No. 20-1214

In The
Supreme Court of the United States

FRED J. EYCHANER,
Petitioner,

v.

CITY OF CHICAGO,
Respondent.

On Petition for Writ of Certiorari to the Appellate Court of Illinois

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONER FRED J. EYCHANER

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QUESTIONS PRESENTED

1. Is the possibility of future blight a permissible basis for a government to take property in an unblighted area and give it to a private party for private use?

2. Should the Court reconsider its decision in *Kelo v. City of New London*, 545 U.S. 469 (2005)?

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation (PLF) and National Federation of Independent Business Small Business Legal Center submit this brief amicus curiae in support of Petitioner Fred J. Eychaner.[1]

PLF was founded over 45 years ago and is widely recognized as the most experienced nonprofit legal foundation of its kind. PLF attorneys have participated as lead counsel or amicus curiae in several landmark United States Supreme Court cases in defense of the right of individuals to make reasonable use of their property and the corollary right to obtain just compensation when that right is infringed. *See*, *e.g.*, *Cedar Point Nursery v. Hassid*, Supreme Court of the United States, Dkt. No. 20-107; *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019); *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017); *Horne v. Department of Agriculture*, 576 U.S. 350 (2015); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013); *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). PLF has offices in Florida, California, Washington, and the District of

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[1] Pursuant to this Court's Rule 37.2(a), all parties have received timely notice and consented to the filing of this brief.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

Columbia, and regularly litigates matters affecting property rights in state courts across the country.

The NFIB Small Business Legal Center (NFIB SBLC) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate, and grow their businesses.

To fulfill its role as the voice for small business, the NFIB SBLC frequently files amicus briefs in cases that will impact small businesses. The NFIB SBLC files in this case because the small business community remains deeply concerned about this Court's decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), and the consequences flowing from that decision. Small businesses are often victimized—at the expense of more powerful business interests—when private property is taken for the purpose of "economic development."

PLF and the NFIB SBLC believe that their perspectives and experience with property rights litigation will aid this Court in the consideration of the issues presented in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Fifth Amendment states that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. This case raises an important and unresolved question concerning the limitations that the Public Use Clause places on the government's authority to condemn private property: whether, after *Kelo v. City of New London*, 545 U.S. 469 (2005), the Public Use Clause places any discernible limits on the government's power to use eminent domain to transfer the property of one private owner to another under the guise of "economic development." *See id.* at 492–93 (Kennedy, J., concurring). The facts here reveal why certiorari is warranted to delineate these limits. The Court should take this opportunity to restore full effect to the Fifth Amendment. *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2170 (2019) ("Fidelity to the Takings Clause . . . requires . . . restoring takings claims to the full-fledged constitutional status the Framers envisioned when they included the Clause among the other protections in the Bill of Rights.").

The Public Use Clause is an essential restraint on the government's power to take an individual's private property against his or her will. Certainly, courts through the years have blurred the distinction between a strict "public use" and a more general "public purpose." *See Kelo*, 545 U.S. at 515–17 (Thomas, J., dissenting). But even so, the Court has been careful to emphasize that the government's power is not unlimited—that "[a] purely private taking could not withstand the scrutiny of the public use requirement," as "it would serve no legitimate

purpose of government and would thus be void." *Hawaii Hous. Authority v. Midkiff*, 467 U.S. 229, 245 (1984). Indeed, even while it upheld New London's "public use" justification for an apparent private taking in *Kelo*, the Court still recognized the importance of these limits. *See Kelo*, 545 U.S. at 477–78, 487 (majority opinion).

In sanctioning a condemnation that bears all the hallmarks of a disguised and impermissible private taking, the Illinois decisions below blew past any recognizable limits. Indeed, this case presents the very scenario that concerned the Court in *Kelo* (and alarmed the public and commentators). The City of Chicago used its eminent domain power to take Fred Eychaner's land and give it to Blommer's Chocolate Factory (Blommer), apparently for the nominal sum of one dollar. App. 36a (detailing Blommer's offer). Blommer was to use Eychaner's property "to expand" its factory campus. App. 103a. The City's eventual justification—that Eychaner's property was at risk of "future blight"—was far more speculative than even the bare economic development rationale accepted in *Kelo*. Even so, the Illinois appellate court sustained the taking as a valid "public use." To do so, the court construed *Kelo* as having broadly authorized such takings so long as the government presented a comprehensive development plan. *See* App. at 53a–54a. To accept such a proposition, however, would be to concede what the *Kelo* majority expressly rejected—that the Public Use Clause places no meaningful limit on the government's eminent domain power.

