No. 19-607

IN THE

Supreme Court of the United States

WOODCREST HOMES, INC.,

Petitioner,

v.

CAROUSEL FARMS METROPOLITAN DISTRICT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

The Carousel Farms Metropolitan District is a special district formed pursuant to Colorado Revised Statutes §§ 32-1-101 *et seq.* "Special districts are political subdivisions of the state and are created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them." *Risen* v. *Cucharas Sanitation & Water Dist.*, 32 P.3d 596, 599 (Colo. Ct. App. 2001). The Carousel Farms Metropolitan District has no parent corporation, and no publicly held company has any ownership in it.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES v

INTRODUCTION 1

STATEMENT 4

A. Factual Background 4

1. The Carousel Farms Development 4

2. The Metropolitan District 5

B. Douglas County District Court Proceedings 7

C. Colorado Court Of Appeals Proceedings 10

D. Supreme Court Of Colorado Proceedings 11

REASONS FOR DENYING THE PETITION 15

I. THE QUESTION PRESENTED IS NOT PROPERLY BEFORE THIS COURT 15

A. Petitioner Did Not Press Its Fifth Amendment Argument Before The Colorado Courts 16

B. The Supreme Court Of Colorado Did Not Pass Upon The Question Presented 17

C. Because The Question Presented Was Neither Pressed Nor Passed Upon Below, The Court Should Deny The Petition 19

TABLE OF CONTENTS—Continued

Page

1. This Court lacks jurisdiction to consider the state-law issues Petitioner preserved 19

2. Petitioner cannot overcome the prudential considerations that weigh against reviewing waived claims 20

II. THE DECISION BELOW IS CONSISTENT WITH *KELO* 21

A. The Colorado Courts Analyzed The Condemnation's Actual Purpose....................... 22

B. The Supreme Court Of Colorado's Opinion Is Consistent With *Kelo* 24

C. The Supreme Court of Colorado's Conclusion That Respondent's Condemnation Of Parcel C Was Actually For Public Purposes Is Both Correct And Unworthy Of This Court's Review 26

III. PETITIONER IDENTIFIES NO DIVISION IN AUTHORITY.. 28

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Page(s)

Adams v. *Robertson*, 520 U.S. 83 (1997) 16, 21

American Family Mutual Insurance Co. v. *American National Property & Casualty Co.*, 370 P.3d 319 (Colo. Ct. App. 2015) 11

Baker v. *Carr*, 369 U.S. 186 (1962) 21

Bankers Life & Casualty Co. v. *Crenshaw*, 486 U.S. 71 (1988) 16, 19

Bermel v. *BlueRadios, Inc.*, 440 P.3d 1150 (Colo. 2019) 17

City of Lafayette v. *Town of Erie Urban Renewal Authority*, 434 P.3d 746 (Colo. Ct. App. 2018) 26

Denver West Metropolitan District v. *Geudner*, 786 P.2d 434 (Colo. Ct. App. 1989) 15, 24, 25

Exxon Corp. v. *Eagerton*, 462 U.S. 176 (1983) 20

Foster v. *Chatman*, 136 S. Ct. 1737 (2016) 19

Goldstein v. *New York State Urban Development Corp.*, 921 N.E.2d 164 (N.Y. 2009) 30

Gorman v. *Tucker ex rel. Edwards*, 961 P.2d 1126 (Colo. 1998) 17

Howell v. *Mississippi*, 543 U.S. 440 (2005) 19

Illinois v. *Gates*, 462 U.S. 213 (1983) 19, 20, 21

International Longshoremen's Ass'n v. *Davis*, 476 U.S. 380 (1986) 19

TABLE OF AUTHORITIES—Continued

Page(s)

Izumi Seimitsu Kogyo Kabushiki Kaisah v. *U.S. Philips Corp.*, 510 U.S. 27 (2010).....................27

Kelo v. *City of New London*, 545 U.S. 469 (2005)...2, 11, 21, 22, 27

KMS Retail Rowlett, LP v. *City of Rowlett*, -- S.W.3d --, 2019 WL 2147205 (Tex. 2019).................29

Oregon v. *Guzek*, 546 U.S. 517 (2006).............................19

Phillips v. *People*, 443 P.3d 1016 (Colo. 2019)...............17

Puntenney v. *Iowa Utilities Board*, 928 N.W.2d 829 (Iowa 2019)...28, 29

Riley v. *Kennedy*, 553 U.S. 406 (2008)............................19

Risen v. *Cucharas Sanitation & Water District*, 32 P.3d 596 (Colo. Ct. App. 2001).............27

Rodgers Development Co. v. *Town of Tilton*, 781 A.2d 1029 (N.H. 2001)...................................29, 30

Thompson v. *Consolidated Gas Utilities Corp.*, 300 U.S. 55 (1937)...11

United States v. *Haymond*, 139 S. Ct. 2369 (2019)..20

United States v. *Windsor*, 570 U.S. 744 (2013)..............21

Webb v. *Webb*, 451 U.S. 493 (1981).................................16

Yee v. *City of Escondido*, 503 U.S. 519 (1992)...............15

Zivotofsky ex rel. Zivotofsky v. *Clinton*, 566 U.S. 189 (2012)...20

TABLE OF AUTHORITIES—Continued

Page(s)

DOCKETED CASES

Carousel Farms Metropolitan District v. *Woodcrest Homes, Inc.*, No. 2015CV30013 (Douglas Cty. Dist. Ct.) 8, 9

Carousel Farms Metropolitan District v. *Woodcrest Homes, Inc.*, No. 2018-SC-30 (Colo.) 12, 13, 21

Woodcrest Homes, Inc. v. *Carousel Farms Metropolitan District*, No. 15CA1956, (Colo. Ct. App.) 10

STATUTES AND RULES

28 U.S.C. § 1257 .... 15, 19

Colo. Rev. Stat.
§ 32-1-103 .... 5, 6
§ 32-1-1004 6
§ 38-1-101 .... 3, 11, 13, 15, 17, 18
§ 38-1-105 7

S. Ct. R. 10 .... 22, 27

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BRIEF IN OPPOSITION

INTRODUCTION

Respondent Carousel Farms Metropolitan District respectfully submits that the petition for certiorari filed by Petitioner Woodcrest Homes, Inc. should be denied. The Fifth Amendment challenge Petitioner presents was not pressed or passed upon in *any* of the Colorado state courts below, where Petitioner's arguments rested solely on state law. And Petitioner's supposed split in authority is illusory, as is the claim that the decision below conflicts with this Court's precedent.

