extended beyond that to encompass the purpose of *developing* that area to create conditions that would prevent a reversion to blight in the future." 545 U.S. at 484 n.13.

Petitioner's assertion (Pet. 23) that "takings premised on future blight or other speculative future harms" should be "subject to heightened scrutiny, including for pretext," is also misguided. Again, the Court has already rejected heightened scrutiny for economic-development takings like this one. For example, *Kelo* declined to require "'reasonable certainty' that the expected public benefits will actually accrue," noting that such scrutiny would represent a significant "departure from [the Court's] precedent" requiring deference to legislative judgments. 545 U.S. at 487-88. The Court also declined to "second-guess the [c]ity's determinations as to what lands it needs to acquire in order to effectuate" the planned development, because the Court held in *Berman* that "'[o]nce the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.'" *Id.* at 488-89 (quoting *Berman*, 348 U.S. at 35-36). Petitioner's demand for heightened scrutiny raises no legal issue that the Court has not considered and rejected.

At any rate, there is nothing "speculative" or "pretext[ual]" about the City's determinations. *E.g.*, Pet. 2, 12, 22-25, 29-30. Although petitioner faults (Pet. 20) future blight as "a low threshold and necessarily conjectural," he did "not contest the designation of the River West TIF as a conservation area." Pet. App. 57a. Moreover, the City carefully

determined that the area was a "conservation area" based on documented statutory blighting factors, such as "deterioration of structures and surface improvements, presence of structures below minimum code standards, excessive vacancies, lack of community planning and lag in growth of Equalized Assessed Value." C. 240-44. The statute applied in *Berman*, which petitioner does not ask this Court to reconsider, did not even define "slums" or "blighted areas." 348 U.S. at 28 n.1.

Petitioner contends (Pet. 23-24) that pretext was afoot because Chicago decided to pursue the taking after "Blommer insisted on obtaining Eychaner's property as a condition for supporting the PMD." To be clear, the City planned the PMD and the River West TIF district first, and later decided that taking petitioner's vacant lot would serve the broader goals of the plan to reduce land use conflicts and retain industry. As the Illinois Appellate Court noted, moreover, the "findings associated with the PMD, the River West TIF, and the ordinance authorizing the taking of Eychaner's land did not indicate a sweetheart deal to help Blommer avoid paying full price," nor was there any "evidence that the River West TIF and PMD were set up as a sham to take his property." Pet. App. 59a-61a. Instead, all the findings confirmed that the taking "aligns with the goals of the City's economic development plan to retain existing industry, prevent conflicts between residential and industrial use, and promote

investment and revitalization in a conservation area." Pet. App. 61a-62a.[3]

Petitioner is likewise wrong that pretext should have been inferred because Chicago pursued the taking even after repealing the PMD based on the River West TIF having found a risk of future blight "16 years earlier." Pet. 24 (emphasis omitted). Petitioner forfeited this argument by waiting until after the second trial to raise it. *See* Pet. App. 14a-17a (lower court finding this argument untimely). Further, as the lower courts concluded, the replacement of the PMD with the North Branch Framework does not affect the constitutionality of the taking because the North Branch Framework shares the broader goals of economic revitalization and promotion of existing industry, which support the constitutionality of the taking. C. 8382-87; Pet. App. 13a-21a.

Finally, petitioner emphasizes how the area has "not become blighted in the sixteen years since" the City decided to exercise eminent domain. *E.g.*, Pet. 14. But the permissibility of a taking does not

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[3] Petitioner's argument (Pet. 25) that "the taking here was effectuated to keep a powerful private entity 'satisfied' based on that entity's 'unilateral demand for expansion'" is not only wrong but also ironic given petitioner's own political influence. *E.g.*, Illinois Sunshine, https://tinyurl.com/yh5e6r99 (visited May 14, 2021) (Eychaner political contributions list); Federal Election Comm'n, https://tinyurl.com/dutjh97f (visited May 14, 2021) (same).

depend on "empirical debates over the wisdom of takings." *Midkiff*, 467 U.S. at 242-243. Indeed, in *Midkiff*, the Court upheld Hawaii's transfer of private properties from lessors to lessees while noting that the state legislation authorizing such transfers, "like any other, may not be successful in achieving its intended goals." *Id.* at 242. All that matters for the public use requirement, the Court noted, is whether the state legislature "'rationally could have believed that the [Act] would promote its objective,'" not "'whether in fact the provision will accomplish its objectives.'" *Id.* at 242-43.

