No. _____

In the Supreme Court of the United States

BOWERS DEVELOPMENT, LLC,
Petitioner,

v.

ONEIDA COUNTY INDUSTRIAL DEVELOPMENT AGENCY ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court of New York, Appellate Division, Fourth Department

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Kelo v. *City of New London*, 545 U.S. 469 (2004), held that when the government uses eminent domain to take property from a private owner to give it to a different private owner—where the taking occurs as part of a comprehensive economic-redevelopment plan and where the identity of the new private owner was unknown at the time of the taking—the taking may be justified by asserted secondary public benefits subject only to minimal rational-basis review. The questions presented are:

1. Does the Public Use Clause require something more than minimal rational-basis review when the government takes land from one private owner to give it to a specifically identified private owner outside the context of a comprehensive economic-redevelopment plan?

2. Should *Kelo* be overturned?

PARTIES TO THE PROCEEDINGS BELOW

The petitioners in the proceeding below were Bowers Development, LLC, and Rome Plumbing & Heating Supply Co., Inc. (Rome Plumbing & Heating Supply Co., Inc., does not join in this petition.) The respondents below were the Oneida County Industrial Development Agency and Central Utica Building, LLC.

CORPORATE DISCLOSURE STATEMENT

Petitioner does not have any parent corporation, and no publicly traded corporation owns 10% or more of its stock. (The same is true of Rome Plumbing and of a successor in interest to Petitioner called Utica Med Building, LLC.)

STATEMENT OF RELATED CASES

- *Bowers Development, LLC* v. *Oneida County Industrial Development Agency*, No. 764/22 OP 22-00744, Supreme Court of New York, Appellate Division, Fourth Department (judgment entered February 2, 2024);

- *Matter of Bowers Development, LLC* v. *Oneida County Industrial Development Agency*, No. 89, Court of Appeals of New York (judgment entered December 14, 2023).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner seeks a writ of certiorari to review the judgment of the Fourth Department of the Appellate Division of the Supreme Court of New York.

OPINIONS BELOW

The opinion of the appellate division from which petitioner seeks certiorari, App. 1a, is reported at 224 A.D.3d 1240. The New York Court of Appeals denied review in an unpublished order. App. 6a. The appellate division also issued an earlier opinion, App. 12a, which is reported at 211 A.D.3d 1495. That opinion was reversed in a published opinion of the New York Court of Appeals, App. 7a, which is reported at 40 N.Y.3d 1061. New York public-use challenges like this one are filed as petitions in the Appellate Division, so there is no opinion from a trial court.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The appellate division entered its judgment on February 2, 2024. That court denied a timely filed motion for leave to appeal on May 3, 2024. The New York Court of Appeals denied a timely filed motion for leave to appeal on September 19, 2024. This petition was timely filed on December 18, 2024.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

STATEMENT

Petitioner Bowers Development, LLC, was under contract to buy land in upstate New York in the hopes of building a medical office building. Then the local government condemned that land for the express purpose of giving it to a different private corporation—one that was building a different medical office building and had asked for the Bowers land to use as its private parking lot. These facts are uncontested and were accepted by the New York Court of Appeals below. App. 10a. The question presented is whether this is allowed under the Public Use Clause.

More specifically: Bowers Development was under contract to buy a lot in Utica, NY, near a newly built private hospital, which it thought would be a good site for a new medical-office building.[1] But that plan never came to fruition because of Respondent Central Utica Building, LLC, which also had plans "to build a medical office building[,] on an adjoining property." App. 8a. Central Utica asked Respondent the Oneida County Industrial Development Agency (OCIDA) to take Petitioner's property and give it to Central Utica so that Central Utica could use it to build a parking lot for Central Utica's building. *Ibid.* Central Utica claimed that without more land, it

[1] Review of decisions to condemn property under New York law are conducted on a closed administrative record after a public hearing. N.Y. Em. Dom. Proc. L. § 207. The administrative record is cited below as "R." This fact appears at R. 5561.

would not have enough parking to support its proposed private office building.[2]

OCIDA agreed. OCIDA thought Central Utica's proposed office building would be an economic boon to the area, and it thought that reason enough to take Petitioner's land and hand it over to its business rival. At the public hearing on the proposed condemnation, OCIDA recited asserted "public purposes" for the taking, which focused almost entirely on the economic benefits of Central Utica's proposed private office building.[3]

Petitioner then challenged the decision to condemn and was initially successful: New York's Appellate Division at first rejected the condemnation on statutory grounds, holding that a parking lot for a medical office building was a health-care use outside OCIDA's statutory authorization to acquire property for "commercial" purposes. App. 13a–14a.