This Court's review is needed to establish a clear line between public and private takings. If such a line cannot be drawn coherently, the Court should use this case to take a fresh look at economic development takings and overrule *Kelo*. Resolution of this question is a matter of utmost national importance, as the lower courts regularly confront claims of pretextual economic development takings, and they are sharply divided on the proper approach to such claims.

The petition should be granted.

REASONS FOR GRANTING THE PETITION

I.

THIS CASE RAISES AN IMPORTANT QUESTION AS TO WHETHER THE PUBLIC USE CLAUSE PROHIBITS THE GOVERNMENT FROM USING AN "ECONOMIC DEVELOPMENT" RATIONALE AS A PRETEXT TO TRANSFER PROPERTY TO A PARTICULAR PRIVATE PARTY FOR PRIVATE PURPOSES

The Illinois Court of Appeals adopted a rule of federal constitutional law that extends *Kelo* beyond reason and in a manner that undermines the Public Use Clause. App. 57a, 60–61a. At its most basic, the "public use" requirement forbids the government from taking property from one person to give it to another. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (An exercise of eminent domain power for private gain is "against all reason and justice."). This fundamental protection is essential to our constitutional system. Without it, "all private property is . . . vulnerable to being taken and transferred to another private owner, so long as it might be upgraded[.]" *Kelo*, 545 U.S. at

494 (O'Connor, J., dissenting). Indeed, *Kelo* itself purported to reaffirm the rule that a private taking will remain forbidden regardless of the Court's conclusion that economic plans can sometimes qualify as a public purpose. *Id*. at 477–78 (majority opinion).

The *Kelo* majority emphasized that the government would not "be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." *Id*. at 478. Justice Kennedy's concurrence stated that under the Public Use Clause, a court "should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits." *Id*. at 491 (Kennedy, J., concurring). His opinion further anticipated that some private transfers could raise such a substantial risk of "undetected impermissible favoritism" that they should be presumptively invalid. *Id*. at 493 (Kennedy, J., concurring). That is, "the transfers are so suspicious, or the procedures employed so prone to abuse, or the purported benefits are so trivial or implausible, that courts should presume an impermissible private purpose." *Id*.

Despite the Court's assurance that *Kelo* would not open the door for the government to carry out private takings in the name of economic progress, the decision provided little guidance on how and when courts should identify takings as pretextual and improper. Daniel B. Kelly, *Pretextual Takings: Of Private Developers, Local Governments, and Impermissible Favoritism*, 17 Sup. Ct. Econ. Rev. 173, 174 (2009). The majority and concurring *Kelo* opinions did point to several criteria that suggested that pretext was not a problem in *Kelo* itself: the taking was part of an

"integrated development plan," the transferee was not known before hand, and the public benefits were not incidental. *Kelo*, 545 U.S. at 487, 492; *id.* at 493 (Kennedy, J., concurring). But neither opinion discussed whether such contrary factual circumstances—in isolation or in combination—would establish a violation of the Public Use Clause. The Court instead left this critical question for another day. *Kelo*, 545 U.S. at 487; *id.* at 493 (Kennedy, J., concurring); Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 Cornell L. Rev. 1, 65 (2006) ("[T]he majority and Justice Kennedy left unanswered the question of how courts should determine when a taking becomes too private to constitute a public use.").

The *Kelo* decision's lack of a clear framework for identifying (and striking down) private takings disguised as public measures left concerns that it invited governments to take property to give to favored, private patrons. John Dwight Ingram, *Eminent Domain After* Kelo, 36 Cap. U. L. Rev. 55, 57 (2007) ("If the *Kelo* definition of 'public use' is applied, no private property will be protected from condemnation. A small business will always provide fewer jobs and tax revenues than a big national retail chain. The same can be said if a church is replaced by a large hotel, or a community of homes by a large manufacturing plant."). Indeed, the *Kelo* dissenters objected to the majority opinion largely because they believed it put all private property at risk of being taken to benefit economically powerful private parties. *Kelo*, 545 U.S. at 503–04 (O'Connor, J., dissenting). The dissenters were rightly skeptical of the majority and concurring Justices' vague assurance

that their opinions would not countenance naked property transfers from A to B. *Id*. at 502–04.

