No. 19-447

IN THE
Supreme Court of the United States

KEITH PUNTENNEY, ET AL.,

Petitioners,

v.

IOWA UTILITIES BOARD, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court of Iowa

BRIEF IN OPPOSITION FOR RESPONDENT DAKOTA ACCESS, LLC

DAVID DEBOLD
COUNSEL OF RECORD
WILLIAM S. SCHERMAN
MATTHEW S. ROZEN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
ddebold@gibsondunn.com

BRET A. DUBLINSKE
BRANT M. LEONARD
FREDRIKSON & BYRON, P.A.
505 East Grand Avenue, Suite 200
Des Moines, Iowa 50309
(515) 242-8900

Counsel for Respondent Dakota Access, LLC

QUESTIONS PRESENTED

The Iowa Utilities Board authorized the use of eminent domain in the form of easements needed to route a below-ground interstate crude oil pipeline through Iowa. Petitioners challenged the decision under the Takings Clause of the Iowa Constitution and the Fifth Amendment of the U.S. Constitution, contending that the property was not "taken for public use." The Iowa Supreme Court applied the Iowa Constitution's more demanding requirements to uphold the taking. In particular, it cited longstanding authority allowing the use of eminent domain on behalf of common carriers and public utilities such as railroads and pipelines. The court also recognized that the pipeline would serve the valid public purposes of a safer and cheaper mode of transporting crude oil across the state, and lower prices in Iowa for refined petroleum products. Petitioners seek to present two questions:

Does a state's exercise of eminent domain satisfy the "public use" requirement of the Fifth Amendment's Takings Clause if the only benefits experienced within that state are incidental?

Can a state satisfy the "public use" requirement of the Fifth Amendment's Takings Clause merely by labeling the taking with a traditional category of public use, without engaging in the "public purpose" analysis outlined by *Kelo v. City of New London*, 545 U.S. 469 (2005)?

RULE 29.6 STATEMENT

Respondent Dakota Access, LLC is a nongovernmental entity formed to construct and own the Dakota Access Pipeline. Dakota Access, LLC is owned 75% by Dakota Access Holdings, LLC and 25% by Phillips 66 DAPL Holdings LLC.

These companies are in turn owned as follows:

1. Dakota Access Holdings, LLC is wholly owned by Bakken Pipeline Investments LLC, which is owned 51% by Bakken Holdings Company, LLC, and 49% by MarEn Bakken Company LLC (a joint venture between MPLX LP and Enbridge Energy Partners, L.P.).

2. Bakken Holdings Company LLC is owned 60% by La Grange Acquisition, L.P. and 40% by Permian Express Partners LLC, which in turn is owned 87.7% by Sunoco Pipeline L.P. and 12.3% by Mid-Point Pipeline LLC (a subsidiary of Exxon Mobil Corporation).

3. Sunoco Pipeline L.P. is a wholly-owned, indirect subsidiary of Energy Transfer Operating, L.P. ("ETO").

4. La Grange Acquisition, L.P. is a wholly-owned, indirect subsidiary of ETO.

5. Phillips 66 DAPL Holdings LLC is owned equally (20% each) by Phillips 66 DE Holdings 20A LLC, Phillips 66 DE Holdings 20B LLC, Phillips 66 DE Holdings 20C LLC, Phillips 66 DE Primary LLC, and Phillips 66 DE Holdings 20D LLC. Each of these companies are wholly owned by Phillips 66 Project Development, Inc.

The following are parent companies, subsidiaries, or affiliates of Dakota Access, LLC, which have any outstanding securities in the hands of the public:

1. Phillips 66 Company. Phillips 66 Company holds an ownership interest in Dakota Access, LLC through several privately held subsidiaries.

2. ETO. ETO holds an ownership interest in Dakota Access, LLC through several privately held subsidiaries. ETO has publicly traded preferred equity (NYSE: ETPprC, ETPprD and ETPprE), but no publicly traded common equity. ETO also owns the general partner interest and limited partner interests in Sunoco LP (NYSE: SUN) and USA Compression Partners, LP (NYSE: USAC).

3. Energy Transfer LP ("ET"). ET holds an ownership interest in Dakota Access, LLC through several privately held subsidiaries. ET is a publicly traded partnership and is listed on the NYSE under the ticker symbol "ET".

4. MPLX LP, Enbridge Energy Partners, L.P., and Exxon Mobil Corporation have several publicly traded entities.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.6 STATEMENT.. ii

OPINIONS BELOW...2

JURISDICTION...3

STATEMENT 3

REASONS FOR DENYING THE PETITION..........12

A. The Lower Courts Are Not Divided On Any Issue Decided By The Iowa Supreme Court 13

B. Review Is Not Warranted For A Challenge To How The Iowa Supreme Court Applied The Test in *Kelo v. City of New London* 19

C. This Case Is Otherwise A Poor Vehicle For Addressing The Questions Presented...26

CONCLUSION...29

TABLE OF AUTHORITIES

Page(s)

Cases

Adams v. Greenwich Water Co.,
83 A.2d 177 (Conn. 1951) 24

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 22

Atlanta Gas Light Co. v. FERC,
140 F.3d 1392 (11th Cir. 1998) 28

Carole Media LLC v. N.J. Transit Corp.,
550 F.3d 302 (3d Cir. 2008) 16, 17, 18

City of Boerne v. Flores,
521 U.S. 507 (1997) 22

City of Cleburne v. Cleburne Living Ctr.,
473 U.S. 432 (1985) 22

City of Emmetsburg v. Cent. Iowa Tel. Co.,
96 N.W.2d 445 (Iowa 1959) 4, 19

County of Hawai'i v. C&J Coupe Family Limited Partnership,
198 P.3d 615 (Haw. 2008) 14, 17

County of Hawai'i v. C&J Coupe Family Limited Partnership,
242 P.3d 1136 (Haw. 2010) 14

Crawford Family Farm P'ship v. TransCanada Keystone Pipeline L.P., 409 S.W.3d 908 (Tex. App. 2013) 20

Cutter v. Wilkinson, 544 U.S. 709 (2005) 26

Enbridge Energy (Ill.), L.L.C. v. Kuerth, 99 N.E.3d 210 (Ill. App. Ct. 2018) 11

EQT Gathering, LLC v. A Tract of Prop. Situated in Knott Cty., 970 F. Supp. 2d 655 (E.D. Ky. 2013) 20

Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896) 4

Felix v. Superior Court, 375 P.2d 730 (Ariz. 1962) 29

Franco v. Nat'l Capital Revitalization Corp., 930 A.2d 160 (D.C. 2007) 15, 18

Goldstein v. Pataki, 516 F.3d 50 (2d Cir. 2008) 15, 18

Gralapp v. Miss. Power Co., 194 So. 2d 527 (Ala. 1967) 24

Henry v. Mississippi, 379 U.S. 443 (1965) 28

Kelo v. City of New London, 545 U.S. 469 (2005) 1, 2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 17, 19, 20, 21, 22, 23, 25, 26, 27

