No. 20-1214

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The arguments of the City of Chicago for denying the petition are demonstrably incorrect.

This Court has jurisdiction to review Eychaner's federal claim. He explicitly challenged the taking under both the federal and Illinois constitutions, and the highest state court to consider the case resolved both claims. The City's newfound contention that the federal claim was not raised or decided, after the City spent a decade litigating it on the merits below, fails.

The City's responses to the questions presented in the petition are equally unavailing. As to question one, the City relied on future blight to take Eychaner's property. The highest state court to consider the case held that future blight takings are constitutional, which conflicts with other courts and extends beyond this Court's ruling in *Berman v. Parker*, 348 U.S. 26 (1954). As to question two, the fact that many states responded to *Kelo v. City of New London*, 545 U.S. 469 (2005), by substantively restricting takings under state law supports reconsidering *Kelo*, not leaving it in place. Moreover, the City persuaded the courts below to apply a maximal reading of *Kelo* to both the federal and Illinois constitutions. That reading is not a workable constitutional rule; it is an abdication that strips the Public Use Clause of any substantive constraint.

ARGUMENT

I. THIS COURT HAS JURISDICTION.

This Court has jurisdiction over all "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any title, right,

privilege, or immunity is specially set up or claimed under the [U.S.] Constitution." 28 U.S.C. § 1257(a). This Court generally requires that the federal issue be "*either* addressed by *or* properly presented to the state court that rendered the decision [it] ha[s] been asked to review." *Campbell v. Louisiana*, 523 U.S. 392, 403 (1998) (emphasis added). Here, the Court's jurisdiction is clear, and *both* prongs of the disjunctive *Campbell* test are met.

A. Eychaner challenged the taking under federal law.

For purposes of this Court's review, a litigant need not have used any "particular form of words or phrases" in raising a federal claim in state court. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 85 n.9 (1980). All that is needed is "that the claim of invalidity on the ground therefor be brought to the attention of the state court with fair precision and in due time." *Id.* "A litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief . . . by citing in conjunction with the claim the federal source of law . . . or a case deciding such a claim on federal grounds." *Howell v. Mississippi*, 543 U.S. 440, 444 (2005).

Eychaner raised the federal question at the first opportunity. To do so, he had to file a traverse. Pet. at 10. In that filing, made before the trial-level Circuit Court, he claimed that the "taking of defendant's property violates the 5th and 14th Amendments to the United States Constitution" because "[t]he City's intended use is neither a proper public use nor a proper public purpose under the law." S.App. 2a–3a ¶9; *see also* S.App. 3a ¶10 ("the taking of the defendant's property by the City violates the 5th

and 14th Amendments to the United States Constitution").[1]

The City acknowledged that the issues presented included whether the taking "violate[s] the 5th and 14th Amendments of the United States Constitution." S.App. 11a ¶4; *see also* S.App. 23a ("Defendant alleges that the City's use of eminent domain . . . violates the 5th and 14th Amendment of the U.S. Constitution."). The City urged the Circuit Court to find the taking "consistent and in accordance with . . . the U.S. Constitution." S.App. 23a–27a.

On appeal, Eychaner challenged the denial of his traverse, which he again described as including a claim under "the 5th and 14th Amendments to the United States Constitution." S.App. 58a. He cited various authorities, including out-of-state cases that struck down future blight takings under the federal constitution, such as *City of Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006), and *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F.Supp.2d. 1123 (C.D. Cal. 2001). S.App. 70a, 110a.

The City again acknowledged the federal question, and asserted that the taking was permitted by "[t]he United States and Illinois Constitutions." S.App. 94a. It even urged the Appellate Court to interpret the federal

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[1] In the appendix accompanying his petition, Eychaner included the opinions below and his petition to the Illinois Supreme Court. He cited other materials by their page number in the record before the Illinois Appellate Court. *See* Pet. at 3 n.1. Given the position now taken by the City, Eychaner includes a supplemental appendix to this reply with the key filings confirming that he raised the federal claim.

and Illinois takings clauses conterminously, so that the Fifth Amendment analysis would carry over to the state claim. S.App. 101a–03a.[2]

Finally, in petitioning the Illinois Supreme Court, Eychaner made clear he was "challenging the City's authority to use eminent domain [under] both the state and federal constitutions." App. 101a. He then analyzed *Kelo* at length, arguing that the decision "fails to meaningfully constrain governmental action" under "the Fifth Amendment." *Id.* 112a.

