No. _____

In The
Supreme Court of the United States

KEITH ALLEN KIEFER,

Petitioner,

v.

COUNTY OF ISANTI,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Minnesota

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A county's rural agricultural land-use laws completely prohibit outdoor storage use of personal property – a "noneconomic interest" – while permitting unlimited outdoor storage relating to permitted, conditional, and other uses. Hence, an arbitrary group of property owners with only an outdoor storage use lose a benefit of property ownership. In this case, Isanti County has obtained a court order to physically remove Petitioner's outdoor storage based on such an ordinance.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 n.8 (1992), this Court stated that "there are plainly a number of noneconomic interests in land whose impairment will invite exceedingly close scrutiny under the Takings Clause. *See, e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 . . . (1982) (interest in excluding strangers from one's land)." Since 2005, the state courts have applied the Court's decision in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005). However, *Lingle* never specifically addressed whether *Lucas*'s exceedingly close scrutiny on impairment of possessory property rights still applies under the Takings Clause.

1. Whether *Lingle* overturned *Lucas*'s noneconomic interests doctrine under the Takings Clause which requires exceedingly close scrutiny of physical impairments of possessory property rights.

QUESTIONS PRESENTED – Continued

2. Whether the *Lucas* noneconomic interests doctrine means it is a taking for Takings Clause purposes when a physical impairment of possessory property rights is fatally underinclusive by affecting only an arbitrary category of property owners.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Keith Kiefer respectfully petitions for a writ of certiorari to review the judgment and opinion below.

OPINIONS BELOW

The Petitioner petitions from the Minnesota Court of Appeals decision and opinion interpreting the federal Takings Clause as reported at *County of Isanti v. Kiefer*, 2017 WL 3469521 (Minn. Ct. App. Aug. 14, 2017), *review denied* (Oct. 25, 2017). The Court of Appeals affirmed the post-remand decision of the District Court upon remand interpreting the federal Takings Clause as reported at *County of Isanti v. Kiefer*, 2017 WL 1806929 (Minn. Dist. Ct. Jan. 27, 2017).

Notably, an earlier Court of Appeals decision reported at *County of Isanti v. Kiefer*, 2016 WL 4068197 (Minn. Ct. App. Aug. 1, 2016) affirmed in part, reversed in part, and remanded the District Court decision reported at *County of Isanti v. Kiefer*, 2015 WL 13297970 (Minn. Dist. Ct. July 6, 2015).

JURISDICTION

The date of the Minnesota Supreme Court's denial of review was October 25, 2017. Application for extension of time to file petition for writ of certiorari (No.

17A820) was granted extending the time to file until February 20, 2018.

This Court's jurisdiction rests under 28 U.S.C. § 1257(a).



CONSTITUTIONAL, STATE STATUTORY, AND COUNTY ORDINANCE PROVISIONS INVOLVED

The Fifth Amendment's Takings Clause, which applies to local governments via incorporation by the Fourteenth Amendment, provides:

> * * * nor shall private property be taken for public use, without just compensation.

Minnesota Statutes § 394.27, subd. 7 provides, in relevant part:

> No variance may be granted that would allow any use that is not allowed in the zoning district in which the subject property is located.

Isanti County, Minn., Zoning Ordinance ("Zoning Ordinance") § 6, subd. 1 (2014), Agriculture-Residential District, governs the purposes of the zoning designation:

> The A/R Agriculture/Residential District is intended to provide a district that will: (1) allow suitable areas of the County to be retained in Agricultural use; (2) prevent scattered, non-farm development; and (3) secure economy in governmental expenditures for public services, utilities and schools. Any building in an

> A/R District must accept the rural environment as it is found.

Subdivisions governing uses for the Agriculture Residential District under Zoning Ordinance § 6 include subdivision 2 governing permitted uses, subdivision 3 governing conditional uses, subdivision 4 governing interim uses, and subdivision 5 governing permitted accessory uses. None of the ordinance sections mention outdoor storage as a "use." While Zoning Ordinance § 6, subd. 5 defines permitted accessory uses as "accessory uses customarily incidental to the uses permitted in . . . this Section," the same Zoning Ordinance under § 4, subd. 1(4), identifies prohibited uses:

> 4. Prohibited Uses: Whenever in any zoning district a use is neither specifically permitted nor denied, the use shall be considered prohibited.

Accordingly, as interpreted by the state courts, the outdoor storage use by Kiefer is prohibited in Isanti County's Agriculture Residential zoned district because Kiefer's outdoor storage use is not related to any legally authorized use in Zoning Ordinance § 6, Agriculture-Residential District, subds. 2, 3, 4 or 5 (2014). Yet, paradoxically, subdivision 5 permits unlimited outdoor storage related to a legally authorized use.

STATEMENT OF THE CASE

This case presents an important question regarding the regulation of land use to preclude a

noneconomic interest of outdoor storage in a rural setting. Can local government physically extinguish by court order a fundamental attribute of property ownership – here, land set aside to be exclusively used as outdoor storage of personal property – without court review under the standard of "exceedingly close scrutiny" under the Takings Clause? Petitioner Keith Allen Kiefer endured a 10-year litigation experience of both criminal and civil prosecutions for having stored personal property on one acre of land. Now, the county has a court order to remove Kiefer's property.