Kingsway Cathedral v. Iowa Dep't of Transp.,
711 N.W.2d 6 (Iowa 2006)....................................3

Kohl v. United States,
91 U.S. 367 (1875)...24

Martin v. Blessing,
571 U.S. 1040 (2013)...19

Mayor & City Council of Baltimore City v. Valsamaki,
916 A.2d 324 (Md. 2007)..........................16, 17, 18

Middletown Twp. v. Lands of Stone,
939 A.2d 331 (Pa. 2007)...........................15, 17, 18

Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co.,
240 U.S. 30 (1916)....................................4, 19, 21

Nat'l R.R. Passenger Corp. v. Bos. & Me. Corp.,
503 U.S. 407 (1992)..................................4, 19, 21

New England Estates, LLC v. Town of Branford,
988 A.2d 229 (Conn. 2010)............................14, 18

Ohio Oil Co. v. Fowler,
100 So. 2d 128 (Miss. 1958)................................20

Orr v. Quimby,
54 N.H. 590 (1874)..24

Peck Iron & Metal Co. v. Colonial Pipeline Co.,
146 S.E.2d 169 (Va. 1966) 20

Pres. Pittsburgh v. Conturo,
477 F. App'x 918 (3d Cir. 2012) 28

R.I. Econ. Dev. Corp. v. Parking Co.,
892 A.2d 87 (R.I. 2006) 15, 17

Ralph Loyd Martin Revocable Tr. Declaration Dated First Day of Apr. 1994 v. Ark. Midstream Gas Servs. Corp.,
377 S.W.3d 251 (Ark. 2010) 20

Reddall v. Bryan,
14 Md. 444 (1859) 24

Rosenberger v. Rector & Visitors of Univ. of Va.,
515 U.S. 819 (1995) 22

Secombe v. Milwaukee & St. P. R.R. Co.,
90 U.S. (23 Wall.) 108 (1874) 19

Stewart v. Bd. of Supervisors of Polk Cty.,
30 Iowa 9 (1870) 4, 20

Sunoco Pipeline L.P. v. Teter,
63 N.E.3d 160 (Ohio Ct. App. 2016) 20

U.S. Dep't of Agric. v. Moreno,
413 U.S. 528 (1973) 22

Statutes

28 U.S.C. § 1257(a) 3

Iowa Code § 479B.1 6

Iowa Code § 479B.2(3) 25

Iowa Code § 479B.4 6

Iowa Code § 479B.5 6

Iowa Code § 479B.9 6

Iowa Code § 479B.16 25

Rules

Sup. Ct. R. 10(b) 13

Treatises

90 A.L.R. 1032 24

143 A.L.R. 1040 24

Constitutional Provisions

Iowa Const. art. I, § 18 3

U.S. Const. amend. V 3

Other Authorities

Stephen M. Shapiro et al., *Supreme Court Practice* (11th ed. 2019) 23

William Baude, *Rethinking the Federal Eminent Domain Power*, 122 Yale L.J. 1738 (2013) 24

BRIEF IN OPPOSITION

Petitioners challenge the Iowa Utilities Board's March 2016 decision authorizing the use of eminent domain to obtain the easements needed for a crude oil pipeline to pass through Iowa. That 1,172-mile pipeline, which crosses four states, has been in operation since mid-2017. Before the Board acted, it held transparent public hearings, received input and evidence from multiple Iowa stakeholders, and found that the pipeline would bring enormous benefits to Iowa—greater tax revenue, substantial payments to landowners, thousands of jobs, and a mode of transporting oil across Iowa that is safer than the alternatives. The Iowa Supreme Court upheld the use of eminent domain, concluding that achieving these benefits and the resulting lower oil prices for Iowa consumers was a valid "public use" under both the federal Constitution and the stricter standard imposed by the Iowa Constitution.

That decision was a straightforward—and correct—application of settled authority. While this Court split 5-4 in *Kelo v. City of New London*, 545 U.S. 469 (2005), on the use of eminent domain for private economic development (in that case, for shops and office buildings to revitalize a distressed municipality), all nine Justices recognized states' longstanding authority to transfer property to common carriers and public utilities such as railroads and pipelines. Those substantial benefits to Iowa citizens also easily qualify as the type of "public purpose" that *Kelo*'s majority found sufficient to pass muster even for private economic development projects. *Id.* at 484.

There is no split of authority on the use of eminent domain in this context. Petitioners cite no other cases

discussing common carriers, public utilities, or the types of benefits relied on by the Iowa Supreme Court. Instead, they try to piggyback on a supposed split over "pretextual" takings—those motivated by invalid reasons despite assertions of public benefit—*an issue neither presented nor decided below.* Petitioners have never argued, let alone presented evidence, that the Board's decision was pretextual. The record is also clear that the Board made its decision openly and in good faith, based solely on the *public* interest, after applying Iowa's demanding statutory test for ensuring that takings benefit the public. Nor have Petitioners shown any "confusion" in the lower courts over the "relevant factors" for proving pretext. The decisions they cite differ on their facts, but not their view of the law.

Apart from Petitioners' inability to locate a split of authority, it would make little sense to resolve any such split here, where the briefing and decision below focused on *state* constitutional standards, and where Petitioners addressed federal law only briefly to argue that *Kelo* and other decisions were each inapposite. Nor should this Court excuse Petitioners' failure to seek preliminary injunctive relief pending their appeal to the Iowa Supreme Court. Respondent has spent billions of dollars completing construction since Petitioners abandoned such a remedy. As a result, Petitioners have little prospect of effective relief, the case may therefore be moot, and granting discretionary review at this late stage would be inequitable.

The petition should be denied.

OPINIONS BELOW

The opinion of the Iowa Supreme Court (Pet. App. 1-58) is reported at 928 N.W.2d 829. The opinions of

the district court (Pet. App. 59-107) and the Iowa Utilities Board (Pet. App. 108-292) are unreported.

JURISDICTION

The judgment of the Iowa Supreme Court was entered on May 31, 2019. On August 19, 2019, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including September 30, 2019. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATEMENT

1. The Fifth Amendment's Takings Clause, which the Fourteenth Amendment makes applicable to the states, provides that private property shall not be "taken for public use, without just compensation." U.S. Const. amend. V. This public-use requirement ensures that, regardless whether just compensation is paid, states may not take property from a private party for the sole purpose of transferring it to another private party. *Kelo v. City of New London*, 545 U.S. 469, 477 (2005).

Many states impose even stricter restrictions on the takings power. *Kelo*, 545 U.S. at 489. As explained below, Iowa is one of them.

Similar to its federal counterpart, Iowa's constitution states that "[p]rivate property shall not be taken for public use without just compensation." Iowa Const. art. I, § 18. The Iowa Supreme Court treats federal cases interpreting the federal Takings Clause as "persuasive" but "not binding" in its interpretation of the state's sister provision. *Kingsway Cathedral v. Iowa Dep't of Transp.*, 711 N.W.2d 6, 9 (Iowa 2006).