These fears have proved well-founded. In one alarming example, the New York Court of Appeals upheld the condemnation of property for transfer to Columbia University under the guise of a fanciful "blight" designation. The court did so despite extensive evidence of pretextual motive, evidence that Columbia would reap most of the condemnation's benefits, evidence of inadequate planning, and the undisputed fact that Columbia's identity as the main beneficiary of the taking was known from the beginning.[2] *See Kaur v. N.Y. State Urb. Dev. Corp.*, 892 N.Y.S.2d 8, 18–22 (N.Y. App. Div. 2009), *rev'd*, 933 N.E.2d 721 (N.Y. 2010) (striking down the Columbia takings under the *Kelo* pretext standard). The state high court's decision in the face of such compelling evidence of private purpose should serve as a warning for anyone who hoped that *Kelo* would sufficiently cabin economic development takings.

This case stretches the "blight" rationale even further to encompass a speculative finding of potential "future blight." In the process, it exemplifies the *Kelo* dissenters' worst fears—a taking of A's property to give it to B for B's private use, under the guise of a public economic purpose. Because of *Kelo*, the Illinois courts felt compelled to turn a blind eye to clear evidence that Chicago condemned Eychaner's land only because Blommer threatened to make Chicago's life politically difficult, either by opposing its inclusion

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[2] For a more extensive discussion of these aspects of *Kaur*, *see* Ilya Somin, *Let There Be Blight: Blight Condemnations in New York after* Goldstein *and* Kaur, 38 Fordham Urb. L.J. 1193, 1210–17 (2011).

in the Planned Manufacturing District (PMD) or simply leaving Chicago. App. 97a–98a. That the courts below found no meaningful difference between this case and *Kelo* shows the need for this Court's correction. *Kelo* should not be applied to effectively eviscerate the public use limitation on the eminent domain power.

II.

STATE COURTS AND THE LOWER FEDERAL COURTS ARE IRREPARABLY DIVIDED ABOUT HOW TO IDENTIFY A PRIVATE TAKING

Review is also necessary to settle a widening split of authority among the state and lower federal courts over the test used to identify a private taking. *Kelo* suggested that heightened scrutiny would apply to a taking that transfers property to a private person under a pretextual economic purpose but declined to provide a test. Without clear guidance on this issue, lower courts have struggled to identify and address alleged pretextual economic development takings. Ilya Somin, *The Judicial Reaction to* Kelo, 4 Alb. Gov't L. Rev. 1, 3 (2011) ("[F]ederal and state courts have been all over the map in their efforts to apply *Kelo*'s restrictions on 'pretextual' takings. There is no consensus in sight on this crucial issue. It may be that none will develop unless and until the Supreme Court decides another case in this field."); Kelly, *Pretextual Takings*, 17 Sup. Ct. Econ. Rev. at 176 ("[T]he [*Kelo*] Court's lack of clarity, has created significant uncertainty for both litigants and lower courts.").

In general, courts faced with private takings claims have focused on factual criteria highlighted in the *Kelo* opinions. But they draw sharply divergent conclusions as to which criteria are most relevant to determining whether a private taking is at hand, and to what extent those criteria allow courts to look beyond the stated justification. Some courts have interpreted *Kelo* to permit (or even require) them to look behind the justification for a purported economic development taking if "there is evidence that the stated purpose might be pretextual." *Cty. of Hawaii v. C & J Coupe Fam. Ltd. P'ship*, 198 P.3d 615, 644 (Haw. 2008). Upon such evidence, the Hawaii Supreme Court and the District of Columbia Court of Appeals have suggested an inquiry into whether the taking "provided a predominantly private benefit," *id.* at 647, or whether the benefits to the public "are only 'incidental' or 'pretextual,'" *Franco v. National Cap. Revitalization Corp.*, 930 A.2d 160, 173–74 (D.C. 2007). Other courts, however, mainly focus on the actual motives of the condemnor—or, as the Pennsylvania Supreme Court put it, "the 'real or fundamental purpose' behind [the] taking." *Middletown Township v. Lands of Stone*, 939 A.2d 331, 337 (Pa. 2007) (quoting *Belovsky v. Redev. Auth.*, 54 A.2d 277, 283 (Pa. 1947)).[3]

The Third Circuit took another approach, focusing on whether the condemnor identified the private beneficiary of a taking beforehand. *See Carole Media*

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[3] Some courts took this view even before *Kelo*. *See, e.g.*, *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203, 1229 (C.D. Cal. 2002) ("Courts must look beyond the government's purported public use to determine whether that is the genuine reason or if it is merely pretext.").