Petitioner challenges a condemnation pursued by Respondent involving a narrow slice of land in the town of Parker, Colorado ("the Town"). The property at issue lies between two larger tracts, which will be the site of a housing subdivision. The condemned property

will be used for road, water, and sewer improvements that will benefit not only the subdivision built on the adjacent plots, but also Parker's "long term plan of encouraging coordinated development of Carousel Farms and a large plot of property to the west of Carousel Farms as a whole." Pet. App. 67.

Petitioner acknowledges that road, water, and sewer improvements are facially valid justifications for a taking. Petitioner nonetheless contends that these justifications are pretextual, and that Respondent's real purpose is to benefit the developer seeking to build the housing development on the larger adjacent tracts. Petitioner invokes the Takings Clause of the Fifth Amendment to the federal constitution, which mandates that "private property" may "be taken" only "for public use."

The petition should be denied for at least three reasons.

First, the federal question Petitioner presents for review was neither pressed nor passed upon below. As the Supreme Court of Colorado explained at the outset of its opinion, Petitioner's argument below was "that the condemnation violates … the public use protections of the *Colorado Constitution* and the *statutory* prohibition on economic development takings." Pet. App. 2 (emphasis added). The claims Petitioner advanced below rested solely on state law, as does the decision of the Supreme Court of Colorado that Petitioner challenges.

Second, there is no conflict with *Kelo* v. *City of New London*, 545 U.S. 469 (2005), as even a cursory review of the Supreme Court of Colorado's decision confirms. *Kelo* addressed the requirements of the federal, not the Colorado, Constitution. And in any event, far

from rejecting *Kelo*'s admonitions about the impermissibility of takings to benefit particular private parties, the Supreme Court of Colorado assessed the condemnation under an even more demanding standard of public purpose than that suggested by *Kelo*. Colorado, like many states, enacted so-called "anti-*Kelo*" statutes designed to protect property owners by ensuring that condemnations that might be permissible under *Kelo* would not be permitted as a matter of state law. Colorado's statute expressly provides that "'public use' shall not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenue." Colo. Rev. Stat. § 38-1-101(1)(b). In upholding the condemnation at issue in this case, the Supreme Court of Colorado held Respondent to state statutory requirements that are *stricter* than those announced in *Kelo*. The state supreme court's reasoning thus was not contrary to *Kelo*. Petitioner's disagreement with the outcome seeks nothing more than correction of purported errors in the Colorado courts' factual findings.

Third, the conflict Petitioner portrays among other lower court decisions is illusory. Those decisions all recognize, as the Supreme Court of Colorado did, that a taking of property may be invalidated when it rests on an improper pretextual basis. The Supreme Court of Colorado rejected Petitioner's challenge not because it questioned that proposition, but because it found, based on the record before it, that the taking at issue here served legitimate public purposes.

The petition for a writ of certiorari should be denied.

STATEMENT

A. Factual Background

1. The Carousel Farms Development

This case stems from efforts to develop three adjacent parcels of property—Parcels A, B, and C—in Parker, Colorado. Petitioner initially conceived of the project, called the "Carousel Farms Development" ("the Development"), in 2006. Pet. App. 52. Parcels A and B each occupy roughly twenty acres. *Id.* 4. Parcel C, the subject of this case, is a twenty-foot-wide strip of land located between the other two parcels. *Id.* Parcel C "is a natural drainage way/storm water runoff with culverts." *Id.* 52. It also "contains a sanitary sewer line" and a 30-foot "exclusive water line easement." *Id.*

By the summer of 2006, Petitioner had purchased Parcel C and had entered into agreements with the owners of Parcels A and B that gave Petitioner an option to purchase those properties. Pet. App. 52-53. In late 2007, Petitioner submitted a "Final Plat" for the Development, designating Parcel C "as a road … and for utilities." *Id.* 53. That road would connect to a road called Newlin Gulch Boulevard, which, in turn, would link the Development to Main Street in the Town. *Id.* The Final Plat "required" Petitioner to dedicate Parcel C to the Town and the Parker Water and Sanitation District. *Id.*

Notwithstanding the initial progress it had made on the Development, "the weak housing market left [Petitioner] unable to move ahead" to acquire Parcels A and B before the expiration of its option agreement with the owners of the parcels. Pet. App. 4 (internal quotation marks omitted).

In November 2012, Century Communities and its subsidiaries ("Century") bought Parcels A and B. Pet. App. 54. Century offered Petitioner "as much as $44,850 for Parcel C," but Petitioner rejected the offer. *Id.*

In January 2014, the Town, the Parker Water and Sanitation District, and the owners of Parcels A and B (working closely with Century) executed the Carousel Farms Annexation Agreement ("Annexation Agreement"). Pet. App. 54. The Annexation Agreement "memorialize[d] the steps needed to annex Parcels A, B and C into the Town and move forward with the application process for approval of the Carousel Farms Development." *Id.* Parcels A and B were subsequently annexed into the Town and accordingly rezoned. *Id.* The Annexation Agreement "contemplated that Century" would acquire Parcel C and that the Town would subsequently rezone it. *Id.*

2. The Metropolitan District

By January 2014, Century had "filed preliminary plats/sketch plans of the Carousel Farms Development with the Town to gain preliminary approval and begin the process of working with the Town's planners on the Carousel Farms Development." Pet. App. 60. The Town at this point had given its "backing and support" to the Development. *Id.* At the same time, Century began working to create a "special metropolitan district" under Title 32 of the Colorado Revised Statutes. *Id.* 2, 56.

A special metropolitan district is a "quasi-municipal corporation and political subdivision," Colo. Rev. Stat. § 32-1-103(20), "that provides for the inhabitants thereof any two or more of" several enumerated services,

including "[s]anitation," "[s]treet improvements," and "[w]ater," *id.* § 32-1-103(10)(e), (g), (j). Metropolitan districts "may … exercise the power of eminent domain," but they may do so only "for the purposes of fire protection, sanitation, street improvement, television relay and translator facilities, water, or water and sanitation," *id.* § 32-1-1004(4). Century sought to create a special metropolitan district for the purpose of "financ[ing] the public improvements for the Carousel Farms Development that the Town could not provide." Pet. App. 56.