Owning 53 acres of land, Kiefer set aside one acre of land for personal use – outdoor storage of personal property – and leased the remaining tillable acreage for agricultural farming. Since then, Kiefer stored personal property on that one acre of land, including antique cars, used (non-farming related) equipment, and other miscellaneous personal items. Under the Isanti County governing ordinances for agriculture-residential zoned property, the leaseholder of the remaining 52 acres of land could store even inoperable farm machinery as a permitted use under Zoning Ordinance § 6, subds. 2-3, and Zoning Ordinance § 4 ("A use clearly incidental or accessory to the principal use of a lot . . . located on the same lot as the accessory use"), but Kiefer is completely prohibited from using the set-aside acre for outdoor storage use of personal property. County regulations, as confirmed by the Minnesota courts, expressly prohibit him from seeking either a variance or conditional use permit to request outdoor storage use on this one acre of land. This is a complete

elimination of value of that one acre of land for Kiefer's desired use.

In *Lucas v. South Carolina Coastal Council*, this Court recognized that "there are plainly a number of noneconomic interests in land whose impairment will invite exceedingly close scrutiny under the Takings Clause." 505 U.S. 1003, 1019 n.8 (1992) (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982), which applied the Takings Clause to a property owner's interest in excluding others from the owner's land). But the Minnesota Court of Appeals, in applying the factors from *Penn. Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), ignored Kiefer's lost benefit of property ownership due to a county regulatory scheme that extinguished a noneconomic interest as a fundamental attribute of ownership – outdoor storage of personal property. While others enjoy outdoor storage associated with a legally authorized use, Kiefer remains unable to enjoy outdoor storage of any type because he does not have a legally authorized use.

Unfortunately, state appellate courts since the 1992 *Lucas* decision have done almost nothing to develop the doctrine of noneconomic interests. But California has provided an exception. In *Cwynar v. City & County of San Francisco*, 109 Cal. Rptr. 2d 233 (Cal. Ct. App. 2001), a state appellate court found that "a San Francisco ordinance that restricts a property owner's ability to evict a tenant from a residential rental unit so the unit could be used as a residence by the owner or a close family member," *id*. at 238, required close scrutiny, finding that the ordinance "is not

a straightforward, evenly applied regulation. It directly affects the possessory property rights of an apparently arbitrary category of property owners." *Id*. at 251. Such arbitrary restrictions on possessory property rights can be fatally underinclusive under *Lucas*'s noneconomic interest doctrine.

Since 2005, the state courts have erroneously applied this Court's decision in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005). The state courts have assumed *Lingle* overturned *Lucas*'s noneconomic interest doctrine applying exceedingly close scrutiny to fatally underinclusive impairments of possessory property rights. The Court in *Lingle* stated, "A plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed by alleging a "physical" taking, a *Lucas*-type total regulatory taking, a *Penn Central* taking, or a land-use exaction violating the *Nollan* and *Dolan* standards." *Id.* at 549. However, the Court also said it was not disturbing any prior "holdings." *Id.* at 546. Further, *Lingle* did not involve an impairment of possessory property rights. Additionally, the Court in *Lingle* never addressed whether *Lucas*'s noneconomic interests doctrine continues as applied to impairments of possessory property rights.

In Kiefer's case, Isanti County's regulatory scheme restricts possessory property rights affecting arbitrarily a class of property owners. It is a taking for Takings Clause purposes for the government to ban all outdoor storage use on property in such a fatally underinclusive way as to permit unlimited outdoor

storage related to a legally authorized use and to prohibit the outdoor storage use for a property owner who exercises no legally authorized use. Such a regulatory scheme, when exercised by local government, is an extraordinary circumstance that can leave the property owner without an economically beneficial use of land. *See Lucas*, 505 U.S. at 1017.

Minnesota courts, inconsistently with *Lucas* and *Cwynar*, ignore the "exceedingly close scrutiny" required for certain regulations of noneconomic interests such as restrictions on possessory property rights imposed on an arbitrary category of property owners. Instead, Minnesota relies exclusively on the multi-factor test of *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978), completely forgoing the exacting scrutiny that *Lucas* requires for certain regulations of noneconomic interests.

Moreover, the issue presented is of nationwide significance as other courts struggle to apply a consistent standard to protect noneconomic interests, which this Court has stated requires exceedingly close scrutiny. Other courts have referenced *Lucas* and the noneconomic interest doctrine, albeit inconsistently and incompletely. *See*, *e.g.*, *Robinson v. City of Baton Rouge*, 2016 WL 6211276, at *38 (M.D. La. 2016); *City of Coeur d'Alene v. Simpson*, 136 P.3d 310, 327-28 (Idaho 2006); *Peters v. Milks Grove Special Drainage Dist. No. 1 of Iroquois Cty.*, 610 N.E.2d 1385, 1389 (Ill. App. Ct. 1993); *Countryman v. Schmitt*, 673 N.Y.S.2d 521, 524, 526 (N.Y. Sup. Ct. 1998).

Factual and Procedural Background

1. The litigation dispute over noneconomic interests arose because Kiefer leases 52 of 53 acres of rural land to a tenant farmer and reserves one acre for his outdoor storage use.

Kiefer owns fifty-three acres of rural land zoned Agriculture-Residential in Isanti County, Minnesota. The farm has no particular scenic, cultural, historical preservation, or other value. Kiefer set aside one acre of those 53 acres specifically for outdoor storage of personal property. App. 2.