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[2] R. 5282, 6062. The private hospital nearby had previously identified the Bowers property as a lot it might wish to acquire for its own purposes, but Central Utica first asked for the land to be condemned as part of its private office building in an October 26, 2021 letter to OCIDA, in which it simultaneously applied for financial assistance to build the project and asked OCIDA to acquire Petitioner's land. R. 6062. Petitioner (already under contract to buy the land to build an office building of its own) promptly objected to its land being included in its business competitor's private project. R. 6482–87.

[3] The asserted purposes for the condemnation were: "1: Improving healthcare for the community; 2: Creating new and improved job opportunities; 3: Reducing unemployment; 4: Eliminate blight in the immediate area of the Project; [5]: Promote urban renewal and redevelopment and; 6: On an overall basis, result in the betterment of community prosperity within Oneida County." R. 5557.

The New York Court of Appeals reversed. App. 8a. In its view, the condemnation was statutorily authorized because "a parking facility used by the customers of a profit-making business plainly has a 'commercial' purpose." App. 10a. The condemnation "did not serve any healthcare-related function." *Ibid.* Instead, "the building itself was an office building with space leased out to paying tenants" and therefore "[t]he proposed parking facility functioned simply to satisfy the need for parking created by the medical office building and provide public parking at night." *Ibid*.

Having resolved the statutory question, the Court of Appeals remanded for the Appellate Division to consider Petitioner's remaining arguments—including whether building "a parking facility used by the customers of a profit-making business" was a public use under the Fifth Amendment's Public Use Clause. App. 10a–11a.

The Appellate Division made short work of that question. In a single paragraph, it noted that "[w]hat qualifies as a public purpose or public use is broadly defined as encompassing virtually any project that may confer upon the public a benefit, utility, or advantage." App. 3a–4a (quotation marks omitted). And building a parking lot for a private office building was "rationally related to a conceivable public purpose": "mitigating parking and traffic congestion." App. 4a. It did not matter that the condemnation was originally requested by the private beneficiary; it did not matter that the asserted purpose of the condemnation was job-creation and community prosperity; it did not matter that the putative additional benefit of the public parking "at night" was

invented after the public hearing. The government had articulated a conceivable benefit of taking property from *A* to give to *B*, and that was enough.

The New York Court of Appeals denied a timely motion for leave to appeal, App. 6a, and this petition followed.

REASONS FOR GRANTING THE PETITION

In *Kelo* v. *City of New London*, this Court held 5-4 that the Fifth Amendment's Public Use Clause can be satisfied when property is taken for private development so long as the taking will generate some secondary benefit like economic development. 545 U.S. 469 (2005). *Kelo* did not, however, hold that the Public Use Clause is *always* satisfied by private-to-private transfers. Instead, it reaffirmed that "the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation." *Id.* at 477. It emphasized the point repeatedly: "[T]he City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party." *Ibid.* "Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." *Id.* at 478.

But, said the majority, the takings in *Kelo* were saved from unconstitutionality by two features. The first was that they "would be executed pursuant to a 'carefully considered' development plan." *Ibid.* The second was that the identity of any ultimate private owner was "not known when the plan was adopted." *Id.* at 478 n.6; see also *ibid.* ("It is, of course, difficult to accuse the government of having taken *A*'s property

to benefit the private interests of *B* when the identity of *B* was unknown."). Justice Kennedy's concurrence returned to these points, emphasizing that "[a] court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits[.]" *Id.* at 491 (Kennedy, J., concurring).

However strong Justice Kennedy's instructions were, the majority made clear that it was not reaching that situation. It expressly declined to address "hypothetical cases" involving "a one-to-one transfer of property, executed outside the confines of an integrated development plan." *Id.* at 487.

Those hypothetical cases, however, turn out to be very real. And lower courts disagree about how to implement *Kelo*'s caveats about development plans and identified private beneficiaries. The result, as detailed in Part I below, is a patchwork of conflicting rules. Some jurisdictions take *Kelo*'s caveats seriously. Others, as here, freely permit "property transfers generated with less care, that are less comprehensive, that happen to result from less elaborate process" based solely on "legislative prognostications about the secondary public benefits of [the] new use[.]" *Id.* at 504 (O'Connor, J., dissenting). In those jurisdictions, "the Public Use Clause . . . [is] a virtual nullity[.]" *Id.* at 506 (Thomas, J., dissenting). This Court should intervene to resolve that split.

Indeed, the only reason the split is not deeper is that many states have expressly rejected *Kelo* under their own constitutions, so the issue never arises there. State legislatures have amended their

laws, but also state high courts have held that the rule in *Kelo* is both unjust and unadministrable, wrongly reading an enumerated right out of the Constitution. This Court should thus also grant certiorari to consider whether *Kelo* should be overturned. Four Justices have publicly voted to consider the standard for pretextual takings,[4] overruling *Kelo*,[5] or both.[6] Now is the time to do it.