On September 15, 2014, the Town approved a "Service Plan," or governing document, for the proposed special metropolitan district. Pet. App. 56. On November 25, 2014, Respondent "was officially organized" as a special metropolitan district "by the recordation of the Order and Decree of the [Douglas County] District Court." *Id.* No objections were made to the court's entry of that order. Respondent encompasses Parcels A and B. *Id.* Parcel C was designated "as a future inclusion area." *Id.*

The Service Plan conferred several powers and responsibilities on Respondent. It authorized Respondent "to provide for the planning, design, acquisition, construction, installation, relocation, development, and financing of public improvements," but required Respondent to "dedicate such public improvements … to the Town or other appropriate jurisdiction[s]." Pet. App. 56-57. The Service Plan also required Respondent "to construct a roadway" using Parcel C, to make "associated water, storm drainage and sanitary sewer improvements," and to dedicate "all" of these improvements "to the Town and/or Parker Water and Sanitation District upon completion." *Id.* 57.

After Respondent was formed, the Town of Parker and Century amended the Annexation Agreement to clarify that Respondent would be the entity to acquire Parcel C. Pet. App. 54-55. The Amended Annexation Agreement, in accordance with the Service Plan, now directs Respondent to "dedicate [Parcel C] to the Town for public use and ownership upon completion of construction of the public improvements." *Id.* 58.

In December 2014, as required by Colorado law, Respondent adopted a "[r]esolution of [n]ecessity," setting out the grounds for the exercise of its eminent domain authority to acquire Parcel C. Pet. App. 58. Respondent then sent Petitioner a "Notice of Intent to Acquire and Final Offer Letter." *Id.* The notice informed Petitioner that if the parties could not come to terms, Respondent would begin condemnation proceedings. *Id.* 33-34. Petitioner responded on January 5, 2015, informing Respondent that it "object[ed] to any condemnation proceeding," but refusing to counteroffer. *Id.*

B. Douglas County District Court Proceedings

Respondent filed a petition in condemnation and motion for immediate possession in the Douglas County District Court. Pet. App. 59. When faced with a condemnation petition, Colorado district courts must "hear proofs and allegations of all parties interested touching the regularity of the proceedings and shall rule upon all objections thereto." Colo. Rev. Stat. § 38-1-105(1). Petitioner raised two such objections in its answer to the petition: that the condemnation was "in violation of Colorado statutes and law"; and that Respondent was not acting in good faith by "asserting a right to which it is not entitled, on behalf of private landowners." Woodcrest Homes Answer to Pet. in Condemnation 2,

Carousel Farms Metro. Dist. v. *Woodcrest Homes, Inc.*, No. 2015CV30013 (Douglas Cty. Dist. Ct. Feb. 2, 2015). Petitioner did not voice any objection based on federal law.

The brief Petitioner filed similarly couched its objections solely in terms of Colorado constitutional provisions and Colorado statutes. It cited only decisions interpreting Colorado law. *See* Woodcrest Homes Br. in Opp. to Pet. in Condemnation & Mot. for Immediate Possession 5-8, *Carousel Farms*, No. 2015CV30013 (Douglas Cty. Dist. Ct. Mar. 16, 2015).

The state district court held a two-day hearing in March 2015, at which multiple witnesses testified. Pet. App. 51. Following the hearing, the parties submitted proposed findings of fact and conclusions of law. Like its previous filings, Petitioner's post-hearing submission rested entirely on Colorado law. Its proposed "Conclusions of Law," for example, cited only to Colorado statutes. Findings of Fact, Conclusions of Law and Order Proposed—Woodcrest Homes 7-8, *Carousel Farms*, No. 2015CV30013 (Douglas Cty. Dist. Ct. Mar. 27, 2015). Petitioner urged the state district court to conclude that Respondent had "no public use *as defined by Colorado law* for Parcel C." *Id.* at 8 (emphasis added). Petitioner did not ask the state district court to reach any conclusions of federal law.

The state district court issued its Findings of Fact and Conclusions of Law on April 1, 2015. Pet. App. 50. The court rejected Petitioner's challenges to the condemnation and granted Respondent's motion for immediate possession of Parcel C. *Id.* 79-80. The court's opinion rested entirely on Colorado law. The court mentioned neither the federal Takings Clause nor *Kelo*. In fact, the only federal decisions the state court cited

were from the U.S. District Court for the District of Colorado interpreting Colorado law. *Id.* 72-75.

Of the various Colorado law issues the district court did address, most relevant here is its finding that Respondent had condemned Parcel C for "a myriad of public uses." Pet. App. 66. In reaching that conclusion, the court rejected Petitioner's argument that "the essential purpose" of the condemnation "was not for a public use, but rather, was to advance the private interests of [Century's] officers." *Id.* 69-70. The court noted the "myriad of public uses" Parcel C would serve, including "construct[ion of] … public roadway improvements," *id.* 66, and "underground sanitary sewer lines, storm water lines and water lines that will allow service from the existing lines from outside of the Carousel Farms Development to provide service to the planned homes within the Carousel Farms Development," *id.* 68. These improvements, the court explained, "will clearly benefit the public." *Id.* 70. The improvements would allow "future owners of the new homes" in the Development to "obtain access to … arterial roads" in the Town, while the Town as a whole would benefit from "the water and sanitation improvements that the … District will construct beneath the street." *Id.* 70-71.

The court recognized that, far from subordinating the Town's interests to those of Century or Respondent, the "condemnation supports the Town's long term plan of encouraging coordinated development of Carousel Farms and a large plot of property to the west of Carousel Farms as a whole." Pet. App. 67. This long-desired goal went back to 2006, when Petitioner first conceived of the Carousel Farms Development. *See id.* 52-58. And as the state court expressly recognized, "Parcel C … has consistently been shown in all the

plans for the Carousel Farms Development," including plans dating back to before Century ever got involved with the Development, "to be a public right of way, with a roadway, street improvements, water, sanitary sewer and storm water lines within that right of way." *Id.* 52. In light of all this, the court concluded that Respondent's "proposed street, water and sanitation improvements are intended for public use." *Id.* 71.