But, Isanti County bans outdoor storage *use* on agricultural lands. If the outdoor storage is incidental or accessory to a permitted principal use, Zoning Ordinance § 4 permits outdoor storage.[1] So outdoor storage related to the legally authorized use of farming is permitted. Even small items such as storing a wheelbarrow outside are banned unless Kiefer farms the land or Kiefer has another legally authorized use which Kiefer does not have. Tr. 125:7-10. Moreover, Minnesota Statutes § 394.27, subd. 7, bans a variance in this situation, "No variance may be granted that would allow any use that is not allowed in the zoning district in which the subject property is located." Likewise, no conditional use permit is available to Kiefer. Zoning Ordinance § 6, subd. 3 (2014).

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[1] Also, for agricultural lands, inoperable equipment may store inoperable farm machinery as a permitted use under Zoning Ordinance § 6, subds. 2, 3. Here, Kiefer is not farming on his one acre of land.

Kiefer leases 52 of 53 acres to a tenant farmer. The remaining one acre was not leased and has been used for outdoor storage of his personal property. App. 2, 6. The county ordinances, as written, would allow outdoor storage if Kiefer himself was farming on his remaining 52 acres of land, as it would be considered incidental to the permitted use of farming. Since Kiefer's 52 acres are leased to a third-party farmer, Kiefer is prohibited from the specific use of outdoor storage because it is not associated with the tenant's farming.[2]

The county has been partially successful in criminal and civil proceedings against Kiefer for his outdoor storage use on the one-acre parcel. *See* App. 3. While the Minnesota courts have allowed Kiefer some temporary storage use as a "non-conforming" use, the Minnesota courts have agreed with Isanti County that Kiefer is precluded by county ordinances from exercising a noneconomic interest of outdoor storage use of personal property. As the non-conforming use evaporates, Kiefer will be left with no outdoor storage use. Kiefer is completely prohibited by county ordinance from outdoor storage use on his one acre of land. Isanti County's ordinance restricts outdoor storage use which is a noneconomic interest.

Isanti County's ordinance restricting outdoor storage is underinclusive because Kiefer's neighbors have

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[2] *See* Zoning Ordinance § 4 ("Use, Accessory. A use clearly incidental or accessory to the principal use of a lot . . . located on the same lot as the accessory use.").

unlimited rights to outdoor storage associated with their legally authorized uses. Yet the same ordinance bans Kiefer's outdoor storage use because he has no legally authorized use.

This petition seeks review of the state court's denial of Kiefer's post-remand claims against the county brought in response to the county's successful claims against Kiefer to remove the outdoor storage as violative of the county's current ban on outdoor storage use. The federal takings claim was presented and resolved on remand after the courts interpreted Isanti County ordinances to ban future outdoor storage use on Kiefer's property. App. 8-11, 25-27.

Kiefer's post-remand claim is that the county's physical application of its ban on outdoor storage is a taking for federal Takings Clause purposes which caused Kiefer $2,496 in damages because Kiefer has spent that money to date leasing outdoor storage elsewhere instead of using the outdoor storage on his own property. App. 26.

Isanti County has not, despite Kiefer's urging, enacted a reasonable outdoor storage use ordinance as most Minnesota counties have. Instead, Isanti County insists on its ordinances being a complete ban on outdoor storage use. Meanwhile, the ordinance is underinclusive by allowing unlimited outdoor storage by others. Further, Isanti County's implementation of the ordinance is ad hoc via neighbor complaints. Consequently, Isanti County's approach results in a patchwork of unequal ordinances and enforcement

applied to the detriment of Kiefer and other similarly-situated landowners instead of a county-wide uniform enforcement of a reasonable outdoor storage ordinance.

The Minnesota state courts dismissed Kiefer's takings damages claim of $2,496 based on Isanti County's ordinance and physical actions not satisfying the U.S. Supreme Court's three-factor test in *Penn. Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). App. 10-11, 25-27.

To the contrary, in *Lucas v. South Carolina Coastal Council*, this Court recognized that "there are plainly a number of noneconomic interests in land whose impairment will invite exceedingly close scrutiny under the Takings Clause." 505 U.S. 1003, 1019 n.8 (1992) (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982), which applied the Takings Clause to a property owner's interest in excluding others from the owner's land). And, in *Cwynar v. City & County of San Francisco*, 109 Cal. Rptr. 2d 233 (Cal. Ct. App. 2001), the California Court of Appeal found that "a San Francisco ordinance that restricts a property owner's ability to evict a tenant from a residential rental unit so the unit could be used as a residence by the owner or a close family member," *id*. at 238, required close scrutiny, finding that the ordinance "is not a straightforward, evenly applied regulation. It directly affects the possessory property rights of an apparently arbitrary category of property owners." *Id*. at 251. Such arbitrary restrictions on

possessory property rights can be fatally underinclusive under *Lucas*'s noneconomic interest doctrine.

Kiefer contends the Minnesota Court of Appeals erred by not recognizing that outdoor storage on agricultural land is a noneconomic interest in land whose impairment – like the interest in excluding strangers from use of one's land – invites exceedingly close scrutiny under the Takings Clause. If such an ordinance restricting possessory property rights "is not a straightforward, evenly applied regulation" and if it "directly affects the possessory property rights of an apparently arbitrary category of property owners," it may be fatally underinclusive and result in a taking under the federal Takings Clause.

2. Isanti County bans outdoor storage use on agricultural property without possibility of variance.

Isanti County does not have an outdoor storage use ordinance regarding the Agriculture-Residential zoning district. In this case, Isanti County successfully applied its zoning ordinances as a complete ban against Kiefer's outdoor storage use: "whenever in any zoning district a use is neither specifically permitted nor denied, the use shall be considered prohibited." Zoning Ordinance § 4, subd. 1(4) (1996). The district court concluded that Kiefer's outdoor storage use is not a use that is currently authorized under the county's zoning ordinance, focusing its analysis on whether the use is a permissible accessory use under the ordinance.