I. Courts disagree about when (if ever) private-to-private takings require meaningful judicial review.

Kelo made clear it was not endorsing pretextual private-to-private takings. See *Eychaner* v. *City of Chicago*, 141 S. Ct. 2422, 2423 (2021) (Thomas, J., dissenting from denial of certiorari) ("*Kelo* weakened the public-use requirement but did not abolish it."). *Kelo* emphasized aspects of the taking there—careful public planning and the absence of an identified private beneficiary—to explain its holding. Yet both New York's state courts and the Second Circuit disregard *Kelo*'s caveats, holding that any private-to-private transfer survives constitutional scrutiny so long as the condemnor can articulate some theoretical public benefit. On the other side, three

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[4] *Brinkmann* v. *Town of Southhold*, No. 23-1301, 2024 WL 4529878 (Oct. 21, 2024) (noting Justice Thomas's, Justice Gorsuch's, and Justice Kavanaugh's votes to grant certiorari); *Goldstein* v. *Pataki*, No. 07-1247, 554 U.S. 930 (2008) (noting Justice's Alito's vote to grant certiorari).

[5] *Eychaner* v. *City of Chicago*, No. 20-1214, 141 S. Ct. 2422 (2021) (noting Justice Kavanaugh's vote to grant certiorari and the written dissent of Justice Thomas, joined by Justice Gorsuch).

[6] *Ibid.*

state high courts disagree and read *Kelo* to mean what it says: that courts have a role to play in ensuring that the eminent-domain power is not used merely to take from *A* and give to *B*. Moreover, pre-*Kelo* federal cases make clear that courts cannot approve private-to-private transfers simply because the government articulates some incidental public benefit.

A. Some courts, like the court below, apply minimal rational-basis review regardless of the circumstances.

New York's approach captures the minimal-review side of the split. The state appellate court's analysis in this case is strikingly brief—exactly because New York's courts have long held that evidence of pretext is legally irrelevant in takings cases. Nearly two decades ago, New York's highest court upheld (on state-law grounds) a taking whose original stated purpose was "economic development-job creation" but which the government justified by pointing out that (years after the plan was drawn up) it had declared the condemned property "blighted." *Goldstein* v. *N.Y. State Urb. Dev. Corp.,* 921 N.E.2d 164, 189 (N.Y. 2009) (Smith, J., dissenting). The assertion of blight was dispositive. *Id.* at 172 (majority opinion). After all, reasoned the majority, "the concept of public use . . . has [been] sapped . . . of much of its limiting power." *Id.* at 173. It might be unwise to allow "political appointees to public corporations" to use "studies paid for by developers" as "a predicate for the invasion of property rights and the razing of homes and businesses[,]" but that was a matter for the legislature, not the courts. *Id.* at 172. Since then, New York's highest court has consistently rubber-stamped any taking that comes with an

asserted public benefit. Cf. *Kaur* v. *N.Y. State Urb. Dev. Corp.*, 933 N.E.2d 721, 737 (N.Y. 2010) (Smith, J., concurring) ("The finding of 'blight' in this case seems to me strained and pretextual, but it is no more so than the comparable finding in *Goldstein*.").

To be sure, Judge Smith repeatedly cautioned that New York's Court of Appeals had not formally adopted *Kelo* as a matter of state law. See *Uptown Holdings, LLC* v. *City of New York*, 944 N.E.2d 650, 651 (N.Y. 2011) (Smith, J., concurring) ("[O]ur dismissal of this appeal does not imply endorsement of the Appellate Division majority opinion, which may be read to suggest that [*Kelo*] should be followed by New York courts interpreting the New York Constitution[.]"). But New York's lower courts have gotten the message that deference is the rule of the day. Accordingly, they routinely hold the "public use" inquiry demanded by the state or federal constitution can be satisfied by "virtually any project that may confer upon the public a benefit, utility, or advantage[.]"*Syracuse Univ.* v. *Proj. Orange Assocs. Servs. Corp.*, 71 A.D.3d 1432, 1433 (N.Y. App. Div. 2010); accord *3649 Erie, LLC* v. *Onondaga Cnty. Indus. Dev. Agency*, 220 N.Y.S.3d 540, 544 (N.Y. App. Div. Nov. 15, 2024) (applying same test and citing *Kelo*, 545 U.S. at 480). The deferential standard applied below is thus well-established law in New York. See App. 4a.