LLC v. New Jersey Transit Corp., 550 F.3d 302, 311 (3d Cir. 2008). In rejecting a challenge to a policy that sought to take a business's licenses to post advertisements on billboards owned by the New Jersey Transit Corporation to bid them out to other advertising companies, the court emphasized that there was "no allegation" that the condemnor "knew the identity of the successful bidder for the long-term licenses" when it took them. *Id*. The lack of a certain private beneficiary was dispositive for the court, which held that fact precluded a finding that the condemnation was the textbook private taking. *Id.*

Several courts have taken *Kelo*'s invitation to scrutinize the nature and extent of public planning to determine whether a taking is truly for a public purpose. On a few occasions, courts have found such plans wanting. The Maryland Court of Appeals invalidated a taking of a "three story building which houses a bar and package goods store" for ultimate transfer to a private developer absent any comprehensive public plan. *Mayor and City Council of Baltimore City v. Valsamaki*, 916 A.2d 324, 326 (Md. 2007). The Rhode Island Supreme Court invalidated a taking because it found New London's "exhaustive preparatory efforts that preceded the takings in *Kelo*" stood in "stark contrast" to the actions of the development corporation in its case. *Rhode Island Econ. Dev. Corp. v. The Parking Co.*, 892 A.2d 87, 104 (R.I. 2006).[4]

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[4] The Illinois courts in this case distinguished a similar pre-*Kelo* Illinois Supreme Court case invalidating a taking of a business's property for use as a parking lot for a racetrack. *See Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C.*, 768 N.E.2d 1, 10 (Ill. 2002) ("SWIDA's true intentions were not clothed in an independent,

Finally, a few courts have discounted *Kelo*'s pretext language altogether and concluded that this Court's jurisprudence requires such deference to the condemnor that it cannot invalidate a taking even when the facts show that a condemnation mainly is designed to give property to a private party for its own gain. The leading decision in this regard comes from the Second Circuit in *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008). *Goldstein* concerned the taking of private property to make way for a new basketball stadium, and related amenities, for a private team. The property owners asserted "that the project's public benefits are serving as a 'pretext' that masks its actual raison d'être: enriching the private individual who proposed it and stands to profit most from its completion." 516 F.3d at 52–53. The Second Circuit, however, upheld the taking, concluding that *Kelo* did not allow courts to consider whether the proffered economic development justification was a pretext for giving land to a private party for private purposes even when the facts showed a real risk of this occurrence. *Id*. at 52–53, 62–64.

This Court should take this case to resolve the disagreements among the courts on these issues.

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legitimate governmental decision to further a planned public use. SWIDA did not conduct or commission a thorough study of the parking situation at Gateway. Nor did it formulate any economic plan requiring additional parking at the racetrack.").

III.

CHICAGO'S POTENTIAL FUTURE BLIGHT RATIONALE ENCOURAGES EMINENT DOMAIN ABUSE

The heightened scrutiny suggested by *Kelo* is particularly warranted here because allowing a private taking based on a declaration of potential future blight encourages eminent domain abuse and goes against the public interest. Indeed, the argument that economic development is a public use rests on the faulty belief that property, once transferred to a new owner, might lead to some economic benefit—like increased employment or tax revenue—that could eventually generate some public benefit. Ilya Somin, *The Case Against Economic Development Takings*, 1 N.Y.U. J. L. & Liberty 949, 950 (2005). But under this rationale, almost any compelled transfer of property from one party to another could be justified as economic development—particularly where property is transferred from a poor owner to a wealthier person or entity. *See* Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of "Public Use,"* 32 Sw. U. L. Rev. 569, 598–99 (2003); Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 170 (Harvard Univ. Press, 1985). Thus, the economic development rationale on its own extinguishes a critical limiting principle written into the Fifth Amendment.