C. There is no conflict.

Petitioner is mistaken to argue that the decisions below "conflict with other cases enjoining future blight takings," Pet. 16. Of the three cases petitioner cites, two interpreted the state Constitutions, so they present no conflict with the decisions here, which applied the Illinois and (petitioner argues) federal Constitutions. *See City of Norwood v. Horney*, 853 N.E.2d 1115, 1123 (Ohio 2006) ("the fact that the appropriation would provide an economic benefit to the government and community, standing alone, does not satisfy … the Ohio Constitution"); *County of Wayne v. Hathcock*, 684 N.W.2d 765, 770 (Mich. 2004) (takings at issue "do not pass constitutional muster under … our 1963 constitution"). If anything, those cases counsel against certiorari because they demonstrate that when courts perceive problematic takings, they have

no difficulty "placing further restrictions on [the] exercise of the takings power" under state law, as this Court has suggested. *Kelo*, 545 U.S. at 489.

The other case petitioner cites—*99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001)—is also readily distinguishable. The municipality there admitted "the *only* reason" it proposed the taking "was to satisfy the private expansion demands" of a large retailer. *Id.* at 1129; *cf. Kelo*, 545 U.S. at 487 & n.17 (characterizing *99 Cents* as involving "an unusual exercise of government power" that could raise a suspicion of "private purpose"). By contrast, Chicago did not initiate the taking solely to satisfy Blommer's private expansion, but rather pursuant to a pre-existing development plan that sought to retain industry and reduce land use conflicts. C. 757, 760-61, 767, 780, 807-08. Those are material differences and correctly led to the conclusion that Chicago's taking was for public use and not pretextual. In all events, the possibility of a conflict between the decisions of a state intermediate appellate court in this case and a twenty-year-old decision of a federal district court is not a reason to grant certiorari.

III. THERE IS NO BASIS TO RECONSIDER *KELO*.

The petition presents no sound reason to reconsider *Kelo*. More than forty States have restricted takings in response to *Kelo*. And *Kelo* is

inseparable from the Court's earlier takings cases like *Berman* and *Midkiff*, neither of which petitioner challenges. To prohibit the taking at issue, therefore, overturning *Kelo* would not be enough; the Court will have to reject its century-old jurisprudence of deferring to legislatures regarding what is an appropriate public use—deference on which state and local governments across the country have long relied, and are currently relying—to pursue important projects with significant public benefits.

A. States have significantly tightened eminent domain laws in recent years.

Petitioner warns that if the decisions below stand, governments could "take almost any property." Pet. 20. But takings of the kind he objects to—though permissible under the federal Constitution—are uncommon because States, including Illinois, have significantly amended their eminent domain laws since *Kelo*, as this Court invited States to do. There is no need for the Court to take up this issue now.

1. The Court explained in *Kelo* that "nothing in [its] opinion precludes any State from placing further restrictions on its exercise of the takings power," and that "many States already impose 'public use' requirements that are stricter than the federal baseline." 545 U.S. at 489. This trend has increased since then, with at least 44 States enacting restrictions on state eminent domain power. *See* Pet.

32; Berliner, *Looking Back Ten Years After* Kelo, 125 Yale L.J. Forum 82, 84-88 & nn.9-17 (2015) (cataloguing post-*Kelo* updates).

First, eleven States amended their Constitutions to prohibit economic development takings. For example, the Texas Constitution provides that "'public use' does not include the taking of property … for transfer to a private entity for the primary purpose of economic development or enhancement of tax revenues." Tex. Const. art. I, § 17(b) (amended 2009).

Second, approximately forty States have enacted legislation narrowing the scope of the government's eminent domain powers. For instance, Kansas has prohibited the "taking of private property by eminent domain for the purpose of selling, leasing or otherwise transferring such property to any private entity" subject to narrow exceptions limited primarily to public rights-of-way and common carriers. Kan. Stat. Ann. § 26-501a(b) (eff. July 1, 2007). And Florida has prohibited the use of eminent domain to eliminate blight. Fla. Stat. § 73.014 (eff. May 11, 2006).