And the Second Circuit has long applied the same near-meaningless test. In *Goldstein* v. *Pataki*, that court outlined a starkly limited test: "Once we discern a valid public use to which the project is rationally related, it makes no difference that the

property will be transferred to private developers, for the power of eminent domain is merely the means to the end." 516 F.3d 50, 60 (2d Cir. 2008), cert. denied, 594 U.S. 930.[7] In the Second Circuit's view, private beneficiaries of eminent domain are not merely *permissible*. They are *irrelevant*. *Pataki* stressed that there were no circumstances in which a court could look behind an asserted rational basis to reject a taking meant to benefit a private party. Indeed, the panel derided that argument as based on only "a passing reference to 'pretext' in the *Kelo* majority opinion in a single sentence." 516 F.3d at 61. That is still the rule today. Just earlier this year, the Second Circuit reaffirmed that the only public-use inquiry permitted under *Kelo* is whether "the exercise of the eminent domain power is rationally related to a conceivable public purpose." *Brinkmann* v. *Town of Southold*, 96 F.4th 209, 213 (2d Cir. 2024) (quotation marks omitted), cert. denied, 2024 WL 4529878 (Oct. 21, 2024).[8] Just as in state courts, the government's assertions enjoy complete deference—so complete that a lawsuit alleging a pretextual taking may be dismissed under Rule 12(b)(6). *Ibid.*; see also *Goldstein*, 516 F.3d at 53.

The upshot is that in New York, whether in federal or state court, it is irrelevant that a taking was initiated at the behest of a single private beneficiary or that it takes place outside the context of a broader, government-driven development plan. If any tangential public benefit can be imagined, the

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[7] Justice Alito would have granted the petition.

[8] Justices Thomas, Gorsuch, and Kavanaugh would have granted the petition.

inquiry ends. Simply put, "there is no longer any judicial oversight of eminent domain proceedings in New York." *Uptown Holdings, LLC* v. *City of New York*, 77 A.D.3d 434, 437 (N.Y. App. Div. 2010) (Catterson, J., concurring).

B. At least three state supreme courts disagree and take *Kelo*'s caveats seriously.

If this taking been attempted elsewhere, the result would have been different. Courts vary in their rationales, but three state supreme courts have held that the public-use inquiry requires more than mere rubber-stamp review—at least when the taking occurs in circumstances more suspicious than those in *Kelo*.

Pennsylvania: In one of the earliest state-court decisions to grapple with *Kelo*'s warnings about pretext, the Pennsylvania Supreme Court concluded that the Public Use Clause requires courts to examine "the 'real or fundamental' purpose behind a taking . . . [because] the *true* purpose must primarily benefit the public." *Middletown Twp* v. *Lands of Stone*, 939 A.2d 331, 337 (Pa. 2007). "This means that the government is not free to give mere lip service to its authorized purpose or to act precipitously and offer retroactive justification." *Id.* at 338. The Pennsylvania courts therefore stress the existence of what the *Kelo* majority called a "'carefully considered' development plan" to justify a taking. *Ibid.* (citing *Kelo*, 545 U.S. at 478). And the mere existence of a plan is not enough: That plan must also be "tailored to the actual purpose" that justifies the condemnation "or it will be overturned as excessive." *Ibid.* Rather than apply the limited rational-basis review the New York courts

used here, Pennsylvania courts instead must ask whether the public purpose for the taking is "real and fundamental, not post-hoc or pretextual." *Ibid.*

Rhode Island. The Rhode Island Supreme Court, like Pennsylvania's, casts a more skeptical eye on takings that do not arise from *Kelo*-style planning processes. In *Rhode Island Economic Development Corp.* v. *The Parking Co.*, that court rejected the proposed condemnation of a temporary easement of a parking garage after finding it was undertaken in bad faith. 892 A.2d 87, 106 (R.I. 2006). The government's asserted purpose was to provide publicly managed public parking, but the overall circumstances of the condemnation suggested that it was actually meant to obtain an advantage in an ongoing negotiation with the garage owner. *Id.* at 102, 106. In reaching that conclusion, the Rhode Island court twice pointed to this Court's reliance on the planning process in *Kelo*, which stood "in stark contrast to [the condemnor's] approach in the case before us." *Id.* at 104; see also *id.* at 106 ("[S]uch hasty maneuvering bears little resemblance to the comprehensive and thorough economic development plan that was undertaken and upheld by the United States Supreme Court in *Kelo*[.]").

Hawaii. The Supreme Court of Hawaii similarly holds that *Kelo* allows "courts to look behind an eminent domain plaintiff's asserted public purpose under certain circumstances." *County of Hawaii* v. *C & J Coupe Fam. Ltd. P'ship*, 198 P.3d 615, 638 (Haw. 2008). The condemnation in that case was supported by sufficient "*prima facie* evidence of public purpose under a rational relationship test[,]" but that did not end the inquiry. *Id.* at 644. Instead, courts needed to

"expressly consider the question of whether the taking was 'clearly and palpably of a private character[.]'" *Id.* at 647. To be sure, the Hawaii court said it was conducting "rational basis" review, but it made equally clear that "where the actual purpose of a condemnation action is to bestow a benefit on a private party, there can be no rational basis for the taking." *Ibid.* (citing *Kelo*, 545 U.S. at 477–78).[9]

In any of these jurisdictions, this case would come out differently. All of them hold that facts matter and that context matters, and all of them hold that a taking whose actual purpose is illegitimate cannot be saved by the government's mere articulation of some public benefit. Below, though, that mere articulation was the end of the analysis. Compare *Lands of Stone*, 939 A.2d at 337 (rejecting taking), with App. 4a (accepting taking). That outcome-determinative difference warrants this Court's intervention.

