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 OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Supreme Court should overturn *Kelo v. City of New London*, 545 U.S. 469 (2005), given its misreading of the original meaning of the Fifth Amendment's public-use limitation—including its historical judicial treatment—and its reliance on two flawed precedents, *Berman v. Parker*, 348 U.S. 26 (1954) and *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies works to restore limited constitutional government, which is the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

This case interests Cato because it directly questions the Court's ruling in *Kelo v. City of New London*, 545 U.S. 469 (2005), a much-criticized decision that allows governments to seize and reallocate property from one private party to another under the guise of eminent domain. *Kelo* is anathema to the original meaning of and the Court's own precedent regarding "public use" under the Takings Clause. Overturning *Kelo* would help return to property the same robust protections from state interference that are accorded life and liberty, the other pillars of the Lockean philosophy at the heart of our nation's founding documents.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case affords the Court its best chance yet to overturn the mistaken decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), which its author

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[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

acknowledged was "the most unpopular opinion I ever wrote, no doubt about it." Jess Bravin, "Justice Stevens on His 'Most Unpopular Opinion,'" Wall St. J., Nov. 11, 2015, https://on.wsj.com/3t4GFQk. Some of that unpopularity lacks merit—manifestations of the same armchair-quarterbacking that follows the Court whenever it rules on politicized controversies. But some of its critiques are legitimate and warrant consideration. Among them is that *Kelo* misunderstands (and in some respects ignores) the original meaning of the Takings Clause's public-use limitation and its historical treatment to permit anything that a legislature could conceivably view as *helpful* to the public, regardless of whether it provides public access or utility, *or even that the taken property is used at all*. The land at issue in *Kelo*, for example, remains undeveloped. *See* Jeff Benedict, "'Pink House' Author Says It's Time for a New Ending to Eminent Domain Story," *The Day* (New London, Conn.), May 25, 2018, https://bit.ly/3v8yxjt ("Thirteen years after the *Kelo* decision, after all the condemning and evicting and bulldozing, nothing has been built on the land that was taken. Basically, an entire neighborhood was erased in vain.").

Kelo's illogic renders the words "public use" surplusage. One of its dissents points this out, also targeting the majority's false equation of public use with "incidental public benefits." *Kelo*, 545 U.S. at 494 (O'Connor, J., dissenting). Even if the *term* "public use" is employed in every eminent domain action, *Kelo*'s broad deference to legislative wisdom renders it toothless, as this case amply demonstrates.

Chicago's move here to seize petitioner's property and transfer it to a chocolate manufacturer bears key

similarities to New London's actions in *Kelo*. "Chicago took property from [Eychaner] to [Blommer Chocolate Company] for private use. It did so because it needed [Blommer's] support for a new manufacturing district that included the properties of both [Eychaner] and [Blommer]." Pet. Br. at 2. Even more egregious than New London's efforts, Chicago "justified the taking as necessary to prevent *future* blight." *Id.* This is important because, unlike Fort Trumbull in the relatively more dilapidated New London (which was not "blighted" but rather "sufficiently distressed to justify a program of economic rejuvenation," 545 U.S. at 483), the Chicago neighborhood in which petitioner's property is located is even further from being blighted: "The possible future blight cited by the City to justify the taking in 2005 has never materialized. Rather . . . there was a 'surge in development and market demand in the area.'" *Id.* at 10 (internal citations omitted). The Court "has never held that avoiding future blight is a valid basis for taking property," But *Kelo*'s deference to legislative judgments opens the door to such a ruling. *Id*. at 2.

Aside from the perverse consequences of allowing governments to transfer property to private entities to increase tax revenue, *Kelo* was wrong as a matter of constitutional interpretation. Its reasoning is erroneous from a contemporary perspective and from those of 1791 and the mid-19th century, during which a clear majority of courts took the natural view that public use means "use by the public." *Kelo* should never have been decided as it was, and this Court now has an opportunity to remedy that.

ARGUMENT

I. INTEPRETATIONS OF THE TAKINGS CLAUSE, FROM RATIFICATION UNTIL *BERMAN*, FATALLY UNDERMINE *KELO*'S VIEW OF THE PUBLIC USE CLAUSE

The original meaning of the Constitution's text is essential. *See* Antonin Scalia, Ori*ginalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 854 (1989) ("[T]he Constitution, though it has an effect superior to other laws, is in its nature the sort of 'law' that is the business of the courts—an enactment that has a fixed meaning ascertainable through the usual devises familiar to those learned in the law."). This is especially true for the Takings Clause, since it involves rights in property, the preservation of which is the *condicio sine qua non* of government. John Locke, S*econd Treatise of Government* § 124 (C.B. Macpherson ed., 1980) (1690) ("The great and *chief end*, therefore, of men's uniting into common-wealths, and putting themselves under government, *is the preservation of their property*.") (emphasis original).