C. Colorado Court Of Appeals Proceedings

Petitioner's opening brief on appeal renewed the arguments it had advanced before the state district court, again making plain that these arguments were founded on state law. *See* Woodcrest Homes Amend. Opening Br. v-vi, *Woodcrest Homes, Inc.* v. *Carousel Farms Metro. Dist.*, No. 15CA1956 (Colo. Ct. App. May 25, 2016), 2016 WL 10956941. Petitioner's subsequent filings similarly did not mention the Fifth Amendment or decisions interpreting it, including *Kelo*. *See* Woodcrest Homes Reply Br., *Woodcrest Homes*, No. 15CA1956 (Colo. Ct. App. July 19, 2016); Woodcrest Homes Suppl. Br., *Woodcrest Homes*, No. 15CA1956 (Colo. Ct. App. July 7, 2017).

A panel of the Colorado Court of Appeals reversed, resting its decision, as the trial court had, entirely on state law. Pet. App. 29. The state court of appeals found the condemnation unlawful on two grounds. First, in that court's view, the condemnation had violated the requirement "under the state constitution" that a governmental entity must "intend[] to use the property taken for a proper public purpose." *Id.* 36. In explaining the "legal principles" governing that determination, the court devoted eight pages to a discussion of a dozen decisions interpreting the Colorado Consti-

tution. *Id.* 36-42.[1] Respondent's condemnation of Parcel C did not meet this standard, in the panel's view, because, while the "planned improvements would benefit the public, … [t]he question … is not whether the condemned property will eventually be devoted to a public use but whether the *taking itself* was for a public purpose." *Id.* 40 (citing *American Fam. Mut. Ins. Co.* v. *American Nat'l Prop. & Cas. Co.*, 370 P.3d 319 (Colo. Ct. App. 2015)).

The panel quoted from *Kelo* when it asserted that "[t]he government may not 'take property under the mere pretext of a public purpose, when its actual purpose [is] to bestow a private benefit.'" Pet. App. 46 (quoting *Kelo*, 545 U.S. at 478) (alteration in opinion). But it did so in a section of the opinion other than the one in which it addressed the taking's purpose, and only after having explained why, in its view, the taking did not satisfy the public purpose requirement under Colorado law.

The panel also held the taking unlawful under Colo. Rev. Stat. § 38-1-101(1)(b), enacted "in the wake of *Kelo* to preclude the government from taking property and transferring it to a private entity." Pet. App. 47.

D. Supreme Court Of Colorado Proceedings

Respondent petitioned for review by the Supreme Court of Colorado. Pet. App. 7. That court granted certiorari to answer three questions:

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[1] As authority for the proposition that "any taking of private property by a governmental entity must be for a public purpose," the panel cited the Colorado Constitution and a Colorado statute, Colo. Rev. Stat. § 38-1-101(2)(b), followed by a "see also" cite to *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U.S. 55, 80 (1937). Pet. App. 36-37.

> (1) Whether the court of appeals should review for clear error a trial court's determination that a condemning authority sufficiently demonstrated that a taking is for public use.
>
> (2) Whether the court of appeals erred in concluding a metropolitan district failed to prove condemnation of a parcel was for public use and necessary, where the subdivision that would principally benefit from the condemnation did not exist at the time of the taking and development of the subdivision was conditioned on the district's acquisition of the parcel.
>
> (3) Whether the court of appeals erred in concluding that a metropolitan district's condemnation of a parcel violated section 38-1-101(1)(b), C.R.S. (2017), when the condemned parcel would be dedicated to the public and would not be transferred to a private entity.

Id. 7 n.3.

In accordance with the questions accepted for review, Respondent's opening brief relied exclusively on state law in arguing for reversal. *See* Carousel Farms Metro. Dist. Opening Br., *Carousel Farms Metro. Dist.* v. *Woodcrest Homes, Inc.*, No. 2018-SC-30 (Colo. Sept. 4, 2018).

After Respondent submitted its opening brief, but before Petitioner filed its responsive brief, the Institute for Justice—which now represents Petitioner before this Court—filed an amicus brief in support of Petitioner arguing that, under *Kelo*, Respondent's condemnation of Parcel C violated the Fifth Amendment. *See* Institute for Justice Amicus Br., *Carousel Farms*, No. 2018-SC-30 (Colo. Oct. 5, 2018).

In contrast to the Institute's amicus brief, Petitioner's response brief invoked the Fifth Amendment only twice. First, it asserted that Respondent's "attempt to act on behalf of the Developer, under the direction of Developer's employees and agents, is a clear example of a 'pretext' to confer private benefits on private parties prohibited by *Kelo*." Woodcrest Homes Answer Br. 25, *Carousel Farms*, No. 2018-SC-30 (Colo. Oct. 9, 2018). Offering no analysis of its own to buttress this assertion, Petitioner directed the court to the Institute's amicus brief. *Id.* Second, Petitioner stated that under *Kelo*, Respondent should not "be allowed to take property under the mere pretext of public purpose, when its actual purpose was to bestow a private benefit." *Id.* at 37.

Respondent's reply brief reiterated that it "did not, and has not, framed any issue on appeal in the context of the Fifth Amendment of the U.S. Constitution, *Kelo v. City of New London*, or whether the taking is 'pretextual.'" Carousel Farms Metro. Dist. Reply Br. 20, *Carousel Farms*, No. 2018-SC-30 (Colo. Nov. 7, 2018).

The Supreme Court of Colorado reversed the state court of appeals' judgment. Pet. App. 3, 26. In accordance with its statement of the issues presented for review, the Supreme Court of Colorado's opinion rests entirely on state law. The court noted as much in characterizing Petitioner's claims. Petitioner, the court explained, "maintains that the condemnation violates both the public use protections of the Colorado Constitution and the statutory prohibition on economic development takings." *Id.* 2; *see id.* ("Because the public would not be the beneficiary [of the taking] *at the time of the taking*, [Petitioner] contends that this condemnation violates the Colorado Constitution. Moreover, it argues that the taking effectively transfers the condemned land to Century, which violates section 38-1-101(b)(I),

C.R.S. (2018), the state's anti-economic development takings statute."); *see also id.* 13 ("We now analyze whether the taking satisfied the public use requirement of our state constitution and statutes. … The Colorado Constitution requires that, when the government takes private land, it must pay just compensation and the land must be put to a public use. The General Assembly has confirmed the importance of this prohibition by further enacting these requirements into statutory law." (citation omitted)).