Both constitutions preserve state authority to transfer property from one private party to another for "public purposes." *See*, *e.g.*, *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158 (1896) (federal constitution); Pet. App. 40 (Iowa constitution). For example, this Court and the Iowa Supreme Court have long understood the federal and Iowa constitutions, respectively, to permit the transfer of private property (typically in the form of easements) to common carriers and public utilities like railroads. *See*, *e.g.*, *Nat'l R.R. Passenger Corp. v. Bos. & Me. Corp.*, 503 U.S. 407, 422 (1992) (railroad); *Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co.*, 240 U.S. 30, 32 (1916) (public utility); *City of Emmetsburg v. Cent. Iowa Tel. Co.*, 96 N.W.2d 445, 452 (Iowa 1959) (public utility); *Stewart v. Bd. of Supervisors of Polk Cty.*, 30 Iowa 9, 20-21 (1870) (railroad); *see also infra* at 19-20.

2. In *Kelo*, this Court clarified the limits on using the takings power to transfer property between private owners. The Court "granted certiorari to determine whether a city's decision to take property for the purpose of economic development satisfies the 'public use' requirement of the Fifth Amendment." 545 U.S. at 477. In a 5-4 decision, the Court upheld the city's condemnation of residential and investment properties as part of a comprehensive development plan aimed at creating jobs, attracting residents, increasing tax revenues, and otherwise "revitaliz[ing] an economically distressed city." *Id*. at 472.

All nine Justices agreed that under longstanding precedent, a state may transfer property from one private party to another if the recipient is "required to operate like [a] common carrie[r]," such as a railroad, "making [its] services available to all comers." *Kelo*, 545 U.S. at 477-78. Writing for the majority, Justice

Stevens explained that "such a projected use would be sufficient to satisfy the public use requirement." *Id.* at 479. Writing for the four dissenting Justices, Justice O'Connor agreed that "the sovereign may transfer private property to private parties, often common carriers, who make the property available for the public's use—such as with a railroad, a public utility, or a stadium." *Id.* at 498.

The Court divided, however, on the use of eminent domain for private economic development. Justice Stevens' majority opinion held that the development project "satisf[ied] the public use requirement"—even though the city did not "pla[n] to open the condemned land … to use by the general public"—because the project "serve[d] a public purpose." *Kelo*, 545 U.S. at 478, 484. Justice Kennedy joined that opinion in full but wrote separately to caution that courts "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 (emphasis added).

The four dissenting Justices, by contrast, would have held that "economic development takings" are never constitutional. *Kelo*, 545 U.S. at 498 (O'Connor, J.). Justice O'Connor reasoned that the Court's Takings Clause precedents permit states to transfer property between private owners to "*directly* achiev[e] a public benefit" like reducing pervasive blight and reversing dramatic concentration of land in the hands of a few owners, *id.* at 498, 500, but not to achieve "secondary benefit[s] for the public" such as "increased tax revenue" or "more jobs," *id.* at 501. In a separate opinion, Justice Thomas urged the Court to overrule the Court's "public purpose" test and hold instead that the

Takings Clause "allows the government to take property only if the government owns, or the public has a legal right to use, the property." *Id*. at 505-14.

3. This case concerns the application of the takings power to the Dakota Access Pipeline, an underground crude oil pipeline that runs from the Bakken Oil Field in western North Dakota, through South Dakota and Iowa, to an oil transportation hub in Patoka, Illinois. Pet. App. 5. To complete the Iowa portion of this route, Respondent Dakota Access, LLC applied for a permit from the Iowa Utilities Board, the state agency within Iowa entrusted by statute with regulation of hazardous liquid pipelines in the state. *Ibid.*; Iowa Code §§ 479B.1, .4-.5.

As part of Iowa's permitting process, Dakota Access gave advance notice to affected property owners and held Board-supervised, public informational meetings in each affected county. Pet. App. 5; Iowa Code § 479B.4. Petitioners and others then filed written objections. Pet. App. 9-10.

The Board held an eleven-day public hearing, memorialized in a 3,500-page transcript, to determine whether the pipeline would meet statutory requirements. Pet. App. 64, 120-21; Iowa Code § 479B.9. The Board considered more than 200 public comments; received pre-filed written direct testimony from more than 80 witnesses; and asked questions and heard direct, cross, and redirect testimony from 69 live witnesses. Pet. App. 120-21. Dakota Access was supported in these proceedings by numerous stakeholders within and outside of Iowa, including the Midwest Alliance for Infrastructure Now, the Iowa Association of Business and Industry, the Iowa State Grange, the National Association of Manufacturers, and four labor unions. *See id.* at 118-19; Iowa Utilities

Board Dkt. HLP-2014-0001, https://efs.iowa.gov/efs/ShowDocketSearch.do (Pets. to Intervene filed June 25 to July 27, 2015). The Iowa Office of Consumer Advocate fully participated in the proceedings before the Board, and ultimately supported approval of the pipeline on appeal. *See generally* Office of Consumer Advocate Iowa S. Ct. Intervenor Br.[1]

Following post-hearing briefing, the Board issued a 159-page opinion and order conditionally approving the permit. Pet. App. 115, 264-72. The Board found that the pipeline would "promote the public convenience and necessity," as required by Iowa law, *id.* at 264, for three principal reasons.

> (1) <u>Safer transportation</u>: Pipeline transportation of crude oil is "significantly safer" than rail transportation, reducing the "risk of crude oil spills, both in Iowa and elsewhere." *Id.* at 143-44, 220.
>
> (2) <u>Economic benefits</u>: In Iowa alone, the pipeline would generate thousands of jobs, nearly $800 million in economic activity from construction, and $27 million in annual property taxes. *Id.* at 157-58, 220-21.
>
> (3) <u>Meeting demand</u>: As a common carrier—servicing both contracted and "'walk up'" shippers—the pipeline would meet "clear demand for pipeline transportation service[s]," by transporting crude "to refineries in the Midwest and beyond." *Id.* at 147, 221.[2] The record showed

---

[1] Briefing before the Iowa Supreme Court is available at https://www.iowacourts.gov/iowa-courts/supreme-court/supreme-court-oral-argument-schedule/case/17-0423.

[2] The pipeline qualifies as a common carrier by reserving at least 10% of its capacity to "walk-up" shippers. Pet. App. 28.

> that this would lead to "longer-term, reduced prices on refined products and goods and service dependent on crude oil and refined products." *Id.* at 24.

The Board found that these benefits outweighed any purported costs associated with the project, satisfied the "public use requirement" for exercising the takings power under the Iowa and federal constitutions, and also satisfied Iowa statutory provisions governing the taking of agricultural land. Pet. App. 225, 227-33. The Board accordingly authorized Dakota Access to exercise eminent domain to obtain easements allowing construction of the pipeline below the surface of Petitioners' land, with compensation to Petitioners for the easements. *Id.* at 268-71.