The Framers shared this view and thus entrusted counter-majoritarian courts with enforcing limits on democratic interferences with private rights. *See* Gordon S. Wood, *The Radicalism of the American Revolution* 324 (1991) ("Placing legal boundaries around issues such as property rights and contracts had the effect of isolating these issues from popular tampering, partisan debate, and the clashes of interest-group politics. Some things, including the power to define property and interpret constitutions, became matters not of political interest to be determined by legislatures but of the 'fixed principles'

of law to be determined only by judges."). Justice Thomas reiterated this point in his *Kelo* dissent: "Even under the 'public purpose' interpretation" of the Public Use Clause, "it is most implausible that the Framers intended to defer to legislatures as to what satisfies the Public Use Clause, uniquely among all the express provisions of the Bill of Rights." 545 U.S. at 517 (Thomas, J., dissenting).

Soon after the Fifth Amendment's ratification, James Madison, the amendment's chief author, wrote that "Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses." "This being the end of government," Madison continued, "that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*." James Madison, "Property," Nat'l Gazette, Mar. 29, 1792 in *James Madison: Writings* 515 (Jack N. Rakove ed., 1999) (emphasis original). Or, as John Adams tersely put it, "Property must be secured or liberty cannot exist." John Adams, 6 *The Works of John Adams* 280 (Charles Francis Adams ed., 1851). Madison and Adams were not alone in their view that the nature of property placed it beyond the purview of ordinary state administration. The majority of their contemporaries among the politico-intellectual elite shared this belief. As did the American public. Paul J. Larkin, Jr., *The Original Understanding of 'Property' in the Constitution*, 100 Marq. L. Rev. 1, 42–43 (2016) ("Other Founders such as Alexander Hamilton, John Dickinson, Gouverneur Morris, John Rutledge, and Rufus King echoed the opinions of Adams and Madison. . . . The Colonists widely shared the Framers' views.") (internal citations omitted).

Although the collective opinion of the American public is difficult to measure, especially in the 18th century, several state constitutions predating the Fifth Amendment illustrated the long-held suspicion of the "despotic power" of eminent domain. The Vermont Republic's declared "private property ought to be subservient to *public uses*, when *necessity* requires it." Vt. Const. (1786) ch. 1, cl. II. (emphases added). Massachusetts's provided that "whenever the public exigencies require, that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." Mass. Const. (1780) art. X. More than a century before, Carolina's first constitution, which John Locke drafted, shows that colonials' suspicions of the state's eminent-domain power far predated mid-18th-century grievances about stamps and tea: "[The high steward's court] shall have power also to make any public building, or any new highway, or enlarge any old highway, upon any man's land whatsoever; as also to make cuts, channels, banks, locks, and bridges, for making rivers navigable, or for draining fens, *or any other public use*." Fundamental Consts. of Carolina § 44 (1669) (emphasis added).

These state-level provisions reflected established theorists' ideal that the eminent-domain power be limited to necessary public uses. While the "inherent-power concept" of eminent domain "traces back to the early speculative writers on eminent domain, the civil law jurisprudents Pufendorf, Bynkershoek, and Vattel," the pre-Lockean Dutch philosopher Grotius, who "is generally considered the father of modern eminent domain law" (and also coined the term), earlier "[spoke] of the principle that '*public*

advantage' should prevail over 'private advantage.'" William B. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 559–60 (1972) (citing Grotius, *De Jure Belli ac Pacis* 807 (F. Kelsey transl., 1925) (1625) (emphasis added). William Blackstone took an even stronger position:

> So great . . . is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through [private] grounds . . . it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land.

Blackstone, 1 *Commentaries on the Laws of England* 134 (repr. 1979) (1765); *see generally* William D. Bader, *Some Thoughts on Blackstone, Precedent, and Originalism*, 19 Vt. L. Rev. 5, 7–10 (1994).

When the Framers invested the new federal government with this power, just compensation was one novel means of limiting eminent domain to its truly necessary exercise. So too was an *explicit* public-use limitation. James W. Ely, Jr., *"'Poor Relation' Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2004–2005 Cato Sup. Ct. Rev. 39, 54 (2005) ("Consistent with their high regard for private property as the bedrock of individual liberties, the Framers of the Bill of Rights restricted the exercise of eminent domain by imposing the 'public use' and 'just compensation' restraints in the Fifth Amendment.").