The Supreme Court of Colorado found Petitioner's state-law arguments unavailing. "The centerpiece of *our* jurisprudence on takings and public use," the court explained, "is that the taking must, at its core, benefit the public." Pet. App. 2 (emphasis added). "There is nothing in the *Colorado Constitution*," the court continued, "that prohibits private parties from incidentally benefitting from any particular condemnation." *Id.* 2-3 (emphasis added). "*Colorado's prohibition* on economic development takings," meanwhile, "has no bearing on the condemnation at issue here" because, under state law, Respondent is a quasi-public entity invested with the power of eminent domain. *Id.* 3 (emphasis added).

As for the purpose of Respondent's condemnation of Parcel C, the Supreme Court of Colorado agreed with the trial court that "the taking is essentially for public benefit," namely that "Parcel C will be used for public right of ways, storm drainage, and sewer improvements." Pet. App. 15. Even though "Century will also benefit from the taking," the court explained, "that doesn't somehow change the essential benefit from public to private." *Id.* That conclusion was particularly clear because "Parcel C was always going to be used for … improvements—even under [Petitioner's] original plan—because Parcel C is [already] encumbered by

easements and utilities and is best suited for those purposes." *Id.* 16.

The Supreme Court of Colorado also rejected Petitioner's argument that Respondent had undertaken the condemnation in bad faith. *See* Pet. App. 18-21. The court noted that "the trial court found, with ample record support, that Century (and [Respondent]) always planned on putting public improvements on Parcel C; there wasn't a post-hoc public-use justification." *Id.* 21. The court contrasted this case with *Denver West Metropolitan District* v. *Geudner*, 786 P.2d 434 (Colo. Ct. App. 1989), a case upon which both Petitioner and the state court of appeals relied, because in that case "there was never an initial intention to benefit the public." Pet. App. 20-21.[2]

REASONS FOR DENYING THE PETITION

I. THE QUESTION PRESENTED IS NOT PROPERLY BEFORE THIS COURT

"In reviewing the judgments of state courts under the jurisdictional grant of 28 U.S.C. § 1257, the Court has, with very rare exceptions, refused to consider petitioners' claims that were not raised or addressed below." *Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992). That principle suffices to warrant denial of the petition.

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[2] The court also rejected Petitioner's argument that the condemnation violated Colo. Rev. Stat. § 38-1-101(1)(b), Colorado's "anti-*Kelo*" law, which prohibits transfers of condemned land to private parties. Pet. App. 21-25. Near the end of its discussion of that issue, the court noted that Petitioner had cited *Kelo* as well as § 38-1-101(1)(b), but it concluded that *Kelo* was irrelevant to its analysis because "the fact that Colorado took the [U.S.] Supreme Court's advice and enacted a tougher regulation doesn't change the plain language of that regulation." *Id.* 25.

Petitioner asks this Court to answer the question whether the Fifth Amendment's Takings Clause is "satisfied even if a condemnation is undertaken 'for the purpose of conferring a private benefit on a particular private party.'" Pet. i. Petitioner never preserved that federal question in the Supreme Court of Colorado—or indeed, at any stage of the state condemnation proceedings—and no state court ever addressed it.

A. Petitioner Did Not Press Its Fifth Amendment Argument Before The Colorado Courts

"When the highest state court is silent on a federal question"—as the Supreme Court of Colorado was here—this Court "assume[s] that the issue was not properly presented, and the aggrieved party bears the burden of defeating this assumption by demonstrating that the state court had 'a fair opportunity to address the federal question that is sought to be presented here.'" *Adams* v. *Robertson*, 520 U.S. 83, 86-87 (1997) (citations omitted). Petitioner has not even attempted to carry its burden and cannot do so.

A failure to raise "the nature or substance of the federal claim at the time and in the manner required by the state law" forecloses a petitioner from demonstrating that such a federal issue was adequately pressed before the state courts. *Bankers Life & Cas. Co.* v. *Crenshaw*, 486 U.S. 71, 77-78 (1988) (quoting *Webb* v. *Webb*, 451 U.S. 493, 501 (1981)), *quoted in Adams*, 520 U.S. at 87. Petitioner failed in numerous respects to advance its Fifth Amendment argument before the Supreme Court of Colorado "in the manner required by" Colorado law.

First, Colorado law is clear that arguments not "raise[d] … before the lower courts" are not "properly

presented for [the state supreme court's] consideration." *Bermel* v. *BlueRadios, Inc.*, 440 P.3d 1150, 1154 n.4 (Colo. 2019). Second, "simply advancing 'conclusory, boilerplate contention[s]' does not suffice to preserve [an] issue for appeal." *Phillips* v. *People*, 443 P.3d 1016, 1021 (Colo. 2019) (first brackets in original). Third, the Supreme Court of Colorado "will not consider issues raised only by amicus curiae and not by the parties." *Gorman* v. *Tucker ex rel. Edwards*, 961 P.2d 1126, 1131 (Colo. 1998) (en banc).

As discussed above (pp. 7-13), Petitioner did not preserve, much less sufficiently develop, before the Supreme Court of Colorado the Fifth Amendment question it now presents to this Court.

B. The Supreme Court Of Colorado Did Not Pass Upon The Question Presented

In light of Petitioner's failings, it is no surprise that the Supreme Court of Colorado did not address the federal question Petitioner presents here. As explained above (pp. 13-15), the state supreme court assessed Respondent's condemnation only under *Colorado* law. The state supreme court framed the issues before it as whether "the condemnation violates both the public use protections of the *Colorado Constitution* and the *statutory* prohibition on economic development takings." Pet. App. 2 (emphasis added). It introduced its application of the governing legal principles to the facts before it by explaining, "We now analyze whether the taking satisfied the public use requirement of *our state constitution and statutes*." *Id.* 13 (emphasis added). It cited the Colorado Constitution's takings clause and Colo. Rev. Stat. § 38-1-101(1)(b) as the governing legal provisions. *Id.* 2. And it framed the legal rule it applied as providing that "if the purpose and benefit are

essentially public, then the taking offends neither the *state constitution* nor *section 38-1-101(1)(a)*." *Id.* 15 (emphases added). In its analysis of the condemnation's purpose, the court cited neither the Fifth Amendment nor any decision interpreting federal law. *See id.* 13-21.