B. The highest state court to consider Eychaner's case ruled on the federal claim.

The Illinois Appellate Court—the highest state court to consider this case—addressed the taking under both federal and state law. It analyzed the case under "[t]he Illinois Constitution and the United State[s] Constitution." App. 49a. It relied in substantial part on *Kelo*'s interpretation of the Fifth Amendment. *Id.* 53a–54a. Without differentiating between the federal and state claims, it ruled that the "City may use eminent domain to take property in a conservation area to prevent future blight," *id.* 28a, and that "the use of eminent domain to expand Blommer's campus passes constitutional muster," *id.* 61a.[3]

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[2] On return to the Appellate Court after a retrial on compensation, Eychaner reprised his federal and state takings claims, including citing the same out-of-state cases, for issue preservation.

[3] At the second appeal, the Appellate Court stood by this ruling as law-of-the-case. App. 13a.

Lacking any colorable basis to argue otherwise, the City focuses instead on a footnote in the trial-level traverse decision. There, the Circuit Court affirmed that the "traverse challenges the taking under the Fifth and Fourteenth Amendment to the United States Constitution and the Illinois Constitution's taking clause," but claimed that "[t]he arguments . . . have been confined to the public use requirement under the Illinois takings clause." *Id.* 84a n.1.

The City is grasping at straws here. Whatever the Circuit Court meant by this footnote, it does not constitute the "clear[]" and "intentional" language necessary to show waiver of Eychaner's federal claim under state law. *Brookhart v. Janis*, 384 U.S. 1, 4 (1966); *see also Harris v. Reed*, 489 U.S. 255, 266 (1989). As shown above, Eychaner raised the federal claim in his traverse and the City joined the issue on the merits. Moreover, while Eychaner's traverse relied primarily on an Illinois Supreme Court decision, he noted that the decision itself rested in part on the Fifth Amendment. S.App. 31a (quoting *Sw. Ill. Dev. Auth. v. Nat'l City Env't, LLC*, 768 N.E.2d 1, 10 (Ill. 2002) ("*SWIDA*")); *see SWIDA*, 768 N.E.2d at 7–11 (striking down a taking under both the federal and Illinois constitutions). As the Circuit Court acknowledged, Eychaner also cited out-of-state cases that were not interpreting the Illinois constitution. *See* App. 90a.[4]

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[4] That Eychaner also claimed, as a final argument in the last paragraph of his traverse reply brief, that the Illinois constitution should be interpreted more narrowly than *Kelo* interpreted the Fifth Amendment, S.App. 42a, does not somehow suggest that he abandoned the federal argument raised in the traverse.

Developments since the traverse confirm that the federal question was raised and preserved. On appeal, the City never argued that Eychaner waived the federal claim. Instead, the City addressed it on the merits, and argued that the Illinois constitution follows a "lockstep approach" with the Fifth Amendment so that both claims could be resolved by *Kelo*. S.App. 101a–03a. In so doing, the City embraced the notion that the federal and state claims were "interwoven," which is yet another basis for preserving the federal claim. *Michigan v. Long*, 463 U.S. 1032, 1040 (1983).

II. THIS CASE IS A GOOD VEHICLE TO ASSESS THE PERMISSIBILITY OF FUTURE BLIGHT TAKINGS.

A. The future blight issue is squarely presented.

The City proposes reframing the first question presented, and denying it, because it asserts that "this case does not raise the permissibility of future-blight takings." Opp. at 16. This assertion is incorrect, for three reasons.