Zoning Ordinance § 6, subd. 5 (2014) permits "accessory uses customarily incidental to the uses permitted in . . . this Section." But Zoning Ordinance § 4, subd. 1 (2014) states:

> 4. Prohibited Uses: Whenever in any zoning district a use is neither specifically permitted nor denied, the use shall be considered prohibited.

Zoning Ordinance § 6, Agriculture-Residential District, subds. 2, 3, 4, and 5 (2014) addresses uses in the Agriculture-Residential District. Outdoor storage use is not mentioned in any of the subdivisions. Subdivision 2 provides permitted uses. Subdivision 3 provides conditional uses. Subdivision 4 provides interim uses. Minnesota Statutes § 394.27, subd. 7 provides, in relevant part:

> No variance may be granted that would allow any use that is not allowed in the zoning district in which the subject property is located.

Accordingly, no variance is available because the outdoor storage use by Kiefer is prohibited in Isanti County's Agriculture-Residential zoned district because Kiefer's outdoor storage use is not related to any legally authorized use in Zoning Ordinance § 6, Agriculture-Residential District, subds. 2, 3, 4 or 5 (2014).

Neither Isanti County nor Kiefer appealed the District Court's interpretation of Isanti County's ordinance as a complete ban on all outdoor storage use

on Agriculture-Residential zoned property. Instead, Kiefer on remand claims a court order authorizing Isanti County to physically remove personal property based on such an ordinance is a taking for federal Takings Clause purposes. Isanti County's ban on all outdoor storage use on Agriculture-Residential zoned properties shows fatal underinclusiveness by permitting unlimited outdoor storage relating to a lawful use and by only ad hoc enforcement by neighbor complaint.

Kiefer now requests that this Court apply the "exceedingly close scrutiny" – referenced in *Lucas* – to the noneconomic interest of outdoor storage use on rural lands zoned Agriculture-Residential. The U.S. Supreme Court in *Lucas* referenced the "interest in excluding strangers from one's land" as a noneconomic interest worthy of exceedingly close scrutiny as evidenced in *Loretto*. The California appellate court in *Cwynar* recognized the post-eviction right for an owner to live in the owner's apartment as a noneconomic interest whose impairment requires close scrutiny. Kiefer proposes that his noneconomic interest in outdoor storage is the functional equivalent of the noneconomic possessory property interests identified in *Cwynar* and *Loretto*.

Further, Isanti County has an alternative to banning outdoor storage use and having a neighbor complaint system for ad hoc enforcement: a reasonable outdoor storage use ordinance. Minnesota counties and municipalities use reasonable outdoor use storage ordinances to ensure equal enforcement across their respective jurisdictions. Despite Kiefer's urging, Isanti

County insists on not having an outdoor storage use ordinance. Instead, Isanti County implements ad hoc enforcement of its complete ban on outdoor storage use.

Isanti County applied its ordinances against Kiefer's outdoor storage use. First, in this case, Isanti County successfully applied its zoning ordinances as a complete ban against Kiefer's future outdoor storage use. The district court concluded that Kiefer's outdoor storage is not a use that is currently authorized under the county's zoning ordinance, focusing its analysis on whether the use is a permissible accessory use under the ordinance. *See* Zoning Ordinance § 6, subd. 5 (2014) (permitting "accessory uses customarily incidental to the uses permitted in . . . this Section"). Isanti County does not have an outdoor storage ordinance nor standards or regulations for outdoor storage in the Agriculture-Residential zoning district; instead, Isanti County has an ordinance provision that states, "whenever in any zoning district a use is neither specifically permitted nor denied, the use shall be considered prohibited." Zoning Ordinance § 4, subd. 1(4) (2014).

Neither Isanti County nor Kiefer appealed the district court's determination that the zoning ordinances constituted a complete ban on outdoor storage use. Instead, Kiefer argued such an ordinance totally banning outdoor storage use on agricultural-rental property is a taking for Takings Clause purposes because it is a fatally underinclusive restriction affecting an arbitrary class of property owners.

Kiefer believes if this Court will hold that a complete ban – under these facts and circumstances – is an unconstitutional taking that Isanti County will be forced to adopt a reasonable outdoor storage ordinance. Such a ruling would be the end of Isanti's underinclusive, arbitrary ban on outdoor storage use.[3]

3. Minnesota's state courts did not give Isanti County's ban on Kiefer's outdoor storage use the "exceedingly close scrutiny" suggested by the Court in *Lucas*; instead, the Minnesota courts misapplied *Penn Central*'s three-factor test.

The state courts did not give Isanti County's ban on Kiefer's outdoor storage use the "exceedingly close scrutiny" required by this Court in the *Lucas* case for noneconomic interests in land. As a result, Kiefer lost the beneficial use of his one acre of land because the county's ordinances were interpreted by the county and by the state courts as a complete ban on Kiefer's outdoor storage use.

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[3] Notably, Isanti unsuccessfully attempted to apply its solid waste ordinance against Kiefer's outdoor storage use. The Minnesota Court of Appeals in *County of Isanti v. Kiefer*, 2016 WL 4068197 (Minn. Ct. App. Aug. 1, 2016) held the county's solid waste ordinance inapplicable to Kiefer's outdoor storage. The county's solid waste ordinance is several pages. It is not necessary that the entire legal dispute regarding the county's solid waste ordinance be repeated here.