The Supreme Court of Colorado made brief references to the Fifth Amendment and *Kelo* only when discussing § 38-1-101(1)(b)(I)—a statute enacted to give Colorado property owners *greater* protection than the Fifth Amendment provides. Pet. App. 25. The court acknowledged Petitioner's assertion that "*Kelo* … and Colorado's anti-*Kelo* statute prevent the District from finishing the developer's project." *Id.* 24. "However," the court continued, neither *Kelo* nor the statute "affect[ed] the outcome." *Id.* The court then stated:

> In *Kelo*, the city of New London sought to condemn a wide swath of land and transfer it to a private company for economic development. The Supreme Court said that such a taking didn't violate the Fifth Amendment, but left room for the states to enact more stringent regulations. In Colorado, that more stringent regulation is section 38-1-101(1)(b)(I). Still, the fact that Colorado took the Supreme Court's advice and enacted a tougher regulation doesn't change the plain language of the regulation.

Id. 25 (citations omitted).

As that passage makes plain, the Supreme Court of Colorado never acknowledged, much less answered, the question whether the Fifth Amendment barred a taking designed to benefit a private party. Nor did the court address the role of pretext under the Fifth Amendment or whether the condemnation ran afoul of *Kelo*. Thus, the Supreme Court of Colorado plainly did

not give its "considered judgment … on the question" presented in the petition. *Illinois* v. *Gates*, 462 U.S. 213, 223 (1983).

C. Because The Question Presented Was Neither Pressed Nor Passed Upon Below, The Court Should Deny The Petition

This Court has sometimes characterized the "pressed or passed upon" requirement as a jurisdictional bar and sometimes as "a prudential restriction." *Bankers Life*, 486 U.S. at 79. Under either interpretation of the rule, the petition should be denied.

1. This Court lacks jurisdiction to consider the state-law issues Petitioner preserved

The statute defining this Court's jurisdiction to review judgments of state courts, 28 U.S.C. § 1257(a), limits that jurisdiction to "state court determinations that rest upon federal law." *Oregon* v. *Guzek*, 546 U.S. 517, 521 (2006). Thus, this Court has "no jurisdiction to review a state court's decision on a question of state law." *Foster* v. *Chatman*, 136 S. Ct. 1737, 1759 (2016) (Alito, J., concurring); *see also International Longshoremen's Ass'n* v. *Davis*, 476 U.S. 380, 386-387 (1986) (this Court lacks jurisdiction when a state procedural rule "represents an independent and adequate state ground supporting the judgment below," because this Court lacks "authority to review state determinations of purely state law"); *Riley* v. *Kennedy*, 553 U.S. 406, 425 (2008) ("A State's highest court is unquestionably 'the ultimate exposito[r] of state law.'" (alteration in original)).

It is therefore no surprise that a "long line of cases clearly stat[es] that the presentation requirement is jurisdictional." *Howell* v. *Mississippi*, 543 U.S. 440, 445

(2005) (citing cases). The Supreme Court of Colorado's failure to pass upon any Fifth Amendment claim, and Petitioner's failure to press such a claim before that court, means the only issues actually before this Court involve the propriety of the condemnation of Parcel C under Colorado law. But this Court may not second-guess the judgment of the Supreme Court of Colorado on questions of state law, be it Colorado takings law or Colorado procedural law. *See Exxon Corp.* v. *Eagerton*, 462 U.S. 176, 181 n.3 (1983) (this Court lacked jurisdiction over a preemption argument which was never passed upon in the Alabama state courts and was raised for the first time in petitioner's brief before the Alabama Supreme Court because "[t]he general practice of the Alabama appellate courts is not to consider issues raised for the first time on appeal").

2. Petitioner cannot overcome the prudential considerations that weigh against reviewing waived claims

Even if this Court believed it had jurisdiction to review Petitioner's unpreserved federal question—though it does not—"weighty prudential considerations" also "militate against [this Court] considering" questions not adequately presented below. *Gates*, 462 U.S. at 224. Fundamentally, "this Court normally proceeds as a 'court of review, not of first view.'" *United States* v. *Haymond*, 139 S. Ct. 2369, 2385 (2019). In not resolving questions in the first instance, the Court is able to enjoy "the benefit of thorough lower court opinions to guide [its] analysis." *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012). That benefit is missing here, as the courts below nowhere addressed the Fifth Amendment, much less provided "thorough lower court opinions" on the subject.

Also absent from the proceedings below is the "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962), *quoted in United States* v. *Windsor*, 570 U.S. 744, 760 (2013). Here, the parties never engaged in an adversarial clash on the Fifth Amendment issue Petitioner urges this Court to address. As Respondent noted in its reply brief before the Supreme Court of Colorado, it "did not, and has not, framed any issue on appeal in the context of the Fifth Amendment of the U.S. Constitution, *Kelo v. City of New London*, or whether the taking is 'pretextual.'" Carousel Farms Metro. Dist. Reply Br. 20, *Carousel Farms*, No. 2018-SC-30 (Colo. Nov. 7, 2018).

Finally, "[t]he rule" against reviewing claims neither pressed nor passed upon before state courts "serves an important interest of comity." *Adams*, 520 U.S. at 90. "As [this Court] ha[s] explained, 'it would be unseemly in our dual system of government' to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Id.* By failing to adequately present its Fifth Amendment argument to the Supreme Court of Colorado, Petitioner deprived that court of "an opportunity to consider" the federal question it now advances. *Gates*, 462 U.S. at 221. That suffices to warrant denial of the petition.

II. THE DECISION BELOW IS CONSISTENT WITH *KELO*

Certiorari also is unwarranted because, contrary to Petitioner's contention, the decision below is perfectly consistent with *Kelo*. Neither Respondent nor any court below questioned the proposition that the Fifth Amendment's Takings Clause bars property from being taken "under the mere pretext of a public purpose,

when its actual purpose was to bestow a private benefit." *Kelo*, 545 U.S. at 478. Rather, the Supreme Court of Colorado simply held that the *record evidence in this case* establishes that the public purposes Respondent asserted for its condemnation of Parcel C satisfied Colorado law. A state supreme court's purported "misapplication of a properly stated rule of law" does not warrant certiorari. S. Ct. R. 10.