4. Petitioners and others sought review in the Polk County District Court. Pet. App. 9. Some Petitioners then sought an order staying pipeline construction on their properties, arguing that "any remedy w[ould] be inadequate" after Dakota Access dug the trench on their properties. *Id.* at 10. After the court denied the motion, the movants declined to seek interlocutory review. *Ibid.* As a result, Dakota Access was allowed to proceed with construction, and the pipeline was ultimately completed in May 2017, with oil flowing since, at a cost of approximately $4 billion. *Id.* at 15-16.

On the merits, the district court upheld the Board's decision in all respects. It held that substantial evidence supported the Board's statutory finding that the project promoted the "public convenience and necessity," and it ruled that the takings in support of the pipeline were for public uses. Pet. App. 101-02, 104.

5. Petitioners appealed to the Iowa Supreme Court, which retained the appeal. Pet. App. 11. Peti-

tioners focused their arguments on state law, including the Takings Clause of the Iowa Constitution. *Id.* at 21-48. Petitioners argued that the Iowa Supreme Court "should analyze whether Dakota Access' takings independently violate the Iowa Constitution without regard to whether the takings violate the United States Constitution." Puntenney, *et al.* Iowa S. Ct. Br. 23. Petitioners urged the court instead to adopt Justice O'Connor's and Justice Thomas's dissenting opinions in *Kelo* "by requiring a taking to serve an actual public use, not a mere public purpose or public convenience and necessity." *Id.* at 27-30, 46-47.

Petitioners briefly argued that the Board "also violate[d] the United States Constitution." Puntenney, *et al.* Iowa S. Ct. Br. 51-56.[3] They cited just three cases applying the federal Takings Clause—all of which *upheld* the takings at issue, *id.* at 53-56—and mainly limited their argument to *distinguishing* these cases. Petitioners did not argue that the taking here was "pretextual," nor did they offer any evidence or reason to question the Board's good-faith assessment—through a transparent, public process—that the pipeline would benefit the Iowa public. Instead, their sole affirmative argument under the federal Takings Clause was that the pipeline was not a "public use" because it "was not built pursuant to a comprehensive 'integrated development plan.'" *Id.* at 53. As support, they cited only a short passage from *Kelo* hypothesizing—without deciding—that courts might be "suspicio[us]" of "a one-to-one transfer of property" between private parties made "for the sole reason that

[3] The Sierra Club's separate opening brief, which some Petitioners joined, did not address the federal Takings Clause. No other group filed an appellant's brief.

[the recipient] will put the property to a more productive use and thus pay more taxes." 545 U.S. at 487.

6. The Iowa Supreme Court rejected Petitioners' state and federal takings claims and affirmed the decision upholding the taking. Pet. App. 4.

The court focused its takings analysis on the more demanding Iowa constitutional standard. Pet App. 31. It agreed with Petitioners that Iowa should interpret its own Constitution's "public use" requirement more rigorously than the *Kelo* majority had interpreted the parallel federal requirement. *Id.* at 39. In particular, the court adopted Justice O'Connor's more restrictive view that "economic development alone" cannot constitute a public use. *Ibid*.

The court found that the *Kelo* dissent's test was met for two reasons. First, the pipeline would operate as "a common carrier akin to a railroad or a public utility"—which Justice O'Connor had recognized as a "category of traditionally valid public uses." Pet. App. 40. Second, the pipeline involved benefits beyond the "trickle-down … economic development" benefits approved in *Kelo*: "cheaper and safer transportation of oil," leading to "lower prices for petroleum products" for "three million Iowans" who "depen[d] on other states" for those products. *Id.* at 41-42. To conclude otherwise, the court emphasized, would make it "very difficult ever to build a pipeline across Iowa carrying any product that isn't produced in Iowa," threatening the regional market on which Iowa's "economy … depends." *Id.* at 42.

The court rejected Petitioners' "formalistic" view that these did not qualify as public benefits under Justice O'Connor's more restrictive public use test. Pet. App. 42. Petitioners' point here was that "no Iowa business or consumer will actually use the pipeline to

deliver or receive crude oil." *Ibid*. But the court explained that Iowa's economy entirely "depends on other states to produce crude oil and refine that crude oil into petroleum products." *Ibid.* (noting that Iowa produces none of the oil that it consumes). The court agreed with the reasoning of Illinois's court of appeals, which observed that the "fundamental flaw" in an argument like this was that it "focus[es] entirely upon who *uses* the pipeline rather than who *benefits* from it." *Id.* at 43 (quoting *Enbridge Energy (Ill.), L.L.C. v. Kuerth*, 99 N.E.3d 210, 218 (Ill. App. Ct. 2018)) (emphases in *Enbridge*); *see also id.* at 47 ("The Iowa Constitution does not hang on the presence of spigots and on-ramps."). The court distinguished Petitioners' other cases, from Kentucky (where the result turned on a state statute) and West Virginia (where, unlike Dakota Access, the pipeline was not a common carrier required by law to reserve 10% of its capacity for "walk up" customers). *Id.* at 46-47.

The court then dismissed federal-law arguments in a single sentence: "For the reasons already stated"—the long history of common-carrier takings and the direct benefits of cheaper and safer oil transportation—"we also find no Fifth Amendment violation." Pet. App. 47. Given the court's conclusion that these benefits satisfied Justice O'Connor's more restrictive standard, they easily satisfied the *Kelo* majority's "public purpose" test. And given Petitioners' failure to even advance a pretext argument, the court's decision did not mention pretext.

Three Justices dissented on questions of state law—two on the merits and one on procedural grounds. Justice Wiggins, joined by Justice Appel, would have held that the taking here "violate[d] the

Iowa Constitution" and "the applicable eminent-domain authorizing statute." Pet. App. 52. These two justices "agree[d] with the majority that incidental economic benefits alone are not enough for a taking to qualify as 'for public use' under article I, section 18" of Iowa's Constitution, but "disagree[d] that the Dakota Access pipeline fits within the 'common carrier exception' for purposes of the Iowa Constitution." *Ibid.* They, too, applied Justice O'Connor's more protective list of public uses and then parted with the majority on whether her test was met. In their view, "[i]nherent in" Justice O'Connor's "'use-by-the-public' method of compliance is that the condemning sovereign's public be able to use the taken property." *Ibid.* The dissent argued that courts in other states have rejected the exercise of eminent domain where the sole purpose is to serve a public use in another state. *Id.* at 52-53. The third dissenter, Justice McDonald, would have found the case moot under Iowa law, effectively upholding the Board's grant of eminent domain authority, because the pipeline is complete and operational and "[n]o further relief is available." *Id.* at 56.