First, the Appellate Court understood that the taking was justified by a finding of future blight. It described Eychaner's appeal as raising that issue, and held that "the City may use eminent domain to take property in a conservation area to prevent future blight." App. 28a. If the City's arguments here were correct, that core holding below would be dicta or an advisory opinion. When the City was persuading the Appellate Court to rule as it did, the City suggested nothing of the sort.

Second, if this Court holds that preventing future blight is not a valid public use, the City would have no basis to take Eychaner's land. In Illinois, "[a] governmental body has only the powers of eminent domain that are conferred upon it by the appropriate legislative body." *City*

of Chicago v. St. John's United Church of Christ, 935 N.E.2d 1158, 1171 (Ill. App. Ct. 2010). Here, the TIF Act—the statutory authority invoked by the City—authorizes the condemnation of property only upon a finding that an area is "blighted" or "may become . . . blighted." 65 ILCS 5/11-74.4-3. Based on that authority, the City Council approved the condemnation of Eychaner's property. App. 83a, 89a. The City Council unequivocally found that the taking was for the "public purpose of improving" an area that might become "commercially blighted" in the future. *Id.* 81a.[5]

Third, even if a finding of future blight were not a necessary predicate for the taking, the only other "public purpose" offered by the City is the rationale challenged in the second question presented. The City asserts that it need not rely on its future blight finding because *Kelo* broadly authorizes economic development takings. Opp. at 17, 19–21. As Eychaner has argued, the City has overread *Kelo*; the clear and present economic distress cited in that case was absent here. Pet. at 15–16, 22–25. But if the Court believes that *Kelo* would authorize this taking, it should

[5] The City also suggests that the future blight finding arose at the same time as the PMD, and that both pre-dated Blommer's demand for Eychaner's land. Opp. at 2, 6. This is not true. While the City proposed a PMD before Blommer voiced objections, it did not begin to study blight in the area until Blommer started making demands and threatening to leave the City. R.A. 1200, 1310–14. In January 2001, six months after Blommer demanded Eychaner's land, the City designated the area as at risk of future blight. R.A. 201, 240.

grant both questions presented and examine both bases proffered by the City. Otherwise, cities could always circumvent judicial review by adding an economic development rationale to any taking justified on other grounds.

B. The rulings below conflict with other decisions on future blight and exceed this Court's jurisprudence.

The Illinois Appellate Court's constitutional endorsement of future blight takings contradicts the Ohio Supreme Court's holding in *Norwood*, 853 N.E.2d 1115, and the Central District of California's holding in *99 Cents*, 237 F.Supp.2d 1123. Eychaner relied on both decisions below, *see supra* at 3, and in his petition, Pet. at 16–19.[6]

The City's asserts that *Norwood* interpreted the Ohio Constitution and not the federal constitution. Opp. at 25. This argument is not well taken. In *Norwood*, the Ohio Supreme Court assessed a taking under both the federal and state constitutions, including a lengthy discussion of both bodies of law. *See* 853 N.E.2d at 1129–36. It first assessed whether economic development takings were constitutional. Given *Kelo*, the court relied exclusively on the Ohio Constitution in finding that they were not. 853 N.E.2d at 1136–42. But on the separate question of whether the prevention of future blight was a constitutional basis for a taking, it did not distinguish between the federal and state constitutions. *Id.* at 1143–46. Indeed, it relied in part on cases that only interpreted the federal constitution, such as *99 Cents*. 853 N.E.2d at 1145. It is

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[6] The City notes that *County of Wayne v. Hathcock*, 684 N.W.2d 765, 770 (Mich. 2004), applied only Michigan's state constitution. Opp. at 25. Eychaner acknowledged as much, and only cited that case in passing, as another example of a court rejecting a speculative public purpose. Pet. at 18 n.8.

this holding—that future blight is not a valid public use "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—that conflicts with the decision below.

The City's attempt to minimize the Central District of California's holding in *99 Cents* is even further afield. As the City notes, the court there found that the government's future blight justification was pretextual. 237 F.Supp.2d at 1130. But it also held that the "'public use' theory fail[ed] for another independent reason": it "violate[d] the Public Use Clause of the Fifth Amendment" because "the notion of avoiding 'future blight' as a legitimate public use is entirely speculative." *Id.* at 1130–31. That holding, like the one in *Norwood*, stands in sharp contrast to the Illinois Appellate Court's decision below.