A stark example of this arose in 1981, when Detroit condemned the Poletown neighborhood to benefit the General Motors Corporation, promising that a new automobile factory would create about

6,000 jobs and alleviate a crushing economic recession. *See generally* Jeanie Wylie, *Poletown: Community Betrayed* (1989). After heated protests and a hurried decision by the Michigan Supreme Court upholding the condemnation for economic development purposes, the city razed the Poletown neighborhood to make way for an auto plant that never created the promised jobs. *Id.* at 230. Recognizing its mistake, the Michigan Supreme Court overruled the much-disgraced *Poletown* decision:

> To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain. *Poletown*'s [economic development] rationale would validate practically *any* exercise of the power of eminent domain on behalf of a private entity. After all, if one's ownership of private property is forever subject to the government's determination that another private party would put one's land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, "megastore," or the like.

Cty. of Wayne v. Hathcock, 684 N.W.2d 765, 786 (Mich. 2004).

The suggestion that the economic development will impart broad public benefits is also unfounded. In truth, redevelopment plans often fail and visit many negative consequences on the community. Gideon

Kanner, *We Don't Have to Follow Any Stinkin' Planning—Sorry About That, Justice Stevens*, 39 Urb. Law. 529, 536 (2007). Government officials regularly overestimate the benefits of public works projects because they do not—and often cannot—understand precisely how certain plans will affect the economy, leading them to use optimistic projections simply to sell the public on the project. *Cf.* Garrett Johnson, *The Economic Impact of New Stadiums and Arenas on Cities*, 10 U. Denv. Sports & Ent. L.J. 1, 14–15 (2011). And redevelopment plans do not necessarily lead to the benefits they promise because there is no legal mechanism to require the new owner of the condemned property to follow the promised redevelopment plans. Kanner, *supra*, at 539. After the redeveloper acquires condemned land, it will own it in fee simple and is "free to resell it or to put it to any lawful use [it] choose[s]." *Id.* at 540.

The redevelopment at issue in *Kelo*, too, provides the quintessential example of such a misleading and harmful project plan. Hoping to capitalize on Pfizer's plan to build a nearby facility, New London Development Corporation (NLDC) condemned numerous homes in the Fort Trumbull neighborhood to build new facilities, including a marina, park, hotel, office space, and upscale housing, in hopes of revitalizing an economically depressed area. Shortly after the property owners lost their case in this Court and surrendered their homes, Pfizer abandoned the project. Ilya Somin, *The Grasping Hand:* Kelo v. City of New London *and the Limits of Eminent Domain* 235 (The Univ. of Chicago Press, 2015). NLDC therefore did not carry out its redevelopment plans. *Id.* Nor had other redevelopment plans materialized by 2015. *Id.* Instead, for over a decade after *Kelo*, the site of the

former Fort Trumbull homes sat as an empty lot.[5] *Id*. *Kelo* has become an embarrassment for those involved. Connecticut Supreme Court Justice Richard Palmer—a member of the four-judge majority that permitted the condemnation at state court—later apologized to one of the former homeowners, Susette Kelo, for voting to allow the taking. *Id*. at 234. Justice Palmer told Ms. Kelo that he "would have voted differently" had he known what would happen to her home and community. *Id*.

The use of eminent domain for economic development is often most harmful to poor and minority communities. *Kelo*, 545 U.S. at 505 (O'Connor, J., dissenting). Indeed, in jurisdictions where the government may condemn property for economic development, the law incentivizes wealthy and well-connected interests to engage in a practice that economists call "rent seeking," through which private interests try to gain control of the eminent domain power and use it for their own benefit at the expense of the public. Thomas W. Merrill, *Rent Seeking & the Compensation Principle*, 80 Nw. U. L. Rev. 1561, 1577 (1986) ("If the prior distribution of wealth can be changed by the state, . . . then the resources of society will be consumed in a factional struggle to capture the state apparatus in order to obtain benefits for one faction at the expense of everyone else[.]"); *see also* Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in*

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[5] In 2011, the lots were briefly designated as a storm debris dump site in 2011 after Hurricane Irene *See* Gideon Kanner, Kelo *Aftermath—The Final Indignity*, Gideon's Trumpet (Aug. 31, 2011), http://gideonstrumpet.info/2011/08/kelo-aftermath-the-final-indignity/.

an Interest-Group Perspective, 3 Tex. Rev. L. & Pol. 49, 85 (1998).