Third, nine States provide enhanced procedural protections for landowners in eminent domain proceedings. In Virginia, for example, the "condemnor bears the burden of proving that the use is public, without a presumption that it is," Va. Const. art. I, § 11 (eff. Jan. 1, 2013), and many States require

the government to show blight by clear and convincing evidence, *e.g.*, Mich. Const. art. X, § 2 (eff. Dec. 23, 2006).

Fourth, several state supreme courts have interpreted their respective state Constitutions as prohibiting economic development takings and otherwise limiting the government's eminent domain powers. *See, e.g.*, *City of Norwood v. Horney*, 853 N.E.2d 1115, 1142 (Ohio 2006); *Board of Cty. Comm'rs of Muskogee Cty. v. Lowery*, 136 P.3d 639, 648-52 (Okla. 2006) (economic development in the absence of blight is not a "public use" under the Oklahoma Constitution).

Illinois also has amended its eminent domain laws after *Kelo* and its decision to pursue the taking at issue. In 2007, the Illinois General Assembly enacted the Illinois Eminent Domain Act, which requires that, when the government exercises eminent domain "to acquire property for private ownership or control," it "prove by clear and convincing evidence that the acquisition … is (i) primarily for the benefit, use, or enjoyment of the public and (ii) necessary for a public purpose." 735 Ill. Comp. Stat. 30/5-5-5(c). The Act also imposes a host of other procedural and substantive restrictions on the government's ability to take property for the purpose of remedying blight. *See id.* Thus, even in Illinois, the issues raised by petitioner are of diminishing significance.

2. State restrictions, in turn, have limited the kind of takings petitioner complains about. For example, in *Rhode Island Economic Development Corp. v. The Parking Lot Co.*, 892 A.2d 87, 105 (R.I. 2006), the Rhode Island Supreme Court rejected condemnation of a privately-owned parking garage at the airport because it was "motivated by a desire for increased revenue and was not undertaken for a legitimate public purpose" within the meaning of either the federal or state takings clauses. Similarly, a Colorado court relied on the "anti-*Kelo* statute," *Carousel Farms Metro. Dist. v. Woodcrest Homes, Inc.*, 442 P.3d 402, 412 (Colo. 2019), to block a condemnation purportedly undertaken to establish "an open space buffer" but proven, after a two-day evidentiary hearing, to have been motivated by bad faith. *City of Lafayette v. Town of Erie Urban Renewal Auth.*, 434 P.3d 746, 752-54 (Colo. App. 2018); *cf. Franco v. Nat'l Capital Revitalization Corp.*, 930 A.2d 160, 172-75 (D.C. 2007) (explaining elements of Fifth Amendment "pretext defense" in D.C. courts). And the Pennsylvania Supreme Court struck a condemnation under the state's Property Rights Protection Act, passed in the wake of *Kelo*, to prohibit condemnations "'to use [the property] for private enterprise.'" *Reading Area Water Auth. v. Schuylkill River Greenway Ass'n*, 100 A.3d 572, 582-84 (Pa. 2014).

The petition itself demonstrates the lack of a pressing need for the Court's intervention. Petitioner acknowledges that States have rejected

economic development takings under their own Constitutions. Pet. 16-18 & n.8 (Ohio and Michigan). He also points to three cases in which a state or federal court struck down takings as impermissible, Pet. 21, 25 (*Beach-Courchesne*, *99 Cents*, and *Aaron*), and does not identify any purportedly problematic taking—other than of his own vacant lot—that a court has permitted. And three post-*Kelo* decisions that petitioner cites stated that courts will look beyond the condemnation authority's proffered justification to determine pretext, as petitioner requests. Pet. 24-25 (*Franco*, *County of Hawaii*, *Carole Media*).

B. *Kelo* continues the Court's longstanding jurisprudence, provides a workable rule, and supports significant reliance interests.