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[9] One could probably add to this list the District of Columbia, the high court of which has held (at least on the pleadings) that when "property is being transferred to another private party, and the benefits to the public are only 'incidental' or 'pretextual,' a 'pretext' defense may well succeed." *Franco* v. *Nat'l Cap. Revitalization Corp.*, 930 A.2d 160, 173–74 (D.C. 2007). So too with Maryland, which holds (at least as to its quick-take statute) that economic-development takings require a "comprehensive development plan" similar to the one in *Kelo*. *Mayor & City Council of Baltimore City* v. *Valsamaki*, 916 A.2d 324, 355 (Md. 2007). However one counts, the split of authority is real.

C. Pre-*Kelo* federal cases reject rubber-stamp review.

This split about what *Kelo* meant is underscored by pre-*Kelo* federal decisions that routinely distinguished between carefully planned, legislative determinations of public use and local agencies making ad hoc decisions to take property. Those decisions had no problem subjecting the latter to meaningful scrutiny.

Consider the Seventh Circuit, which refused to apply an "any '*conceivable* public purpose'" test to a taking by a local Plan Commission. *Daniels* v. *Area Plan Comm'n*, 306 F.3d 445, 466 (7th Cir. 2002). Instead, because the taking "transfer[red] a property interest to a private entity . . . and in this case any speculative public benefit would be incidental at best[,]" the taking violated the Constitution. *Ibid.*

And the Seventh Circuit was not alone. See, *e.g.*, *United States* v. *101.88 Acres of Land,* 616 F.2d 762, 767 (5th Cir. 1980) ("The court may ask in this [public use] inquiry whether the authorized officials were acting in bad faith[.]"). The en banc Ninth Circuit was particularly emphatic:

> If officials could take private property, even with adequate compensation, simply by deciding behind closed doors that some other use of the property would be a "public use," and if those officials could later justify their decisions in court merely by positing "a conceivable public purpose" to which the taking is rationally related, the "public use" provision of the Takings Clause

> would lose all power to restrain government takings.

Armendariz v. *Penman*, 75 F.3d 1311, 1321 (9th Cir. 1996) (en banc) (refusing to apply deferential review to executive-branch taking). District courts did the same. *Aaron* v. *Target Corp.*, 269 F. Supp. 2d 1162, 1174–76 (E.D. Mo. 2003), rev'd on other grounds, 357 F.3d 768 (8th Cir. 2004) (holding that a property owner was likely to prevail on a claim that a taking ostensibly to alleviate blight was actually intended to serve the interests of Target); *Cottonwood Christian Ctr.* v. *Cypress Redev. Agency*, 218 F. Supp. 2d 1203, 1229 (C.D. Cal. 2002) ("Courts must look beyond the government's purported public use to determine whether that is the genuine reason or if it is merely pretext."); *99 Cents Only Stores* v. *Lancaster Redev. Agency*, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001) ("No judicial deference is required . . . where the ostensible public use is demonstrably pretextual").

Nothing in *Kelo* overturned these cases. Quite the contrary: *Kelo* said that "one-to-one transfer[s] of property, executed outside the confines of an integrated development plan" were "aberrations" that "[c]ourts have viewed . . . with a skeptical eye." 545 U.S. at 487 & n.17 (citing *99 Cents Only Stores*). Neither the Ninth Circuit nor the Seventh has ever said that *Kelo* overturned these earlier pretextual-taking cases. But New York's courts (both federal and state) effectively say it did. Cf. *Pataki*, 516 F.3d at 61 (declining to rely on "a passing reference to 'pretext' in the *Kelo* majority opinion"). The petition for certiorari should be granted to resolve this split of authority.

II. *Kelo* should be overturned.

The split detailed in Part I would be deeper but for 47 states' responding to *Kelo* by changing their laws to make private-to-private transfers more difficult. Dana Berliner, *Looking Back Ten Years After* Kelo, 125 Yale L.J. F. 82, 88 (2015). Those changes come from state legislatures and from voters considering constitutional amendments, but most importantly for this Court's purposes, they also come from state courts that expressly refuse to follow *Kelo* because they find its rule unworkable and unjust.[10] Those state courts are on to something: *Kelo* was wrong the day it was decided, and this Court should grant certiorari to reconsider it.