Instead of applying "exceedingly close scrutiny," the state court analyzed Kiefer's takings claims under the three *Penn Central* factors. App. 25-27. But the *Penn Central* factors are inapposite when fatally underinclusive restrictions on possessory property rights arbitrarily affect a single class of property owners. Kiefer's claim is based on a complete ban on outdoor storage use on Agriculture-Residential property with fatal underinclusiveness shown by unlimited storage permitted for a lawful use and by ad hoc enforcement by neighbor complaint. Another reason for finding that a complete ban on outdoor storage use is a taking in this case, is that the governmental entities have an alternative: a reasonable outdoor storage ordinance.

The first *Penn Central* factor "turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 634 (Minn. 2007) (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540 (2005)). The Minnesota Court of Appeals opined, "Although Kiefer may have incurred expenses by storing certain items in another location, Kiefer remains able to store a number of items on the property. Moreover, there is no indication that enforcement of the zoning ordinance has reduced the property's value." *Kiefer*, 2017 WL 3469521, at *4.

Kiefer's takings claim is based on Isanti County's complete ban on outdoor storage use and its fatal underinclusiveness. Isanti County's regulation has a large impact on those like Kiefer who are victims of the

county's ad hoc enforcement because their neighbors complain about any outdoor storage. For these farm owners, like Kiefer, Isanti County through its enforcement causes a large impact by interfering with the most fundamental of property rights: outdoor storage use. Meanwhile, property owners with legally authorized uses have unlimited outdoor storage.

This differential treatment is why the ordinance is fatally underinclusive. On one hand, the ordinance completely prohibits outdoor storage use when the property has no legally authorized use; on the other hand, unlimited outdoor storage is allowed if the outdoor storage is related to a legally authorized use. Kiefer's property must be bare without any outdoor storage. Kiefer's neighbors who have a lawfully authorized use may have properties full of outdoor storage.

The second *Penn Central* factor is this: "In examining a property owner's investment-backed expectations, the existing and permitted uses of the property when the land was acquired generally constitute the 'primary expectation' of the landowner regarding the property." *Wensmann Realty, Inc.*, 734 N.W.2d at 637 (quoting *Penn Central*, 438 U.S. at 136). The Minnesota Court of Appeals acknowledged that Kiefer argued that he purchased the property "to use it for agricultural purposes, a single-family home, and outdoor storage." *Kiefer*, 2017 WL 3469521, at *4. At trial, Kiefer testified that the property's primary use has been agricultural. Although the zoning ordinance restricts his ability to store certain items on the one-acre property, Kiefer is still able to store preexisting nonconforming

items outdoors and use the property in a number of manners, including for agricultural purposes and a single-family home. *See* Zoning Ordinance § 6, subds. 2, 3 (Dec. 29, 2014) (listing permitted and conditional uses in Agriculture-Residential district).

Kiefer's takings claim is based on Isanti County's complete ban on outdoor storage and its fatal underinclusiveness. It is true Kiefer managed to prevail on the single family home issue and some legal non-conforming outdoor storage uses. However, Isanti County's ad hoc enforcement of its total ban on Kiefer's property ruined his investment-back expectations to use one acre of the 53 acres for outdoor storage use. Isanti County does not have an outdoor storage ordinance. Isanti County successfully argued that its zoning ordinance is a complete ban on outdoor storage use. At the same time, Isanti County permits outdoor storage for lawful uses. Isanti County also implements enforcement with an ad hoc system based on neighbor complaints.

But Isanti County has never explicitly written as much in its ordinances. Isanti County fails to give adequate notice to purchasers of property because it does not have an outdoor storage ordinance. So investors, like Kiefer, purchase property in Isanti County, like Kiefer not knowing that the ad hoc enforcement of Isanti County's ban on outdoor storage use is initiated by any neighbor's complaint based on any outdoor storage use.

This dispute between Isanti County and Kiefer would have been resolved long ago if Isanti County had enacted a reasonable outdoor storage ordinance instead of its complete ban on outdoor storage which applies only to an arbitrary group of landowners. Isanti County's enforcement of its ban on outdoor storage uses obliterates those who are victims of the ad hoc enforcement because their neighbors complain about any outdoor storage use. For these farm owners, like Kiefer, Isanti County, through its enforcement, causes a large impact by interfering with their fundamental possessory property rights.

The third *Penn Central* factor requires a court to consider the character of the government action: "[T]he appropriate focus of the character inquiry should be on the nature rather than the merit of the governmental action." *Wensmann Realty*, 734 N.W.2d at 639 (quotation omitted). "Although the relevant considerations may vary depending on the circumstances of the case, an important consideration involves whether the regulation is general in application or whether the burden of the regulation falls disproportionately on relatively few property owners." *Id.* The Minnesota Court of Appeals stated in its opinion that "the county's actions were properly taken to enforce an applicable ordinance. Kiefer cites the county's failure 'to present evidence to show that the county uniformly implemented county-wide the county's interpretation of its ordinances as applied to Kiefer.' However, such a burden resides with Kiefer, not the county." *Kiefer*, 2017 WL 3469521, at *4.

But, the court's analysis under the third factor failed to acknowledge that Isanti County's complete ban on outdoor storage use is implied by the county's Zoning Ordinance. The Isanti County litigation was, thus, meritless in almost every regard. The character of the Isanti County's government action – not the merits of how much outdoor storage Kiefer should have – is legally dubious. At all times, Isanti could enact a reasonable outdoor storage use ordinance, as Kiefer has suggested, instead of a zoning ordinance implicitly banning outdoor storage use for an arbitrary group of landowners.