A rule that allows private takings to occur without scrutinizing the government's economic rationale will encourage such groups to lobby the government to condemn private property because it is cheaper to do so than negotiating with property owners for their land. *See* Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 Yale L.J. 149, 173–74 (1971). Unfortunately for property owners, rent seeking is difficult to stop because government bodies are willing to capitulate to well-connected interests in exchange for money and political support. *See* Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 Colum. L. Rev. 223, 230 (1986). Moreover, a condemned landowner often lacks the finances to mount a counter-lobbying effort against eminent domain abuse because costs of redevelopment projects are typically dispersed between many landowners while the rent-seeker sees concentrated benefits. *See* Kochan, *supra*, at 81.

As Justice Thomas observed, the poor are the least likely to "put their lands to the highest and best social use, [and] are also the least politically powerful." *Kelo*, 545 U.S. at 521 (Thomas, J., dissenting). Accordingly, the poor would be most susceptible to condemnation if economic redevelopment of lands deemed at risk of potential future blight were considered a valid public use. Justice Thomas emphasized this point, observing that after the Court had first upheld the use of eminent domain to redevelop blighted areas in *Berman v. Parker*, 348 U.S. 26 (1954), cities rushed to draw plans

for downtown development. *Kelo*, 545 U.S. at 522 (Thomas, J., dissenting). Of the families displaced by the urban renewal rush caused by *Berman* between 1949 and 1963, 63% were racial minorities. *Id.*; *see also* Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 Yale L. & Pol'y Rev. 1, 6 (2003) ("Blight was a facially neutral term infused with racial and ethnic prejudice.").

Considering the demonstrably unfair history of redevelopment takings, the dissenters' skepticism toward promised economic development was warranted. Indeed, since *Kelo*, further empirical evidence demonstrates how economic condemnation devastates poor and minority communities. *See* Dick M. Carpenter & John Ross, *Testing O'Connor and Thomas: Does the Use of Eminent Domain Target Poor and Minority Communities?*, 46 Urb. Stud. 2447 (Sept. 2009). Communities targeted by eminent domain tend to have more ethnic or racial minorities, have less education, and earn far less income than surrounding communities unaffected by condemnations. *Id.* at 2455. Those who are displaced by eminent domain use are also more likely to be renters and live at or below the federal poverty line. *Id.* at 2456.[6]

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[6] Small businesses are also often victimized. They usually lack the political clout of large enterprises and are often undercompensated for their losses. *See, e.g.*, Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 Mich. L. Rev. 101, 106 (2006) (noting that uncompensated losses "work to the particular detriment of small business owners [because] some find that they are unable to reopen after they are displaced by eminent domain, while others relocate but subsequently fail").

This Court should grant this petition to ensure that the public use requirement safeguards against the use of pretextual economic rationale to take private property to benefit favored persons or corporations.

IV.

IF NO ENFORCEABLE LIMITS EXIST, CERTIORARI SHOULD BE GRANTED TO OVERRULE *KELO*

The Court need not overrule *Kelo* to find that the taking of Eychaner's property was unconstitutional. But if the Court agrees that the decision below is consistent with *Kelo*, the Court should consider overruling its holding that the transfer of condemned property to private parties for "economic development" is a permissible public use. *Kelo*, 545 U.S. at 478–85.

This Court has stated that it will "overrule an erroneously decided precedent . . . *if*: (1) its foundations have been 'ero[ded]' by subsequent decisions; (2) it has been subject to 'substantial and continuing' criticism; and (3) it has not induced 'individual or societal reliance' that counsels against overturning" it. *Lawrence v. Texas*, 539 U.S. 558, 587–88 (2003) (citations omitted). The Court also considers "the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, . . . and reliance on the decision." *Knick*, 139 S. Ct. at 2178 (quoting *Janus v. State, County, and Mun. Employees*, 138 S. Ct. 2448, 2478 (2018)).

A. *Kelo* Has Faced Widespread Criticism

Since *Kelo* is a recent decision[7] and the Court has not decided any other public use cases since then, it has not yet been "eroded" by future Supreme Court precedents. But few Supreme Court cases have endured as much "substantial and continuing criticism" as *Kelo*. The decision has been opposed by over 80 percent of the public and has generated massive criticism across the political spectrum, including by groups as varied as the NAACP, the American Association of Retired Persons, and the Becket Fund for Religious Liberty. *See* Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 Minn. L. Rev. 2100, 2108–14 (2009) (summarizing the widespread criticism). Numerous state supreme courts to have considered the question have repudiated *Kelo* when interpreting a state constitution's public use clause. *See City of Norwood v. Horney*, 853 N.E.2d 1115, 1136–38 (Ohio 2006) (repudiating *Kelo* and holding that "economic development" alone does not justify condemnation, even though Ohio's Public Use Clause has similar wording to the federal one); *Bd. of County Comm'rs of Muskogee Cty. v. Lowery*, 136 P.3d 639, 646–52 (Okla. 2006) (holding that "economic development" is not a "public purpose" and rejecting *Kelo* as a guide to interpretation of Oklahoma's state constitution); *Benson v. State*, 710 N.W.2d 131, 146 (S.D. 2006) (concluding that the South Dakota constitution gives property owners broader protection than *Kelo*, even