The argument for overturning *Kelo* is straightforward. The "doctrine of stare decisis . . . is at its weakest when [this Court] interpret[s] the Constitution because its interpretation can be altered only by constitutional amendment or by overruling [its] prior decisions." *Agostini* v. *Felton*, 521 U.S. 203, 235 (1997). Each of the "several factors" this Court uses "in deciding whether to overrule a past decision" cuts sharply against retaining the *Kelo* rule. *Knick* v. *Twp. of Scott*, 588 U.S. 180, 203 (2019). Those factors—"the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, . . . and reliance on the decision"—are discussed next. *Ibid.*

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[10] See *Puntenney* v. *Iowa Utils. Bd.*, 928 N.W.2d 829, 848 (Iowa 2019); *City of Nowood* v. *Horney*, 853 N.E.2d 1115, 1123 (Ohio 2006); *Bd. of Cnty. Comm'rs* v. *Lowery*, 136 P.3d 639, 647 (Okla. 2006).

1. Begin with its reasoning. Both Justice O'Connor's and Justice Thomas's dissents were correct, and they have been proven more so by the passage of time. Both the *Kelo* majority and Justice Kennedy's concurrence emphasized that nothing in the opinion was meant to disturb the longstanding principle that property may not be taken from *A* merely to give it to *B*. But, of course, as Justice O'Connor observed in dissent, in practice *Kelo* allows exactly that. 545 U.S. at 498 (O'Connor, J., dissenting). While this Court's earlier cases had at most "sanction[ed] the condemnation of harmful property use," *Kelo* took the guardrails off (almost) entirely, holding that any property could be taken and given to anyone else "so long as the new use is predicted to generate some secondary benefit for the public[.]" *Id.* at 501. After all, "nearly any lawful use of real property can be said to generate some incidental benefit to the public." *Ibid.* So if an asserted incidental benefit will justify an *A* to *B* transfer, then "[t]he specter of condemnation hangs over all property." *Id.* at 503.[11] State courts, writing on a clean slate about their own constitutions, have acknowledged that Justice O'Connor's opinion has the better of the argument. See *Puntenney* v. *Iowa Utils. Bd.*, 928 N.W.2d 829, 848 (Iowa 2019) ("Like our colleagues in Illinois, Michigan, Ohio, and Oklahoma,

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[11] Justice O'Connor's opinion was right as a matter of law and as a matter of practical reality. This Court's decision in *Kelo* unleashed a flood of private-to-private condemnations that was stemmed only by many jurisdictions' decisions to reject the ruling as a matter of statutory or constitutional law. See Dana Berliner, *Opening the Floodgates* (Institute for Justice 2006), *available at* https://ij.org/report/opening-the-floodgates/.

we find that Justice O'Connor's dissent provides a more sound interpretation of the public-use requirement."). This Court should do the same.

If *Kelo* was an unjustified departure from this Court's cases, it was also an unjustified departure from the original meaning of the Constitution, as Justice Thomas explained in dissent. "The most natural reading of the [Public Use] Clause is that it allows the government to take property only if the government owns, or the public has the legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever." 545 U.S. at 508. Justice Thomas's careful, heavily cited discussion of the original text and meaning went unanswered by the majority. See also *Eychaner*, 141 S. Ct. at 2423 (Thomas, J., dissenting from denial of certiorari).

2. The *Kelo* rule has also proven unworkable because, as illustrated by the perfunctory analysis conducted by the lower court in this case, it is no rule at all. Instead, it replaces the enumerated public-use requirement with a standard that allows the government to decide for itself what public use means. It is, as both the dissents and state courts have noted, boundless. Compare *Kelo*, 545 U.S. at 501 (O'Connor, J., dissenting) (noting that a rule allowing takings based on asserted "positive side effects" would not "realistically exclude *any* takings"), with *Puntenney*, 928 N.W.2d at 847–48 (adopting Justice O'Connor's critiques of *Kelo*).

The facts here show as much. The *Kelo* majority seized on several aspects of that case to claim that it was not blessing a mere transfer of land from

A to *B*. Each is absent here. *Kelo* made much of the fact that the takings in that case were planned long before any private beneficiary had been identified. 545 U.S. at 478 n.6. Here, the taking was at the specific request of the new private owner. App. 8a. There, the Court emphasized that the takings were the product of a long, careful government planning process. *Kelo*, 545 U.S. at 483. Here, the only plan is the plan of private interests that want the land for themselves. App. 8a. In *Kelo*, great emphasis was placed on a legislative determination that New London was a "depressed" municipality. *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring); *id.* at 504 (O'Connor, J., dissenting). Here, by contrast, a state agency has been vested with a roving mandate to condemn property for any "commercial" venture that catches its eye. App. 9a. In short, if *Kelo* meant to articulate a rule that prevented "one-to-one transfer[s] of property, executed outside the confines of an integrated development plan," the decision below demonstrates that it has failed. *Kelo*, 545 U.S. at 487. And if it was meant to authorize the sort of straightforward *A*-to-*B* taking at issue here, then it was simply wrong.