The Court does not lightly overturn its precedents, and this case presents no occasion to do so. None of the factors the Court considers for overruling a precedent—e.g., the quality of its reasoning, the workability of the rule it established, its consistency with other related decisions, and reliance interests, *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2178 (2019)—supports reconsidering *Kelo*.

1. *Kelo* follows a long line of precedents, including *Berman* and *Midkiff*, reserving "public use" determinations to legislative discretion. Cato Institute agrees, criticizing *Kelo* for relying on

Berman and *Midkiff*, which, in its view, are also "flawed." Cato Inst. Br. i, 14.

As the Court noted in *Berman*, "[t]he concept of the public welfare is broad and inclusive." 348 U.S. at 33. "It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." *Id.* Thus, when the legislature determines that a development project would serve a public use, the legislature is "the main guardian of the public needs," and courts play only an "extremely narrow" role. *Id.* at 32, 33-34.

Midkiff also emphasized deference as the crux of the Court's takings doctrine. There the Court reversed the lower federal court's judgment that Hawaii's takings were "'a naked attempt'" to transfer A's private property to B "'solely for B's private use and benefit,'" 467 U.S. at 235, reasoning that "public use" is "coterminous with the scope of a sovereign's police powers" and thus it must defer to Hawaii's legislative judgments "'unless the use be palpably without reasonable foundation,'" *id.* at 240-41 (quoting *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 680 (1896)). Under that standard, the Court had "no trouble" finding the State's land transfer to be constitutional. *Id.* at 241-42. "[I]n our system of government," the Court noted, "legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power." *Id.* at 244.

Berman and *Midkiff* have historical analogs as well. As the Court observed more than a century ago, the Court "greatly … deferred to the opinions of the state courts" as to whether a taking is for public use because such determinations "so closely concern[] the welfare of their people." *Hairston v. Danville & W. Ry. Co.*, 208 U.S. 598, 607 (1908). Thus, the Court has upheld as public use condemnations authorizing the owner of arid land to enlarge a ditch on his neighbor's property to irrigate his land, *Clark v. Nash*, 198 U.S. 361, 367 (1905), and generally construction of an irrigation ditch for agricultural use, *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 152-57 (1896); *cf. O'Neill v. Leamer*, 239 U.S. 244, 245-46 (1915). The Court has also upheld a taking to allow a railway company to construct a spur track that would reach the factory of a larger shipper, *Hairston*, 208 U.S. at 599, 608, or a mining company to use an aerial bucket line for purposes of carrying ores over property it did not own, *Strickley v. Highland Boy Gold Min. Co.*, 200 U.S. 527, 529 (1906).

Key to all those decisions was the State's judgment about what constitutes public use. As the Court noted in one such case, the state legislature and supreme court had determined that "the public welfare of that state demands" the taking at issue, and "[t]he Constitution of the United States does not require us to say that they are wrong." *Strickley*, 200 U.S. at 531-32; *see* Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings"*

Clause, 53 Hastings L.J. 1245, 1254 n.28 (2002) (in the nineteenth century, States widely delegated their "eminent domain power to private interests for the creation of a wide variety of manufacturing projects designed to achieve desirable economic ends").

Petitioner ignores those precedents. He argues (Pet. 27-29) that *Kelo* conflicts with the historical understanding of "public use" that allowed takings to "widen a street" or to build railroads and parks and therefore is unfaithful to the constitutional text. But long before *Kelo*, *Berman*, and *Midkiff*, the Court "rejected any literal requirement that condemned property be put into use for the general public." *Midkiff*, 467 U.S. at 244; *accord Rindge Co. v. Los Angeles Cty.*, 262 U.S. 700, 707-08 (1923). The irrigation ditch in *Clark*, for example, was to benefit the arid-land owner. *See Strickley*, 200 U.S. at 531 (*Clark* authorized condemnation "for the irrigation of … land belonging to a private person, in pursuance of the declared policy of the state").