REASONS FOR DENYING THE PETITION

Petitioners confect a "split of authority" over "how to analyze takings where the benefits to the public are asserted to be incidental or pretextual." Pet. 5. Yet the split they urge is illusory. First, no lower court has disagreed with the Iowa Supreme Court's reasons for upholding the taking in this case. Second, Petitioners did not allege pretext below and still do not allege it here. Moreover, on the merits, this Court has long rejected Petitioners' cramped view of eminent domain, in both *Kelo* and earlier decisions. Petitioners do not ask this Court to overturn those decisions, and, as the Iowa Supreme Court recognized, the taking

here is lawful even under the *Kelo* dissents. It would be particularly unwarranted to revisit those precedents in a case where Petitioners focused almost exclusively on *state law* in the court below. Finally, to reach the merits at all, this Court would have to resolve substantial questions as to whether the case is moot. The petition should be denied.

A. The Lower Courts Are Not Divided On Any Issue Decided By The Iowa Supreme Court

The Court ordinarily waits until the lower courts have divided to decide an important legal question. Sup. Ct. R. 10(b). There is nothing even close to a split of authority here.

1. Petitioners cite no lower court decision questioning the Iowa Supreme Court's conclusion that the transfer of property rights to "a common carrier" or "public utility" is a "traditionally valid public us[e]." Pet App. 40. Not one decision on which Petitioners base an asserted "split of authority" involved a transfer of property to any common carrier, railroad, pipeline, or public utility. Nor do any of those decisions address either of the public benefits that the Iowa Supreme Court found to create a valid public purpose in this case—(1) "safer transportation of oil"; and (2) "lower prices for petroleum products" for the "three million Iowans" who "depen[d] on other states" for those products. *Id.* at 41-42. There simply is no division of authority on whether the Takings Clause allows condemnation of property for a common carrier that supports the market for a commonly used product.

2. Rather than address these issues, the cases Petitioners cite mainly concern a separate question not presented here: *pretext*. The plaintiffs in these cases

alleged that the government had a hidden, invalid motive for exercising eminent domain authority. Petitioners have made no such claim in this case.

In *County of Hawai'i v. C&J Coupe Family Limited Partnership*, 242 P.3d 1136 (Haw. 2010) ("*Coupe II*"), for example, the question was whether a county's "asserted public purpose" for condemning land—to build a bypass road to "'alleviate … traffic conditions'"—was "'mere pretext'" for a hidden purpose. *Id.* at 1140, 1148 (alterations omitted). The plaintiffs noted that the county had contracted with a private developer to provide road access to a nearby residential development, and they claimed the county's "true purpose" in building the bypass was to "avoid liability" under the contract. *Id.* at 1149-50. The court there had already decided that the county's "stated public purpose" was proper. *County of Hawai'i v. C&J Coupe Family Limited Partnership*, 198 P.3d 615, 644 (Haw. 2008) ("*Coupe I*"). And the county did not argue that the unstated purpose attributed to it would be valid. The only question, therefore, was which of the two purposes was "the actual purpose." *Coupe II*, 242 P.3d at 1149.

Likewise, in *New England Estates, LLC v. Town of Branford*, 988 A.2d 229 (Conn. 2010), the Connecticut Supreme Court affirmed a jury finding that a town had "acted in bad faith" by "taking … land for pretextual reasons." *Id.* at 252. The town claimed that it sought the property so it could "remediate … contamination" from a nearby landfill and create recreational "playing fields"—a plainly proper, public purpose. *Id.* at 237. But the evidence showed that the town's actual motive was "to prevent the proposed residential development of the property" as affordable housing. *Id.* at 246.

Petitioners' other cases largely follow the same pattern: The government offers a permissible purpose for taking property, the plaintiff claims a different (improper) purpose is at work, and the disagreement concerns *which purpose* "truly motivate[d]" the taking. *Middletown Twp. v. Lands of Stone*, 939 A.2d 331, 333-34, 338 (Pa. 2007) (asserted valid purpose of creating "recreational space," versus alleged invalid purpose of "prevent[ing] … development"); *see also R.I. Econ. Dev. Corp. v. Parking Co.*, 892 A.2d 87, 105-06 (R.I. 2006) (validly creating "increased parking," versus invalidly gaining "bargaining power" in negotiations with a parking garage); *Franco v. Nat'l Capital Revitalization Corp.*, 930 A.2d 160, 163, 170-71 (D.C. 2007) (validly "redevelop[ing]" a "blight[ed]" shopping center, versus invalidly "shar[ing] in the profits of the redevelopment" of perfectly healthy property); *Goldstein v. Pataki*, 516 F.3d 50, 55 (2d Cir. 2008) (validly replacing "blight[ed]" property with a "sporting arena" and "new housing," versus invalidly enriching the sports team's owner).

Here, by contrast, Petitioners do not dispute—and did not dispute below—that the Board acted for the reasons stated in its decision. The Board's decision reflects a transparent, good-faith, evidence-based, public process involving 3,500 pages of testimony and resulting in a detailed, 159-page decision weighing all relevant costs and benefits. Pet. App. 115, 264-72. The Board's conclusion that the pipeline would "promote the public convenience and necessity," *id.* at 225, was backed by multiple stakeholders in Iowa—including the state Office of Consumer Advocate, *see supra* at 7—and was affirmed by both the district court and the Iowa Supreme Court, Pet. App. 4, 107. Petitioners do not claim the Board had any reason to give Dakota Access special solicitude. Nor do they offer any motive

for the Board to favor an out-of-state pipeline company over Iowan landowners or the public interest more generally. Petitioners' opening brief before the Iowa Supreme Court never suggested that the Board's reasoning was in any way pretextual. Even before this Court, Petitioners do not claim pretext.

Cases addressing pretext are thus simply irrelevant here. This Court should leave the question of "how to analyze takings where the benefits to the public are asserted to be … pretextual," Pet. 5, for a case where the Petitioners have made that assertion.

3. Petitioners' remaining cases are likewise inapposite.

This case is nothing like *Mayor & City Council of Baltimore City v. Valsamaki*, 916 A.2d 324 (Md. 2007), which rejected Baltimore's condemnation of property because the city's plans for using the property were too "vague" and "amorphous" for the court to conclude that the property would be used for valid purposes. *Id.* at 344. The court reasoned that it would be "impossible to determine" whether the property would be used for public or private purposes "when no one knows the who, what, and whether of the future use of the property." *Id.* at 353. Here, by contrast, it has always been clear how the property will be used: for the safe transport of crude oil across the state.

Nor are Petitioners aided by *Carole Media LLC v. New Jersey Transit Corp.*, 550 F.3d 302 (3d Cir. 2008), which upheld dismissal of a takings claim challenging New Jersey's efforts to revamp its licensing of billboards on state property. *Id.* at 303. The court explained that the case did not involve a "naked transfer of property" between two private parties, because when the government terminated the plaintiff's license and held an auction for a new license, it did not

"kn[ow]" in advance "the identity of the successful bidder." *Id.* at 311. While the Iowa Board knew Dakota Access's identity at the time of its decision, nothing in *Carole Media* suggests that such knowledge is fatal or that (as Petitioners put it) this factor is "what matters" exclusively, in *all cases*. Pet. 13. In fact, as *Valsamaki* shows, in other cases knowledge of "the who, what, and whether of the future use of the property" is needed to *support* the taking. 916 A.2d at 353.