Finally, the City's claim that this case is "indistinguishable" from *Berman*, Opp. at 2, is well off the mark. In *Berman*, this Court sustained the taking of property in slums beset by clear and present blight. 348 U.S. at 30. While not every parcel was presently blighted, the neighborhood writ large was. *Id.* at 35. As explained in the amicus brief of Professors Lee and Pantin, overuse of blight takings has harmed racial and other minorities, whose property is often the target of urban gentrification. *See* Law Profs. Amicus. If this Court meant to sanction such takings without a finding of present blight in the area, it did not say so in *Berman*.

* * *

Accordingly, and as set forth in greater detail in the petition, this Court should grant the first question presented as formulated by Eychaner.

III. THE CITY'S ARGUMENTS SHOW WHY THIS COURT SHOULD RECONSIDER *KELO*.

In a telling moment, the City appears to agree that with a maximal reading of *Kelo*, "under the federal Constitution" governments can "take almost any property." Opp. at 27. The solution, according to the City, lies with state governments, which have "significantly amended their eminent domain laws since *Kelo*." *Id.*

This argument contradicts federal constitutional jurisprudence. There is no rule that the more states disagree with a prior decision of this Court, the less it should be subject to reconsideration. Rather, when this Court has looked to trends in state law, it has done so to inform federal constitutional meaning. *See, e.g.*, *Mapp v. Ohio*, 367 U.S. 643, 651 (1961) (reversing prior Supreme Court decision and incorporating the exclusionary rule nationally, since "more than half" of states had adopted it). And the more states that depart from *Kelo*, the less reason there is to adhere to it due to "reliance on the decision." *Knick v. Twp. of Scott*, 139 S.Ct. 2162, 2178 (2019).

Moreover, the City argued below that the Illinois constitution should be interpreted in lockstep with a maximal reading of *Kelo*. *See, e.g.,* S.App. 101a–02a. It prevailed on that argument. App. at 57a–61a; *see also Hampton v. Metro. Water Reclamation Dist. of Greater Chi.*, 57 N.E.3d 1229, 1234 (Ill. 2016) (holding that, in Illinois, "if a provision of the state constitution" such as the takings clause is "identical to or synonymous with the federal constitutional provision, federal authority on the provision prevails"). Having relied on *Kelo* as the bellwether of federal and Illinois takings law, the City's invocation of legal

developments in other states, Opp. at 28–29, is beside the point.[7]

The City's reliance on *Kelo* in the proceedings below confirms the warnings of the *Kelo* dissenters. On its face, *Kelo* affirmed that a "sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*." 545 U.S. at 477. Justice Kennedy, supplying the critical fifth vote, was explicit in inviting "a more stringent standard of review . . . for a more narrowly drawn category of takings." *Id.* at 493 (Kennedy, J., concurring). Here, by contrast, the City took property in an area that was neither blighted nor economically distressed to satisfy a powerful private landowner. It has pursued that taking since 2002, even when the future blight failed to materialize and the PMD was repealed. *See* Pet. at 9–10.

This is a far cry from the fundamental property rights recognized at the founding. *See Calder v. Bull*, 3 U.S. (3. Dall.) 386, 388 (1798); The Federalist No. 54, at 370 (Jacob E. Cooke ed., 1961). The Public Use Clause is the constitutional embodiment of those rights and a substantive limitation on governmental power. *See* Pet. at 19–20, 27–28. There is no better time to enforce it than the present.

CONCLUSION

The petition for a writ of certiorari should be granted as to both questions presented.

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[7] In any event, property owners in states with some of the nation's largest urban areas remain "with only the non-protection offered by the Supreme Court." Dana Berliner, *Looking Back Ten Years After* Kelo, 125 Yale L.J. Forum 82, 89 (2015).

Respectfully submitted,

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