A. The Colorado Courts Analyzed The Condemnation's Actual Purpose

The state courts respected the principles from *Kelo* that Petitioner highlights. The Douglas County District Court compiled and reviewed an extensive factual record—including by holding a two-day hearing at which numerous witnesses testified—before concluding that the actual purposes for the condemnation of Parcel C were to benefit the public by enabling the construction of road, water, and sewer improvements—improvements that would benefit not only the inhabitants of the Carousel Farms subdivision but also the Town's inhabitants as a whole. Pet. App. 67. The Supreme Court of Colorado, after carefully reviewing that record, concurred that the condemnation was carried out for public purposes. The fact-driven way in which these courts determined that the taking genuinely served public purposes belies Petitioner's fevered contention (Pet. 11) that "whole swaths of condemnations in Colorado are subject to no meaningful public-use analysis."

As explained above (pp. 7-10), the Douglas County District Court devoted substantial consideration to determining the actual purposes for the condemnation of Parcel C. That court looked not only to the "myriad" public benefits that would flow from the road, water,

and sewer improvements enabled by the acquisition of Parcel C, Pet. App. 66-71, but also to the congruence between those improvements and "the Town's long term plan of encouraging coordinated development of Carousel Farms and a large plot of property to the west of Carousel Farms as a whole," *id.* 67. The court gave great weight to the fact that Parcel C was being used as a utility corridor even before Respondent's acquisition, as it contained a sanitary sewer line and a 30-foot exclusive water line easement. *Id.* 68-69. The court emphasized that the additional improvements for Parcel C had been planned before Century became the lead developer for the Carousel Farms Development, thus contradicting Petitioner's contention that the taking was designed to benefit only a particular private party. *Id.* 52.

The Supreme Court of Colorado's public-purpose analysis likewise rested on careful consideration of the record evidence. The court explained that, under Colorado law, takings may permissibly carry an "antecedent benefit that isn't public, so long as the *essential* benefit is ultimately for the public." Pet. App. 16 (emphasis added). It observed that a taking in which the private benefit "predominated" over the public one would fail to satisfy Colorado's public purpose requirement. *Id.* 19; *see also id.* 17 n.8 ("It's unlikely that a taking where the public doesn't benefit for a significant amount of time would essentially benefit the public."). But it agreed with the trial court that the condemnation of Parcel C involved no such improper predominance of private over public purposes. The court so held because Parcel C was already being put to public use, *id.* 16, would be put to even further public uses, *id.* 15, and "was always going to be used for those improvements—even under [Petitioner's] original plan," a fact

that minimized doubts about "whether the land will be used as claimed," *id.* 16.[3]

The Supreme Court of Colorado also rejected Petitioner's argument that Respondent had condemned Parcel C in bad faith. Pet. App. 19. This rejection rested in significant part on the state trial court's finding that "Century and [Respondent] always sought to build public improvements and have the development annexed into Parker." *Id.* That finding, based on "ample record support," removed any concerns that Respondent was relying on "a post-hoc public-use justification," *id.* 21.[4]

B. The Supreme Court Of Colorado's Opinion Is Consistent With *Kelo*

The thorough consideration the Supreme Court of Colorado gave to the *actual* purposes of the taking belies Petitioner's contention (Pet. 10-11) that Colorado courts will not inquire into a taking's actual purposes.

The state supreme court's discussion of *Denver West Metropolitan District* v. *Geudner*, 786 P.2d 434 (Colo. Ct. App. 1989), underscores the error in Peti-

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[3] Petitioner's amici's assertion that "the future use is merely a present assertion by Respondent," Southeastern Legal Found. Amicus Br. 12, is completely unsupported by the extensive record in this case.

[4] Petitioner's assertion (Pet. 10) that the Supreme Court of Colorado "[c]onced[ed] that the 'taking itself' wasn't for a public purpose" is wrong. In the passage Petitioner points to, the state supreme court was quoting the *state court of appeals* decision, rather than stating its own views. Pet. App. 16 ("The division reasoned that the eventual dedication of the land to a public purpose is insufficient because the 'taking itself' wasn't for a public purpose." (citing Pet. App. 40 ¶35 (Colo. Ct. App. decision))). In the immediately following paragraph, the state supreme court explained why it disagreed with the court of appeals' analysis. *Id.*

tioner's reading of the decision below. *Geudner* embraced the very proposition that Petitioner says the Colorado courts have ignored: that a taking carried out for a facially valid public purpose is still invalid if the actual purpose for the taking is to benefit a particular private party. In discussing *Geudner*, the Supreme Court of Colorado made clear its approval of that principle, distinguishing *Geudner* not on the law but only on the facts. Pet. App. 20-21.

In *Geudner*, a developer entered into a contract to sell a piece of property. 786 P.2d at 435. The contract required the developer to relocate a gulch found on the property before the sale would go through. *Id.* The developer asked an engineering firm to come up with plans to relocate the gulch, but it rejected the three most hydrologically sound plans because they would have left part of the gulch on the developer's property. *Id.* The engineering firm then created a fourth plan, which would relocate the gulch to Geudner's property. *Id.* at 435-436. The developer offered to purchase the affected section of Geudner's property, but Geudner refused to sell. *Id.* at 436. The developer then formed a special metropolitan district and condemned Geudner's property, asserting that relocating the gulch would improve flood control. *Id.* The state courts held the taking invalid, reasoning that the taking was being pursued in bad faith because "the primary purpose for the proposed relocation was to facilitate the sale of [the developer's] property." *Id.* at 436-437.