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[7] Although *Kelo* was decided 16 years ago, it still qualifies as a "recent decision" for the purposes of the stare decisis inquiry. *Montejo v. La.*, 556 U.S. 778, 793 (2009). (decision that is "only two decades old" is less likely to establish legal expectations).

though the two have similarly worded public use clauses). Forty-three States enacted a legislative or constitutional change in response to *Kelo*, most commonly through limits on the definition of "public use" or "blight." *See* Dana Berliner, *Looking Back Ten Years After* Kelo, 125 Yale L.J. Forum 82, 84 (2015). Many takings scholars have also criticized *Kelo*. *See*, *e.g.*, Richard A. Epstein, *Supreme Neglect: How to Revive Constitutional Protection for Private Property* 83–86 (Oxford Univ. Press 2008); James W. Ely, Jr., *"Poor Relation" Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2005 Cato Sup. Ct. Rev. 39; and Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After* Kelo, 15 Sup. Ct. Econ. Rev. 183, 229–47 (2007).

B. *Kelo* was Decided Based on Seriously Flawed Reasoning

The quality of a precedent's reasoning is a crucial factor in determining whether it should be overruled. *Montejo*, 556 U.S. at 793. The *Kelo* majority opinion's reasoning has grave deficiencies that have become more apparent since 2005. Even Justice John Paul Stevens, author of the Court's opinion, has admitted that its reasoning was based in part on an "embarrassing" error: the assumption that a series of late nineteenth and early twentieth century "substantive due process" Supreme Court decisions applying a highly deferential approach to state government takings were actually decided under the Takings Clause of the Fifth Amendment.[8] The *Kelo*

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[8] John Paul Stevens, Address at University of Alabama School of Law, Albritton Lecture: Kelo*, Popularity, and Substantive Due Process* (Nov. 16, 2011), 14–18, *available at* http://www.supremecourt.gOv/publicinfo/speeches/1.pdf.

Court relied on these cases for the proposition that the outcome had the support of "more than a century" of precedent. *Kelo*, 545 U.S. at 483; *see also* Somin, *Controlling the Grasping Hand*, at 241–44 (describing this mistake in detail and explaining its significance to the outcome). An "embarrassing" error in reasoning—publicly acknowledged by the author of the Court's opinion—provides strong justification for the Court to at least consider overruling *Kelo*.

Kelo also represents an unusual anomaly in this Court's jurisprudence on the Bill of Rights. In sharp contrast to its treatment of every other individual right enumerated in that document, *Kelo* allows the very same governments who abuse their eminent domain power to define the scope of the rights protected under the Public Use Clause. Even though it recognizes that the Fifth Amendment protects citizens against takings that are not for a "public use," *Kelo* gives almost unlimited deference to "legislative judgment" in determining what counts as a valid public purpose, if the official rationale is not a mere pretext. 545 U.S. at 480. Currently, "among all the guarantees of the Bill of Rights, only the public use limitation is singled out for heavy [judicial] deference." Ely, *supra*, at 62. The Court recently jettisoned another such anomaly in takings law by overruling the state-litigation requirement to bring a federal takings claim, which mistakenly "relegate[d] the Takings Clause 'to the status of a poor relation' among the provisions of the Bill of Rights." *Knick*, 139 S. Ct. at 2169 (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994)). It should do the same to *Kelo*'s mistaken interpretation of the Public Use Clause.

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This petition demonstrates the flaws in *Kelo*'s reasoning. Wrong the moment it was decided, subsequent events have only confirmed the Court's error. If the Court cannot enforce any limits on economic development takings, the time has come to overrule *Kelo*.

CONCLUSION

For the foregoing reasons, Amici respectfully request that this Court grant the petition for certiorari.

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