4. Apart from relying on cases inapposite here, the conflicts that Petitioners attempt to read into these various cases are illusory.

To start, the cases do not present a relevant conflict over whether "applying the label of a traditional public use will … end the Takings Clause inquiry." Pet. 11. Cases like *Coupe I* allow courts to inquire into whether an asserted public use is *pretextual*. 198 P.3d at 647. But none of Petitioners' cases contemplates any further scrutiny where, as here, the defendant's *actual motive* is a traditional public use.

Nor does any of Petitioners' cases adopt the rule that a taking must always be supported by a "'comprehensive' development plan" like the one at issue in *Kelo*. Pet. 11. Instead, Petitioners' cases merely call for greater suspicion when the government's deliberations over a taking are "hasty," *R.I. Econ. Dev. Corp.*, 892 A.2d at 106, or the intended use of the property remains uncertain at the time of the taking, *see Middletown Twp.*, 939 A.2d at 339 (township stated that it "*might* develop recreational uses," but never "considered, let alone created, such a plan" (emphasis added)); *supra at* 16-17 (discussing *Valsamaki*). Here, by contrast, there is no dispute that the Board's 159-page opinion, culminating a far-from-hasty 18-month

review process, reflects a careful, "informed judgment" about the public costs and benefits of its decision based on a clear understanding of how the condemned property would be used. *Middletown Twp.*, 939 A.2d at 340.

Finally, none of Petitioners' cases presents any broader conflict over "incidental" benefits. Pet. 5. Several do not even mention "incidental" benefits. *See generally New England Estates*, 988 A.2d 229; *Middletown Twp.*, 939 A.2d 331; *Valsamaki*, 916 A.2d 324. The rest include only passing references, none of which helps Petitioners. *See*, *e.g.*, *Goldstein*, 516 F.3d at 58 (refusing to credit conclusory allegation in complaint that that public benefits were incidental or nonexistent); *Carole Media*, 550 F.3d at 309-11 (holding that "incidental benefits for individual private parties" do not undermine an otherwise valid public purpose).

Petitioners themselves quote only a single, isolated sentence of a single lower court decision that mentions "incidental" benefits. Pet. 14 (citing *Franco*, 930 A.2d at 173-74). They seek to read a "balancing test," *ibid.*, into *Franco*'s passing statement that if "the benefits to the public are only 'incidental' or 'pretextual,' a 'pretext' defense may well succeed." 930 A.2d at 174. But *Franco* says nothing about balancing, nor even offers a standard for determining whether benefits are incidental. The court merely states that courts should uphold takings when backed by record evidence of "'substantial benefits to the public,'" and that other cases may be "[h]arder." *Ibid*. In any event, "a 'pretext' defense" cannot "succeed" here, *ibid.*, because Petitioners did not offer one.

B. Review Is Not Warranted For A Challenge To How The Iowa Supreme Court Applied The Test in *Kelo v. City of New London*

Petitioners also argue that certiorari is warranted because the decision below "runs afoul of *Kelo*." Pet. App. 19. But this Court does not sit as a "court of error correction." *Martin v. Blessing*, 571 U.S. 1040, 1043 (2013) (Alito, J., respecting the denial of certiorari). Petitioners' merits arguments, apart from being wrong, fail to demonstrate a compelling need for this Court's involvement in such an issue.

1. At the outset, Petitioners offer no basis to question the longstanding consensus on common carrier takings, which is sufficient to sustain the decision below. The *Kelo* majority recognized that a state may transfer property from one private party to another if the recipient is "required to operate like [a] common carrie[r]," such as a railroad, "making [its] services available to all comers." *Kelo*, 545 U.S. at 477-78. And both dissenting opinions agreed. Justice O'Connor called the authority to "transfer private property to … common carriers" "straightforward and uncontroversial." *Id.* at 497-98. And Justice Thomas traced the use of eminent domain to transfer property to "common carriers" back to "the time of the founding." *Id.* at 512.

That unanimity is unsurprising. Since long before *Kelo*, courts have consistently sustained the use of eminent domain to transfer property to common carriers and public utilities like railroads and pipelines. *Nat'l R.R. Passenger Corp. v. Bos. & Me. Corp.*, 503 U.S. 407 (1992) (railroad); *Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co.*, 240 U.S. 30 (1916) (electric utility); *Secombe v. Milwaukee & St. P. R.R. Co.*, 90 U.S. (23 Wall.) 108 (1874) (railroad); *City of*

Emmetsburg v. Cent. Iowa Tel. Co., 96 N.W.2d 445 (Iowa 1959) (public utility); *Stewart v. Bd. of Supervisors of Polk Cty.*, 30 Iowa 9 (1870) (railroad); *Ohio Oil Co. v. Fowler*, 100 So. 2d 128 (Miss. 1958) (pipeline); *Peck Iron & Metal Co. v. Colonial Pipeline Co.*, 146 S.E.2d 169 (Va. 1966) (pipeline); *Ralph Loyd Martin Revocable Tr. Declaration Dated First Day of Apr. 1994 v. Ark. Midstream Gas Servs. Corp.*, 377 S.W.3d 251 (Ark. 2010) (pipeline); *Crawford Family Farm P'ship v. TransCanada Keystone Pipeline L.P.*, 409 S.W.3d 908 (Tex. App. 2013) (pipeline); *EQT Gathering, LLC v. A Tract of Prop. Situated in Knott Cty.*, 970 F. Supp. 2d 655 (E.D. Ky. 2013) (pipeline); *Sunoco Pipeline L.P. v. Teter*, 63 N.E.3d 160 (Ohio Ct. App. 2016) (pipeline). Petitioners offer no authority at any level (Supreme Court or otherwise) to scale back this common and well-established precedent.

Petitioners argue that this principle should be cabined to circumstances in which the common carrier's services are "use[d] by the public" directly. Pet. 18 (quotation marks omitted) (arguing that "the pipeline here cannot be used by any member of the Iowa public" because it carries all of its oil from North Dakota to Illinois). But they cite no case that has rejected a common carrier taking on that basis. As the majority explained in *Kelo*, this Court has long abandoned any requirement that condemned property must be "'use[d] by the public,'" in favor of the "broader and more natural interpretation of public use as 'public purpose.'" 545 U.S. at 479-80. The Court thus upheld a taking for projected uses that included commercial "office space" that would be leased to "private tenants," not used by the general public. *Id*. at 474, 478 n.6. The "common carrier" cases cited by Justice O'Connor likewise apply this "public purpose" test,

Nat'l R.R. Passenger Corp., 503 U.S. at 422, and expressly recognize "[t]he inadequacy of use by the general public as a universal test," *Mt. Vernon-Woodberry*, 240 U.S. at 32.