Rather than rejecting *Geudner's* reasoning, the decision below *accepted* the rule of that case; the Supreme Court of Colorado instead distinguished *Geudner* on the facts—most notably because, in *Geudner*, "there was never an initial intention to benefit the public—the justification of flood mitigation was added once the pur-

chaser wanted the gulch moved." Pet. App. 21. Here, by contrast, the stated reason for the taking was also the actual reason: "the trial court found, with ample record support, that Century (and then the District) always planned on putting public improvements on Parcel C; there wasn't a post-hoc public-use justification." *Id.* In treating *Geudner* as a correct application of the law and simply distinguishing it factually, the state supreme court made clear that takings for purportedly public purposes are not "immune from further scrutiny," Pet. 10.[5]

C. The Supreme Court of Colorado's Conclusion That Respondent's Condemnation Of Parcel C Was Actually For Public Purposes Is Both Correct And Unworthy Of This Court's Review

Petitioner's major disagreement with the Supreme Court of Colorado appears to be not that the court failed to look behind the taking's stated purpose to determine its actual purpose, but that the court's evaluation of the evidence produced an incorrect conclusion that Respondent's asserted public purposes were genuine. *See* Pet. 9 ("In this case, the evidence of pretext is overwhelming."). Even if Petitioner's assessment of the evidence were correct—and it is not—that issue involves

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[5] *Geudner* and the decision below are far from the only examples of Colorado courts looking to a taking's actual purpose. In *City of Lafayette* v. *Town of Erie Urban Renewal Authority*, 434 P.3d 746 (Colo. Ct. App. 2018), *cert. denied*, 2019 WL 539735 (Colo. 2019), for example, the court held that "the district court properly examined Lafayette's finding of necessity to determine, with record support, that the taking to establish an open space community buffer was pretextual and was not a lawful public purpose," *id.* at 753. This holding reflects the Colorado courts' commitment to look behind a taking's asserted purpose and determine whether a facially public purpose is merely pretextual.

nothing more than fact-bound error correction, an exercise that would "not meet the standards that guide the exercise of [this Court's] certiorari jurisdiction." *Izumi Seimitsu Kogyo Kabushiki Kaisah* v. *U.S. Philips Corp.*, 510 U.S. 27, 34 (2010); *see* S. Ct. R. 10 ("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.").

In any event, the decision below was correct. Petitioner has never contested that Century (and Petitioner itself, when Petitioner was the lead developer for Carousel Farms) had always planned to use Parcel C for road, water, and sewer improvements. Petitioner has likewise never challenged the significant benefits the public would receive from these improvements. Instead, Petitioner relies solely on the notion that the incidental economic benefits Century would receive from Respondent's acquisition of Parcel C somehow nullify the public-facing nature of the improvements to Parcel C. However, when a *public* entity—such as Respondent—condemns, for a genuine public purpose, property that it ultimately transfers to another public entity (here the Town), the mere fact that a private entity (in this case Century) may incidentally benefit from that taking does not render the taking unlawful. *Cf. Kelo*, 545 U.S. at 477 (noting that a State may go even further and transfer property among *private* parties "if future 'use by the public' is the purpose of the taking").[6]

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[6] Petitioner's amici appear to contend that Respondent is actually a private entity, Southeastern Legal Found. et al. Amicus Br. 12, and that public-purpose determinations should be subject to a heightened standard of review when a private entity is involved, *id.* 14. The first contention is wrong, as Respondent is undoubtedly a public entity. *See Risen* v. *Cucharas Sanitation & Water Dist.*, 32 P.3d 596, 599 (Colo. Ct. App. 2001) ("Special dis-

III. PETITIONER IDENTIFIES NO DIVISION IN AUTHORITY

Finally, Petitioner tries to assert a division in state court authority, claiming (Pet. 11) that several state courts have held "that the actual purpose of a taking is irrelevant" under the Fifth Amendment. Even if that were true, this would not be an appropriate case to resolve such a division, as the Supreme Court of Colorado did not decide any Fifth Amendment issue, and its evaluation of the condemnation under state law *did* consider the taking's actual purpose. But in any event, Petitioner's purported split is illusory.

Puntenney v. *Iowa Utilities Board*, 928 N.W.2d 829 (Iowa 2019), *pet. for cert. filed*, No. 19-447, says nothing about pretextual purposes. In that case, a pipeline company condemned property to advance construction of an oil pipeline. *Id.* at 832. Far from disregarding the condemnation's actual purposes, the Supreme Court of Iowa scrutinized them and found them to be genuine. The court upheld the taking after concluding that the pipeline would provide not just "trickle-down benefits of economic development," but also "public benefits in the form of cheaper and safer transportation of oil." *Id.* at 849. The court observed that although "the pipeline is undeniably intended to return profits to its owners," *id.*, there was never any argument that the public benefits flowing from the pipeline formed a mere pretext for

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tricts are political subdivisions of the state and are created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them."). The second contention was neither pressed nor passed upon below and is not even included within the Question Presented.

those desired profits. *Id.* *Puntenney* cannot be said to have held that actual purpose is irrelevant.[7]

In *KMS Retail Rowlett, LP* v. *City of Rowlett*, -- S.W.3d --, 2019 WL 2147205 (Tex. 2019), the Supreme Court of Texas was equally attentive to actual purposes. The condemnation involved an easement a developer needed to construct a road required under a contract between the developer and the city. The court found that the asserted purposes of the taking were not pretextual, partly because of "evidence … that the city [had] considered condemnation long before [the developer] learned it would be unable to access the easement without the city's help." *Id.* at *12. The court also noted the absence of evidence that the contract between the developer and the city "would not have been consummated without the increased rental payment provided by the cross-access drive." *Id.* At most, *KMS Retail* held that a taking can have both a public and a private purpose. *See id.* ("So the question becomes whether the city's alleged desire to benefit a private entity negates a taking based on otherwise indisputably valid public uses. … Under these facts, our answer is no."). That holding does not say a taking's actual purpose is irrelevant.

Petitioner's two other cases are even farther afield. *Rodgers Development Co.* v. *Town of Tilton*, 781 A.2d 1029 (N.H. 2001), predated *Kelo*. And both *Rodgers*

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[7] Moreover, *Puntenney* is barely a Fifth Amendment case at all. As the court explained, "we do not follow the *Kelo* majority under the Iowa Constitution," instead applying "Justice O'Connor's dissent [as] a more sound interpretation of the public-use requirement." 928 N.W.2d at 848. And the dissenting opinion to which the petition cites (at 18 n.5) would have invalidated the taking under the *Iowa* Constitution, not the Fifth Amendment. 928 N.W.2d at 853 (Wiggins, J., concurring in part).

Development and *Goldstein* v. *New York State Urban Development Corp.*, 921 N.E.2d 164 (N.Y. 2009), involved claims under *state* constitutions, not the Fifth Amendment. *Rodgers Dev.*, 781 A.2d at 1034; *Goldstein*, 921 N.E.2d at 167. They therefore cannot form part of any division in authority regarding *federal* takings law—just as this case cannot either.

Accordingly, the question presented is waived, fact-bound, and splitless. It does not warrant this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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