Petitioner's assertion (Pet. 29) that "[n]either *Berman* nor *Midkiff* called for general deference to private use takings" also distorts those and other takings decisions. The taking here was *not* for private use under the Court's precedents. The City determined that developing the area through the PMD and the River West TIF project would invigorate the economy, foster the industrial base, reduce land-use conflicts, and prevent blight, and that the acquisition of petitioner's vacant lot was necessary to

achieve those purposes. That is indistinguishable from the "balanced, integrated plan" in *Berman* that sought to remove and prevent blight and "diversification in future use" of the area. 348 U.S. at 34-35. Nor did the Court limit takings to only those facts of *Berman* and *Midkiff*, as petitioner argues (Pet. 29). As explained above, the Court has authorized condemnations that would generally aid the local economy like agriculture and mining. *See supra* p. 33.

Rather than engaging with those precedents, petitioner criticizes *Kelo* for "erroneously" relying on some of the early takings cases because they involved the Fourteenth Amendment, rather than the Fifth Amendment. Pet. 31-32; *see* Pacific Legal Found. Br. 21-22. But those cases appropriately informed the Court's analysis insofar as they determined whether the taking was for public use. *E.g.*, *Fallbrook*, 164 U.S. at 158 (addressing the claim that a "citizen is deprived of his property without due process of law" if property were taken "for any other than a public use"). Indeed, both the *Kelo* dissent that petitioner cites favorably (Pet. 27-32) and *Midkiff*—which he does not challenge—recognized the Fourteenth Amendment cases as governing the Court's public use doctrine. *See Kelo*, 545 U.S. at 515-16 (Thomas, J., dissenting); *Midkiff*, 467 U.S. at 241 (citing, among others, *Fallbrook*); *cf.* Somin, *Controlling the Grasping Hand: Economic Development Takings After* Kelo, 15 Sup. Ct. Econ. Rev. 183, 241-42 (2007) (Justice Thomas's dissent in *Kelo* "accepted the majority's claim that

Fallbrook and its progeny adopted a broad interpretation of public use"). Petitioner's argument is also irrelevant in any event because *Midkiff* independently affirmed what the early takings cases recognized, holding: "if a legislature, state *or* federal, determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use." 467 U.S. at 244 & n.7 (emphasis added).

2. *Kelo* also provides a workable rule because it accommodates the "diverse and always evolving needs of society," 545 U.S. at 479. Long before *Kelo*, the Court's "earliest [takings] cases … embodied a strong theme of federalism, emphasizing the 'great respect' that [it] owe[s] to state legislatures and state courts in discerning local public needs.'" *Id.* at 482-83 (quoting *Hairston*, 208 U.S. at 606-07). Thus, in allowing the owner of arid land to condemn his neighbor's property, the Court emphasized that "[t]he rights of a riparian owner in and to the use of the water flowing by his land are not the same in the arid and mountainous states of the West that they are in the states of the East" and thus "[t]his [C]ourt must recognize the difference of climate and soil" in determining what constitutes "public use." *Clark*, 198 U.S. at 370; *see O'Neill*, 239 U.S. at 253 ("States may take account of their special exigencies"). Similarly, the Court explained in authorizing a condemnation for a railway company that a public use varies across "the states and territories of the Union" because of the different considerations "touching the

resources, the capacity of the soil, the relative importance of industries to the general public welfare, and the long-established methods and habits of the people." *Hairston*, 208 U.S. at 606-07.

The Court has preserved that flexibility for more than a century—including through *Berman*, *Midkiff*, and *Kelo*—by extending appropriate deference to the determinations by legislatures, which are best positioned to evaluate those factors. Indeed, as the Court noted in *U.S. ex rel. Tennessee Valley Authority v. Welch*, 327 U.S. 546, 552 (1946), any "departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields." *Midkiff* embraced the same caution, noting, "[w]hen the legislature's purpose is legitimate and its means are not irrational, [the Court's] cases make clear that empirical debates over the wisdom of takings … are not to be carried out in the federal courts." 467 U.S. at 242-43.