Not surprisingly, therefore, no Justice in *Kelo* suggested there might be circumstances in which the transfer of private property for use in providing a common carrier service would run afoul of the Takings Clause. The Court should not grant certiorari where Petitioners' only path to victory would require this Court to answer a question that Petitioners do not present: whether to overrule decades of precedent and part from the reasoning of all nine *Kelo* justices.

2. Even setting aside the pipeline's status as a common carrier, Petitioners have no answer to the multiple public benefits that the Iowa Supreme Court found independently sufficient to justify the use of eminent domain here. Petitioners never mention the Board's finding that the pipeline will achieve "safer transportation of oil," Pet. App. 42, and they do not dispute that the pipeline will "lower prices for petroleum products" for "three million Iowans" who "depen[d] on other states" for those products. *Ibid.*

In asking this Court to dismiss these benefits as "incidental" and "meager," Pet. 20, Petitioners distort Justice Kennedy's discussion of "incidental benefits" in *Kelo*, *id.* at 3, 10. His concurrence suggests that courts should strike down takings "intended to favor a particular private party, with only incidental or pretextual public benefits." 545 U.S. at 491. But whether public benefits are "incidental" depends not on the *magnitude* of those benefits, but on the government's "'primary *motivation*.'" *Id*. at 492 (emphasis added). Justice Kennedy long used the word "incidental" to

distinguish unintended benefits from those that motivated a policy. *E.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009) (Kennedy, J.) (contrasting "incidental impact" with "the purpose of the policy"); *City of Boerne v. Flores*, 521 U.S. 507, 531 (1997) (Kennedy, J.) (contrasting "incidental burdens" with "the object or purpose of the legislation"); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 843-44 (1995) (Kennedy, J.) (contrasting "incidental" benefit to religion with "secular purpos[e]"). Justice Kennedy's *Kelo* concurrence invokes the same distinction, *see* 545 U.S. at 491, citing Equal Protection cases in which the Court declined to consider otherwise legitimate benefits of a policy because an alternate, illegitimate motive drove the policymaker's decision, *see City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) ("negative attitudes" toward the "mentally retarded"); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973) ("'to discriminate against hippies'").

None of these cases—nor any of Petitioners'—suggests that evaluating whether a benefit is incidental means weighing private benefits against public benefits. Whether a benefit is incidental turns, instead, on the same considerations that determine whether a stated purpose is pretextual. And whereas a landowner alleging only incidental public benefit must establish by a "clear showing" that the government was not primarily motivated by its stated purpose, *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring), Petitioners failed even to present an argument to this effect in state court. *See supra at* 9, 15-16.

In any event, the benefits here—including the benefits to human safety found by the Board and the Court in moving oil by pipeline rather than rail or truck—are far from "meager," Pet. 20, and there is no

record support for diminishing their importance to the Board here.[4]

3. Rather than address the benefits relied on by the Iowa court, Petitioners ask this Court to reverse a ruling that was never made—that a taking can be sustained based on benefits "felt solely in other states." Pet. 21. In reality, the Iowa court gave weight *only* to benefits to Iowans, felt in Iowa. Partly because "Iowa is fifth in the country in per capita energy use," petroleum products are "essential to *Iowa's* economy." Pet. App. 24, 47 (emphasis added). Indeed, the court observed, Iowans rely on these products for "'some of the necessities of life.'" *Id*. at 45. And the pipeline will "reduce the overall risk" of oil spills "in *Iowa*." *Id.* at 143-44 (emphasis added). For these reasons, the pipeline will benefit "three million *Iowans*." *Id*. at 42 (emphasis added). That is why Iowa organi-

---

[4] Even if Petitioners could somehow overcome the public purposes recognized by the Iowa court, they would still have to explain why the "$800 million" in direct economic benefit to Iowa from pipeline construction, Pet. App. 157, does not establish a valid public purpose under the *federal* Constitution. *See also id.* at 25 (DAPL will "result in at least 3100 construction jobs in Iowa, at least twelve long-term jobs for Iowans, and more than $27 million annually in property tax revenue."). The only reason the Iowa court did not rely on these "trickle-down benefits of economic development" was "because [that court does] not follow the *Kelo* majority under the Iowa Constitution." *Id.* at 41. Under the United States Constitution, *Kelo* explained, "economic development" is a valid public purpose. 545 U.S. at 484. Petitioners present no disagreement among courts on this issue, and they do not present any basis to think they could prevail on it if certiorari were granted. There is no reason for this Court to expend its resources resolving a question that "could not change the result reached below." Stephen M. Shapiro et al., *Supreme Court Practice* § 4.4(f) (11th ed. 2019).

zations like the Iowa State Grange and the Iowa Association of Business and Industry supported the pipeline. *See supra* at 6. Nowhere did the court base its ruling on the many benefits that *also* accrued outside Iowa.[5]

---

[5] The purposes of lower petroleum prices and safer transportation of oil are no less permissible because other states receive similar benefits. Even assuming *arguendo* that the "public" is limited to the public of the taking state, courts have long sustained state takings that benefit the taking state as part of a region or even as part of the United States as a whole. *See*, *e.g.*, 143 A.L.R. 1040, § 2(a) (the "general rule" has always been that a state taking "is not invalidated by the fact that the [eminent domain] power is exercised for the benefit … of the United States" generally (collecting cases)); *Adams v. Greenwich Water Co.*, 83 A.2d 177, 182 (Conn. 1951) ("This principle applies even though the major portion of the public use will benefit nonresidents."); *Gralapp v. Miss. Power Co.*, 194 So. 2d 527, 529-31 (Ala. 1967) (upholding transfer to power company though neighboring state would receive around fifteen times more benefit than taking state because court could not "agree that there would be no benefits to the public in [the taking state]"); 90 A.L.R. 1032, § 1 ("[I]t appears from the cases that the relative amount of direct benefits accruing respectively, inside and outside of the state, is not material."). Indeed, until at least 1875, the federal government "relied on the states to condemn the land it needed." William Baude, *Rethinking the Federal Eminent Domain Power*, 122 Yale L.J. 1738, 1741 (2013); *see also Kohl v. United States*, 91 U.S. 367, 373 (1875) (stating that the eminent domain "power of the Federal government has not heretofore been exercised adversely"). When the Fifth and Fourteenth Amendments were ratified, therefore, state takings on behalf of the country as a whole were commonplace. *E.g.*, *Orr v. Quimby*, 54 N.H. 590, 593 (1874) (upholding state taking for purpose of allowing federal agents to make a survey of United States coastline because "the people of the whole country … have an interest in whatever diminishes the hazards of navigation, and renders commerce … more secure"); *Reddall v. Bryan*, 14 Md. 444, 477 (1859) (upholding Maryland taking for purpose of supplying Washington, D.C.