3. *Kelo* is also inconsistent with this Court's cases in two distinct ways.

First is its failure to grapple with (or even acknowledge) the original public meaning of the Public Use Clause. As noted above, Justice Thomas's dissent explained the original public meaning at length. The majority opinion ignored it. See *supra* 18. That failure is entirely out of step with this Court's modern approach to the Fifth Amendment, which, at

every step, is informed by text and history. When asked whether legislatures are subject to ordinary rules about exactions, this Court answered the question by looking to "constitutional text, history, [and] precedent." *Sheetz* v. *County of El Dorado*, 601 U.S. 267, 276 (2024). When asked whether the government effects a taking when it uses a tax debt to confiscate more than it was due, this Court again reached its conclusion based on what "[h]istory and precedent say[.]" *Tyler* v. *Hennepin County*, 598 U.S. 631, 639 (2023). When asked whether a Takings plaintiff needed to exhaust her state-law remedies before filing a federal civil-rights suits, the Court once again found "valuable context" from "[t]he history of takings litigation." *Knick* v. *Twp. of Scott*, 588 U.S. 180, 199 (2019). In short, when a litigant asks a Takings Clause question, this Court resolves it with reference to history—*unless* the question is about the Public Use Clause. If *Kelo* were decided today, Justice Thomas's dissent would have carried the day or, at minimum, required some explanation from the majority of why it disagreed with the dissent's historical analysis. *Kelo*'s failure to do so means it clashes with all this Court's recent Takings cases.

Second, *Kelo* is inconsistent with this Court's other modern cases because it affords complete deference to legislative decisions about an enumerated right. No other right has been so fully jettisoned—and, in fact, this Court has squarely rejected the idea that enumerated rights can even *be* jettisoned. See *District of Columbia* v. *Heller*, 554 U.S. 570, 628 n.27 (2008) (noting that legislative deference is inappropriate in cases involving "a specific, enumerated right"). The difference is stark: If a New

York state agency wants to interfere with a New Yorker's right to engage in political advocacy[12] or to own a gun[13] or to worship as he sees fit,[14] the judiciary will have something to say about it. If that agency wants to take his property away because his business rival asked for it, the courts stand silent. There is no justification for this disparity, and the Court should correct it.

5. Finally, there are few if any reliance interests in maintaining the *Kelo* rule. This is largely because it has been so widely rejected—in the wake of *Kelo*, 47 states changed their laws to make *Kelo*-style takings more difficult. Berliner, *Looking Back, supra*, at 88. Overturning *Kelo* cannot upend reliance interests if *Kelo* is no longer the law in many places. And in the two decades since *Kelo* was decided, this Court has never once cited it for any proposition. The case has no progeny; revisiting it cannot disturb any other settled rules of law. *Cf. Dickerson* v. *United States*, 530 U.S. 428, 443 (2000) (noting importance of consistent reaffirmance to stare decisis analysis).

Moreover, this Court has long held that reliance interests justifying stare decisis are at their peak in cases involving "property and contract rights." *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991). Those interests cut directly against stare decisis here. Property owners like Petitioner have reliance interests in keeping the property they have invested in. No one has a reliance interest in their *future*

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[12] See *Nat'l Rifle Ass'n* v. *Vullo*, 602 U.S. 175 (2024).

[13] See *N.Y. State Pistol & Rifle Ass'n, Inc.* v. *Bruen*, 597 U.S. 1 (2022).

[14] *Yeshiva Univ.* v. *YU Pride All.*, 143 S. Ct. 1 (2022).

ability to have someone else's property condemned for their own private use. *Cf. Colorado* v. *New Mexico*, 467 U.S. 310, 316 (1984) (noting "society's [ ] interest[] in increasing the stability of property rights"). No reliance interests hinder reconsidering *Kelo*, and the petition should be granted to allow the Court to decide whether that precedent should still stand.

III. The question presented is important.

The question presented is also important. In the 20 years since *Kelo* was decided, private-to-private condemnations have continued to create controversy and injustice—originally nationwide and now, regularly, in the states that have not limited *Kelo* under state law.[15] The inability of courts to apply *Kelo*'s purported limitations has caused confusion for litigants and courts alike.[16] And the decision has continued to received sharp criticism from both legal

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[15] See, *e.g.*, Shalon Stevens, *Residents Object to Onondaga County's Eminent Domain Effort*, Spectrum News 1 (Sept. 14, 2022), *available at* https://tinyurl.com/4aryjbn4; Jim Aroune, *Eminent Domain Dispute Creates Dairy Dilemma in Allegany County*, Spectrum News 1 (June 1, 2021), *available at* https://tinyurl.com/msuddbmy; Justin Schecker, *Family Sues West Haven Over Eminent Domain Case*, NBC Conn. (Sept. 29, 2016) *, available at* https://tinyurl.com/33frtvmv.