In summary, Kiefer requests that this Court consider whether outdoor storage use bans on Agriculture-Residential property are entitled to the same "exceedingly close scrutiny" suggested by this Court in *Lucas* for important noneconomic interests associated with land. If the state courts had given the same "exceedingly close scrutiny" to Kiefer's claims that this Court gave in *Loretto* to the "interest in excluding strangers from one's land" or that the California appellate court gave to the eviction control ordinance, Kiefer would have prevailed on his federal takings claims based on the county's physical actions based on the zoning ordinances constituting a fatally underinclusive, complete ban on his outdoor storage use.

4. Isanti County has been involved in ten years of administrative and litigation processes to remove Kiefer's one acre outdoor storage without having an outdoor storage use ordinance.

Isanti County has been involved in ten years of administrative and litigation processes regarding Kiefer's one-acre outdoor storage without having an outdoor storage use ordinance. Isanti County sued, alleging that he had violated the Isanti County solid-waste and zoning ordinances by storing several items outdoors on his property, which was zoned for agricultural/residential use. The items included unlicensed vehicles, piles of scrap metal, tin, old furniture, old building material, lumber, old windows, old plumbing fixtures, old sinks, a semitrailer container, old pipes, a mobile home, and other miscellaneous items. The county requested an order authorizing it to remove the items from Kiefer's property and to assess the costs of the removal against Kiefer. Kiefer counterclaimed, asserting an unconstitutional taking by the county.

At the time of trial, Kiefer had occupied 52.94 acres of property in Wyanett Township, Isanti County since 1992. He had owned the rural property since at least 1996. The property is currently zoned for Agriculture-Residential use, but it was zoned solely for agricultural use when Kiefer purchased it. The property has no particular scenic, cultural or historical preservation value. Kiefer uses one acre for outdoor storage use.

In April 2008, Holly Nelson, Isanti County's compliance and environmental technician, received a complaint from a citizen regarding vehicles on Kiefer's property. Nelson inspected the property and found vehicles, vehicle parts, scrap iron, and other miscellaneous items on the property. Between May and September, Nelson sent three letters to Kiefer informing him that the condition of his property violated Isanti County's solid-waste and zoning ordinances and directing him to bring the property into compliance with the ordinances. Between May and October, Nelson inspected the property three times and observed that Kiefer had not removed the items.

Nelson inspected the property five additional times between October 2008 and July 2014. The items remained on Kiefer's property. Nelson photographed the items on Kiefer's property, including a mobile home, licensed and unlicensed vehicles, a semitrailer, and miscellaneous personal property including a tank, wiring, plastic, an engine block, metal, an old tire rim, a rusted handsaw, two hot water heaters, a sod roller, a large metal box, a disassembled plastic storage shed, a small wooden box containing logs, a rubber tarp, scrap lumber, a shovel with no handle, an old grate, a steering wheel, household coolers, an unidentified part, old machinery, shelving, a can, an old lawn mower deck, piping, steel rods, posts, old furniture, a rusted metal equipment rack, a dolly, a sink, pallets, an electric motor, tractor tires, a broken door panel, and PVC gutter materials.

The district court concluded that the presence of many items, with the exception of the licensed vehicles, wooden box, mobile home and semitrailer, violated Isanti County's solid-waste ordinance. *Kiefer*, 2016 WL 4068197, at *1-2. The district court also concluded that the presence of the items, with the exceptions noted above, violated Isanti County's zoning ordinance because Kiefer's outdoor storage use was banned by the zoning ordinances. *Id.* Lastly, the district court concluded that the county's enforcement of its solid-waste and zoning ordinances did not result in an unconstitutional taking. *Id.*

The district court entered judgment against Kiefer and ordered him to remove the violative items within 60 days. *Id.* The district court authorized the county to physically remove the items and to assess the removal costs against Kiefer if he did not comply with the order. *Id.* Kiefer moved for amended findings and to stay enforcement of the judgment. The district court denied Kiefer's motion for amended findings, but it stayed enforcement of the judgment pending this appeal. *Id.*

Kiefer appealed, and the Minnesota Court of Appeals affirmed in part, reversed in part, and remanded to the district court. *Kiefer*, 2016 WL 4068197, at *6. Specifically, the court of appeals reversed the district court's conclusion that Kiefer's outdoor storage violated the county's solid-waste ordinance. *Id*. at *4. The solid-waste ordinance did not apply to Kiefer's outdoor storage use at all. But, the court of appeals affirmed the district court's conclusion that no outdoor storage by Kiefer is currently permitted under the county's

zoning ordinance – a point that neither Kiefer nor Isanti County had appealed. The Minnesota Court of Appeals remanded to the district court to determine whether Kiefer's storage is a permissible preexisting nonconforming use. *Id*. at *5. Finally, the court of appeals reversed the district court's ruling on Kiefer's takings claims and remanded the claims for reconsideration. *Id*. at *6.