That is not to say, of course, that courts have no role in policing the boundaries of permissible takings (*see* Pet. 29). "A purely private taking could not withstand the scrutiny of the public use requirement" because "it would serve no legitimate purpose of government and would thus be void." *Midkiff*, 467 U.S. at 245; *see Kelo*, 545 U.S. at 477 ("sovereign may not take the property of *A* for the sole purpose of

transferring it to another private party *B*"); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798). Thus, a court may be suspicious of "a one-to-one transfer of property, executed outside the confines of an integrated development plan" or where there are other indications that the taking's "actual purpose" was "to bestow a private benefit." *Kelo*, 545 U.S. at 477-78, 486-87. But *Kelo* presented "no evidence of an illegitimate purpose," *id.* at 478, and neither does this case, *see* Pet. App. 60a ("Eychaner cites no evidence that the River West TIF and PMD were set up as a sham to take his property.").

Petitioner's contrary arguments are meritless. Although he contends (Pet. 30) that *Kelo* fails to "limit government overreach," state responses since *Kelo* show that there is no danger of rampant takings that petitioner fears. *See supra* III.A. Indeed, much as petitioner and amici tout the unpopularity of *Kelo*, "the strong adverse public and legislative reactions to the *Kelo* decision are evidence of its pragmatic soundness" because "[w]hen the Court declines to invalidate an unpopular government power, it tosses the issue back into the democratic arena," Posner, *Foreword: A Political Court*, 119 Harv. L. Rev. 31, 98 (2005).

Ultimately, it is petitioner's view that is unworkable. It makes little sense for the Court to catalogue constitutionally impermissible takings, since public use depends on circumstances unique to

each town, city, and State.[4] Similarly, the heightened scrutiny that petitioner seeks (Pet. 30) would impose enormous burdens on courts and make economic development intolerably cumbersome. As the Court explained in *Kelo*, "[o]rderly implementation of a comprehensive redevelopment plan obviously requires that the legal rights of all interested parties be established before new construction can be commenced." 545 U.S. at 488. Thus, "[a] constitutional rule that required postponement of the judicial approval of every condemnation until" the court has completed a searching inquiry "would unquestionably impose a significant impediment to the successful consummation of many such plans." *Id.* (rejecting the requirement of a likelihood of success). That is equally true today.

3. Stability in federal takings law is critical, as state and local governments have long relied on eminent domain to carry out significant projects to improve the quality of life for countless individuals. For example, many of the iconic attractions and neighborhoods in New York City were accomplished through eminent domain, including areas in and

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[4] For similar reasons, amici's argument that lower courts are divided over "which criteria" identified in *Kelo* are "most relevant" to determining a pretext, Pacific Legal Found. Br. 9-12, does not suggest any flaw in the *Kelo* decision. It would be odd (and impracticable) for the Court to hold that the federal Constitution deems a particular factor to be most relevant to a pretext determination in every case.

around Times Square and in Brooklyn. *See* New York City Amicus Br., *Kelo v. City of New London*, No. 04-108 (U.S. Jan. 21, 2005), 2005 WL 166943, at *1-2.

Freetown, South Carolina—which was founded in 1880s as a haven for freed slaves—was subject to nearly a century of neglect, deterioration, and rising crime. But in recent years, residents came together and used eminent domain to replace blighted properties with affordable single-family housing and supporting community facilities.[5] This Court's takings precedents have supported those projects by disavowing a uniform federal constitutional bar (or heightened scrutiny) and instead extending appropriate latitude to local governments.

Kelo upholds that stability in the law. Indeed, area-wide development takes years to plan and execute. Overturning *Kelo* and announcing a more constraining rule could disrupt the careful planning, investment, and implementation that went into ongoing development projects. Chicago, for example, recently announced a plan to invest over $750 million in the next three years to revitalize ten communities on the City's South and West Sides,[6] and the City Council has authorized the use of eminent domain for

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[5] Urban Land Institute, *Eminent Domain: An Important Tool for Community Revitalization*, at 19 (June 30, 2007), https://tinyurl.com/3n8hy8en.

[6] INVEST South/West, https://tinyurl.com/3r8vcdt9 (visited May 14, 2021).

several properties integral to achieving the plan's goals.[7] The changes in federal takings law petitioner seeks could throw the City's considered planning into disarray.

CONCLUSION

The petition for a writ of certiorari should be denied.

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[7] *E.g.*, Chicago City Council Journal of Proceedings 27751-54 (Feb. 26, 2021), https://tinyurl.com/4xfyr83b.