[16] *See, e.g.*, Ilya Somin, *The Judicial Reaction to* Kelo*,* 4 Alb. Gov't L. Rev. 1, 3 (2011) ("[F]ederal and state courts have been all over the map in their efforts to apply *Kelo's* restrictions on 'pretextual' takings."); Daniel B. Kelly, *Pretextual Takings: Of Private Developers, Local Governments, and Impermissible Favoritism,* 17 Sup. Ct. Econ. Rev. 173, 176 (2009) ("[T]he [*Kelo*] Court's lack of clarity[] has created significant uncertainty for both litigants and lower courts.").

scholars[17] and Members of this Court. See, *e.g.*, *Eychaner* v. *City of Chicago*, 141 S. Ct. 2422 (Thomas, J., dissenting). This Court may not see public-use questions very often,[18] but that is to be expected: Litigating about public use can be expensive and risky for property owners, who face great pressure to settle. The Court should not mistake the relative rarity of petitions raising these questions for an absence of eminent-domain abuse. In the lower courts (and at dinner tables where homeowners have to decide whether to litigate or to let private businesses force them off their land), *Kelo* continues to run rampant.

That matters. It matters legally, but it also matters morally. Failing to curb the lower courts' expansive vision of *Kelo* "leaves in place a legal regime that benefits 'those citizens with disproportionate influence and power in the political process, including large corporations and development firms.'" *Eychaner*, 141 S. Ct. at 2423 (Thomas, J., dissenting) (quoting *Kelo*, 545 U.S. at 505 (O'Connor, J., dissenting)). To be sure, this case is a dispute between property developers, each of whom wanted to build something on the same piece of land—one of whom had the land and one of whom had more political sway. But many private-to-private takings nationwide continue to involve taking the property of

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[17] See, *e.g.*, Alberto B. Lopez, *Revising* Kelo *and Eminent Domain's "Summer of Scrutiny,"* 59 Ala. L. Rev. 561, 562 (2008); Orlando E. Delogu, Kelo v. City of New London—*Wrongly Decided and a Missed Opportunity for Principled Line Drawing with Respect to Eminent Domain Takings*, 58 Me. L. Rev. 17 (2006).

[18] But see *Brinkmann*, No. 23-1301; *Eychaner*, No 20-1214.

poorer landowners to give it directly to wealthier landowners. See Dick M. Carpenter & John K. Ross, *Testing O'Connor and Thomas: Does the Use of Eminent Domain Target Poor and Minority Communities?*, 46 Urb. Studies 2447 (2009) (finding that redevelopment through eminent domain overwhelmingly targets areas disproportionately populated by poor people and racial minorities). Until this Court reconsiders (or at least limits) *Kelo*, those takings will continue.

IV. This case is a good vehicle.

This case is a good vehicle to revisit the scope or viability of *Kelo* for two reasons. First, the facts are simple, settled, and exactly what *Kelo* said it was leaving for another day. The condemned land will be owned and controlled by the private commercial entity that asked for it to be condemned in a one-off taking. That makes it exactly the sort of *A* to *B* transfer, conducted outside the context of a public development plan and justified only by the assertion of incidental benefits, that the *Kelo* majority said it was not endorsing (and that Justice O'Connor's dissent warned it was). Second, both the condemnor and the New York Court of Appeals agree this property is being taken for a private "'commercial' purpose." App. 10a. To be sure, the public might be (or might not be) allowed to use the new parking lot "at night" when it is not needed by its new private owner. *Ibid.* But this is an asserted incidental benefit of the sort Justice O'Connor warned about; there is no suggestion that the public would have any *legal* right to use the parking lot. So the facts involve nothing like highways, common carriers, or the other genuine

public *uses* that the Clause was originally understood to describe. This is a clean vehicle to consider the boundaries and continued viability of *Kelo*'s holding.

It is also a chance that may not come again. As discussed above, the use (or threatened use) of eminent domain for private development is common, but *appellate litigation* over those condemnations is rare. See *supra* 23. Many eminent-domain cases end in settlement, as property owners facing the uncertain scope of the *Kelo* rule decide not to undergo a long-term fight. When past opportunities to revisit *Kelo* have arisen, at least one (if not more than one) Justice has voted to do so. *Supra* nn. 4–5. This case presents a straightforward vehicle to answer the questions presented, and the time to do so is now.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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