On remand, Kiefer claimed his outdoor storage was a permissible nonconforming use and that the county's zoning ordinance and actions banning future outdoor storage use constituted a taking under the U.S. and Minnesota Constitutions. *Kiefer*, 2017 WL 3469521, at *1-2. The district court concluded that three items – a wooden box, an unlicensed vehicle, and a regenerator – on Kiefer's property were permissible preexisting nonconformities under the county's zoning ordinance. *Id.* The district court further concluded that the miscellaneous items and a different unlicensed vehicle, all of which arrived at Kiefer's property in 2007, were not permissible preexisting nonconformities under the county's zoning ordinance, which bans all of Kiefer's outdoor storage use on the one-acre tract. *Id.* Finally, the district court again concluded that Kiefer's property had not been subject to an unconstitutional taking under the Constitution because the three *Penn Central* factors had not been satisfied. *Id.*

In the second appeal, the Minnesota Court of Appeals affirmed the district court's decision. *Kiefer*, 2017 WL 3469521, at *3-4. The Court of Appeals also concluded that Kiefer's property had not been subject to

an unconstitutional taking because the three factors of *Penn Central* had not been satisfied. *Id.* The Minnesota Supreme Court denied review on October 25, 2017.

REASONS FOR GRANTING THIS PETITION

This petition should be granted under Rule 10 of the Rules of the Supreme Court for the following reasons.

I. The Minnesota Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court.

This petition should be granted under Rule 10(c) of the Rules of the Supreme Court:

> a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court.

In *Lucas v. South Carolina Coastal Council*, this Court recognized that "there are plainly a number of noneconomic interests in land whose impairment will invite exceedingly close scrutiny under the Takings Clause." 505 U.S. 1003, 1019 n.8 (1992) (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982), which applied the Takings Clause to a property owner's interest in excluding others from the owner's land). By so doing, this Court opened the door for important questions of federal law involving

"non-economic interests in land whose impairment will invite exceedingly close scrutiny under the Takings Clause" to be raised by petitions like this one.

Yet, since 2005, the state courts have erroneously applied this Court's decision in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) as overturning *Lucas*'s noneconomic interest doctrine applying "exceedingly close scrutiny" for fatally underinclusive impairments of possessory property rights. This Court in *Lingle* stated, "A plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed by alleging a 'physical' taking, a *Lucas*-type total regulatory taking, a *Penn Central* taking, or a land-use exaction violating the *Nollan* and *Dolan* standards." *Id.* at 549. But, this Court also said it was not disturbing any prior "holdings." *Id.* at 546. Further, *Lingle* did not involve an impairment of possessory property rights. Additionally, the Court in *Lingle* never addressed whether *Lucas*'s noneconomic interests doctrine continues as applied to impairments of possessory property rights. Under these circumstances, the *Lucas* economic interest doctrine applying exceedingly close scrutiny to possessory property rights has not been overturned.

And, *Lucas*'s noneconomic interest doctrine is a good doctrine to protect possessory property rights from arbitrary government action. For example, in *Loretto*, this Court held that a taking occurred when a New York Executive Law required certain property owners to permit installation and maintenance of certain cable television wires on their property. 458 U.S.

at 436. Similarly, in *Cwynar*, the California Court of Appeal found that "a San Francisco ordinance that restricts a property owner's ability to evict a tenant from a residential rental unit so the unit could be used as a residence by the owner or a close family member," 109 Cal. Rptr. 2d at 238, required close scrutiny, *id.* at 251.

Courts have addressed *Lucas* and noneconomic interests. However, the courts have not done it in a complete way adhering to *Lucas*. *See*, *e.g.*, *Robinson v. City of Baton Rouge*, 2016 WL 6211276, at *38 (M.D. La. 2016); *City of Coeur d'Alene v. Simpson*, 136 P.3d 310, 327-28 (Idaho 2006); *Peters v. Milks Grove Special Drainage Dist. No. 1 of Iroquois Cty.*, 610 N.E.2d 1385, 1389 (Ill. App. Ct. 1993); *Countryman v. Schmitt*, 673 N.Y.S.2d 521, 524, 526 (N.Y. Sup. Ct. 1998).

The situation presented here reflects a physical taking in the guise of a county regulation, where the complete ban of outdoor storage as a noneconomic interest bears no reasonable relation to the police powers of the county. Further, the prohibition's application is arbitrary, unreasonable, and discriminatory as it is underinclusive as to whom it impacts. *Lucas* provides the opening to an analysis as to whether outdoor storage use on Agriculture-Residential zoned property is a "non-economic interest in land whose impairment will invite exceedingly close scrutiny." Kiefer's questions presented are closely connected to a natural evolution from *Loretto, Lucas*, and *Cwynar* to today as it relates to physical restrictions of possessory property rights that arbitrarily affect a group of property owners.

Further, the *Penn Central* factors are irrelevant when the taking claim is based on a local government's complete ban on outdoor storage use on Agriculture-Residential property when fatal underinclusiveness is shown. The fatal underinclusiveness here is that Kiefer can have no outdoor storage use because he has no legally authorized use, but Kiefer's neighbors can have unlimited outdoor storage based on a legally authorized use such as farming. Also, the reason that a complete ban on outdoor storage is a taking for Takings Clause purposes is that the county has an alternative: a reasonable outdoor storage ordinance. In addition, the local government's complete ban on outdoor storage is accompanied by ad hoc enforcement based on neighbor complaints. The outright ban with ad hoc enforcement means there is no county-wide uniformity. Also, this system of enforcement destroys the landowner's and business owner's reasonable expectations of a fundamental attribute of property ownership. Absent an outdoor storage use ordinance, there is no certainty in outdoor storage use because of the local government's complete ban on outdoor storage use and ad hoc enforcement.

II. This Court should clarify that the underinclusiveness of a physical restriction on possessory property rights which affects arbitrarily a group of landowners is fatal.

This Court should clarify that the underinclusiveness of a physical restriction on possessory property rights that arbitrarily affects a group of property

owners is fatal. As to the First Amendment, this Court has already stated that "[u]nderinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 802 (2011) (citing *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994) and *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989)).