Petitioners likewise miss the target in invoking *Kelo*'s brief discussion of a transfer "executed outside the confines of an integrated development plan" for "'the sole reason that [the recipient] will put the property to a more productive use and thus pay more taxes.'" Pet. 17 (quoting *Kelo*, 545 U.S. at 487). The taking in this case is neither. It reflects the Iowa legislature's longstanding authorization of interstate pipelines, Pet. App. 81 (citing Iowa Code § 479B.2(3)), the Iowa legislature's reasoned determination that a pipeline meeting the stringent statutory requirements and promoting the "public convenience and necessity" is a public use justifying authorization of eminent domain subject to the conditions imposed by the Board, *id.* at 225-33 (citing Iowa Code § 479B.16), and the Board's extensive planning efforts in assessing the route, terms, and conditions for the pipeline here, *id.* at 176-219. That this project promotes energy independence and helps meet state and regional energy needs in a safer manner only further distances this case from those projects, briefly referenced in *Kelo*, that have the different purpose of merely developing a plot of land. Nor was improving the "productiv[ity]" and "ta[x]" revenue from the condemned property the "sole reason" that the Board approved the pipeline. *Kelo*, 545 U.S. at 487. The pipeline's other benefits—such as safer transportation of crude oil and lower prices for much-need petroleum products—also easily support the Board's decision.

---

with water because "[t]he supplying of the capital of the United States with water … is surely a public use") (emphasis omitted).

C. This Case Is Otherwise A Poor Vehicle For Addressing The Questions Presented

Two reasons make this case an exceedingly poor vehicle for addressing the proposed questions, even were they presented here.

1. This Court is "a court of review, not of first view," *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005), and the Iowa Supreme Court never addressed the questions presented by this petition. Petitioners presented this case below as predominantly raising questions of *state* law under Iowa statutes and the Iowa Constitution—not the United States Constitution. They successfully encouraged that court to decide the case "without regard" to the federal standard, asking it to adopt and apply, as a matter of *state* law, the stricter standard endorsed by the *Kelo* dissents. Puntenney, *et al.* Iowa S. Ct. Br. 23, 27-30, 46-47. Petitioners presented little argument under federal law. *Id.* at 51-56. That terse discussion mostly played defense, distinguishing a handful of cases upholding takings, and never addressed the operative "public purpose" test applied by the *Kelo* majority. *Ibid*. Nor did Petitioners cite any of the cases that now form their alleged "split of authority." Pet. 5. And although they debated whether the pipeline is a common carrier under state law, Puntenney, *et al.* Iowa S. Ct. Br. 56-70, they never disputed that transferring property to a common carrier satisfies the federal standard.

Petitioners cannot now fault the Iowa Supreme Court for "eschew[ing] … the *Kelo* majority's public purpose analysis," Pet. 17, when, at Petitioners' invitation, the court instead followed the analysis urged in the *Kelo* dissent. Once the lower court determined that this stricter standard was met for purposes of

state law, the majority's standard was necessarily satisfied for federal purposes as well. Pet. App. 47. The court therefore disposed of Petitioners' federal law claims without any need to discuss whether there might be additional grounds to uphold the taking under federal law. *See id*. This court should not take up that analysis in the first instance when Petitioners encouraged the court to bypass it below.

Further, adopting the "use by the public" test urged by Petitioners, Pet. 18, would require the court to overturn *Kelo* and turn back decades of precedent, as Justice Thomas's *Kelo* dissent recognized, 545 U.S. at 514-15. Even if the Court were inclined to reconsider those precedents, it should not do so in a case where: (1) Petitioners do not present that question; (2) Petitioners did not question below, nor did that court consider, the wisdom of the *Kelo* majority as a matter of federal law; and (3) the lower court would have upheld the taking even under the *Kelo* dissents.

2. This case also presents a poor vehicle because Petitioners long ago abandoned the opportunity to argue that pipeline construction should await completion of this case. When the district court ruled against staying construction, Petitioners did not seek interlocutory appeal, a stay pending appeal, or an expedited appeal. Pet. App. 9-10, 16. Dakota Access then completed the pipeline, at a cost of $4 billion. *Id*. at 15-16. Up to 450,000 barrels of oil now flow through the pipeline each day. *Id.* at 16.

Petitioners' choice leaves serious questions about whether the completion of the pipeline moots their claims. The Iowa Supreme Court found this a "clos[e] issue" under state law. Pet. App. 15. Indeed, one Iowa justice dissented on the belief that "[n]o further relief

is available" and the case is moot. *Id*. at 56 (McDonald, J.). ("Oil is flowing through the pipeline. … What's done, is done."). Petitioners themselves argued to the district court that "any remedy w[ould] be inadequate" after the "trench [was] dug" on their land. Pet. App. 10. The majority ultimately found a live controversy under Iowa law on the basis of the Board's ability to impose unspecified terms and conditions on the pipeline, but the majority did not identify a single term or condition that had not already been available as part of the just compensation awarded for the takings. And mootness in this Court is a "question of federal law which this Court must ultimately decide" without regard to the state law standards. *Henry v. Mississippi*, 379 U.S. 443, 447 (1965).

To assert federal jurisdiction, therefore, the Court would need to determine that the potential for a state agency to impose unspecified terms and conditions on an unmovable pipeline is sufficient under Article III to sustain a dispute over the pipeline's permitting. Numerous courts have concluded in similar circumstances, though, that construction moots the controversy. *E.g.*, *Pres. Pittsburgh v. Conturo*, 477 F. App'x 918, 920 (3d Cir. 2012) (per curiam) ("[W]e cannot fashion meaningful relief because we cannot reconstruct the Arena."); *Atlanta Gas Light Co. v. FERC*, 140 F.3d 1392, 1402 (11th Cir. 1998) ("An injunction would do no good because the pipeline has been built."). This jurisdictional uncertainty is another reason to deny certiorari.

Independent of any question of jurisdiction, moreover, granting review in this posture would reward Petitioners' delay and encourage parties to wait to seek injunctive relief until adversaries have expended millions, indeed billions, of dollars in irremediable

costs. State courts of last resort have recognized the inequity of granting discretionary review in these circumstances. *E.g.*, *Felix v. Superior Court*, 375 P.2d 730, 732-33 (Ariz. 1962) (denying certiorari because "[c]onstruction of [a] steel tower by respondent during a period when petitioner made no effort to obtain review of [an] order of immediate possession, and no attempt to prevent this construction," caused an "intervening change of position" by respondent). This Court should do the same.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DAVID DEBOLD
COUNSEL OF RECORD
WILLIAM S. SCHERMAN
MATTHEW S. ROZEN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
ddebold@gibsondunn.com

BRET A. DUBLINSKE
BRANT M. LEONARD
FREDRIKSON & BYRON, P.A.
505 East Grand Avenue, Suite 200
Des Moines, Iowa 50309
(515) 242-8900

Counsel for Respondent Dakota Access, LLC

January 6, 2020