This Court should hold the same as to underinclusiveness about possessory property rights under the Takings Clause as it has for First Amendment rights. The underinclusiveness of a restriction on possessory property rights raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular category of property owner.

In Kiefer's case, he is prohibited from an outdoor storage use. But Isanti County's outdoor storage ordinance is fatally underinclusive. A property owner with a legally authorized use has unlimited outdoor storage while Kiefer has none. Further, the enforcement mechanism is ad hoc based on neighbor complaints. So Kiefer, because his neighbor complained, has to remove all his outdoor storage use. His neighbors, because they have a legally authorized use or because their neighbors did not complain, do not have to remove their outdoor storage.

The county's zoning ordinance and implementation result in a patchwork of regulation. One group of property owners who do not have a legally authorized

use, including Kiefer, have no outdoor storage use. Another group of property owners who have a legally authorized use, including Kiefer's neighbors, have unlimited outdoor storage. It is this fatal underinclusiveness, with the county obtaining a court order to physically remove Kiefer's property, which triggers the taking for federal Takings Clause purposes.

This Court, as it has with the First Amendment, should clarify that the "exceedingly close scrutiny" required under *Lucas* for noneconomic interests in land includes legal analysis of underinclusiveness. Specifically, this Court should clarify that the "exceedingly close scrutiny" under the noneconomic interest doctrine requires a determination of whether a physical restriction on possessory property rights arbitrarily affects a group of property owners.

III. Legal questions regarding possessory property rights are important questions for the national economy; local governments have no excuse for not adopting reasonable regulations instead of regulations which affect arbitrarily a group of property owners.

These questions are of nationwide importance because of the impact upon possessory property rights which directly affect the economic value and economic expectation of real property. Local governments should not be excused from enacting reasonable regulations instead of enacting arbitrary regulations adversely affecting only one class of property owners while

providing that same property right to others. In short, counties cannot arbitrarily extinguish fundamental attributes of ownership, such as the noneconomic interest of outdoor storage use, without compensation.

Here, when local governments are considering outdoor storage on agricultural lands that have no particular scenic, cultural, or historical-preservation value, is it a taking for the local government to ban all outdoor storage use for an arbitrary group of landowners and rely on an ad hoc enforcement system based on neighbor complaints?

If this Court were to agree that such conduct could be a taking for federal Takings Clause purposes, more local governments will enact reasonable outdoor storage ordinances instead of recklessly banning outdoor storage for some, but not all, property owners. The resulting certainty in outdoor storage rights, arising from these reasonable and uniform outdoor storage ordinances, will lead to landowners and businesses being able to rely on certain, written laws regarding outdoor storage. Such legal stability as to outdoor storage will allow landowners and businesses to plan with greater confidence. In turn, these events will contribute to a growing national economy.

IV. This petition does not assert error consisting of erroneous factual findings or the misapplication of a properly stated rule of law.

The Petitioner is aware of Rule 10's admonition that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Here, that is not the case. This Petition asks the Court to consider, after *Lingel*, whether the "exceedingly close scrutiny" identified in *Lucas* applies to fatally underinclusive bans on outdoor storage uses as well as when "a stranger enters one's land." The Minnesota Court of Appeals erred by applying the wrong legal standard. The Minnesota Court of Appeals applied erroneously the *Penn Central* factors instead of the "exceedingly close scrutiny" required by *Lucas*. App. 8-11.

The two different legal standards result in different legal analysis of Isanti County's restrictions on Kiefer's possessory property rights. Under the *Penn Central* factors, Kiefer had no opportunity to claim that Isanti County's restriction on possessory property rights was fatally underinclusive because it affected arbitrarily one group of property owners. But, under "exceedingly close scrutiny," Kiefer would have had an opportunity to claim that Isanti County's restriction on possessory property rights was fatally underinclusive because it affected arbitrarily one group of property owners.

Kiefer seeks the same protections under *Lucas*'s noneconomic interest doctrine as the plaintiff received from the California court in *Cwynar*. The California court correctly applied *Lucas*'s noneconomic interest doctrine. The Minnesota Court of Appeals erred by applying the *Penn Central* factors instead of *Lucas*'s noneconomic interest doctrine.

CONCLUSION

Kiefer's petition should be granted because the Minnesota courts, like virtually all other state courts, have not developed the doctrine of noneconomic interests identified in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 n.8 (1992). Thirty-six years after *Lucas*, virtually nothing has been done to develop the doctrine of noneconomic interests. The one exception is the California case *Cwynar v. City & County of San Francisco*, 109 Cal. Rptr. 2d 233 (Cal. Ct. App. 2001). Kiefer seeks that the law applied in Minnesota to his noneconomic interests be that expressed in *Lucas* and *Cwynar*. The Minnesota courts refuse to apply "exceedingly close scrutiny" to noneconomic interests in land as required by *Lucas*. Instead, the Minnesota courts err by applying the *Penn Central* test, which eliminates any analysis of whether the restriction on possessory property rights is fatally underinclusive by affecting arbitrarily a group of landowners. Part of the problem is that the Court's decision in *Lingle* is being interpreted by state courts to overturn the *Lucas* noneconomic interests doctrine,

although it was never intended to be that way. At this stage of the proceedings, after ten years of administrative and court proceedings, only this Court can ensure that the doctrine of noneconomic interests is applied to Kiefer's case as the *Lucas* Court intended.

Respectfully submitted,

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