Grotius would have been proud. As would have the authors of the Massachusetts Body of Liberties (1641), who, in writing that "'[n]o man['s] [c]attel or goods of what kinde soever shall be pressed or taken for any publique use' . . . may have drawn upon Grotius's work for the phrase 'publique use,' choosing 'use' rather than 'benefit' as the 'correct' translation." Bucker F. Melton, Jr., *Eminent Domain, Public Use, and the Conundrum of Original Intent*, 36 Nat. Resources J. 59, 71–72 (1996) (quoting *Massachusetts Body of Liberties* § 8 (1641), reprinted in 5 *Sources and Documents of United States Constitutions* 48 (William F. Swindler ed., 1975)).

State antecedents aside, the American public of 1791 had good reason to take seriously limitations on public invasions of the private realm. Their forebearers had "flocked" to the New World in part "because of the promise of finally owning their own land, rather than serving a landlord." Larkin, *supra*, at 23. And the chance for a plot of one's own was still plausible at the start of the Revolution: "Anyone who wanted his own land could find it in the western portions of the Colonies or in the unsettled territories across the Appalachian Mountains." *Id.* at 24. According to the esteemed historian Bernard Bailyn:

> The sanctity of private property and the benefits of commercial expansion . . . were simply assumed—the Revolution was fought in part to protect the individual's right to private property—nor were acquisitiveness, the preservation of private possessions, and reasonable economic development believed to be in necessary conflict with the civil rectitude that free, republic[an] governments required to

> survive. Later, generations later, such a conflict might be seen to emerge in complex ways, but for the Revolutionary generation and its immediate successors there were harmonious values, implicit in a configuration of ideas that had evolved through the critical passages of Anglo-American history.

Faces of Revolution: Personalities and Themes in the Struggle for American Independence 206 (1990).

Americans in the post-Revolution era were thus apt to give little quarter to philosophical pedantries that would strip the clause of its prophylactic power:

> Anyone who studies the Revolution must notice at once the attachment of all articulate Americans to property. . . . [H]istorians have often felt that this concern . . . was a rather shabby thing . . . and that the constitutional principles . . . were invented to hide it under a more attractive cloak. But the Americans were actually quite shameless about their concern for property and made no effort to hide it, because it did not seem at all shabby to them.

Edmund Morgan, *The Challenge of the American Revolution* 54–55 (1976).

This sense explains the absence of any real discussion of the Takings Clause in the lead up to the Fifth Amendment's ratification. The Framers and the public already knew that the clause by its own terms severely limited public interferences with private property. And initial post-ratification rulings, which provided a foundation for mid-19th-century jurisprudence on the subject, hewed close to the

clause's formative ethos: limiting the power of eminent domain to cases in which the state could establish (not just conject) that the taking made a public use of the confiscated property. "Though there was surprisingly little early discussion of the meaning of the Public Use Clause . . . at the time it was enacted," the "framers['] and ratifiers['] . . . generally strong concern about the need to protect property rights provides at least some support for" a "narrow . . . interpretation of 'public use.' Ilya Somin, *The Grasping Hand:* Kelo v. City of New London *and the Limits of Eminent Domain* 37 (2015).

Shortly after the Bill of Rights was ratified, Justice William Paterson set the tone in *Vanhorne's Lessee v. Dorrance*, declaring that government must not exercise its "despotic power" of eminent domain "except in urgent cases, or cases of the first necessity." 2 U.S. (2 Dall.) 304, 311(1795). "It is . . . difficult to form a case," Paterson continued, "to authorise or excuse the seizing of landed property belonging to one citizen, and giving it to another citizen." *Id*. In all cases in which neither urgency nor necessity demand confiscation of private property, "[t]he constitution encircles, and renders it a holy thing." *Id*. Justice Samuel Chase, in *Calder v. Bull*, further held that "a law that takes property from A[] and gives it to B . . . is against all reason and justice, for a people to entrust a Legislature with *such* powers; and, therefore, it cannot be presumed to have done it." 3 U.S. (3 Dall.) 386, 388 (1798) (emphasis original).

Professor Ilya Somin emphasizes that the narrow view of public use voiced by Justices Paterson and Chase was not limited to interpreting the federal Takings Clause. During the mid-19th century, about

two-thirds of state courts grappling with the question read into their respective constitutions a strict public-use requirement, even occasionally in cases where their constitution made no express reference to it. Of the 25 states that resolved the state-constitutional question before 1877, 16 adopted the narrow view, and nine the broad. Somin, *supra*, at 44–46.

The narrow view did not *foreclose* private ownership of land requisitioned through eminent-domain actions. *See Olcott v. Supervisors*, 83 U.S. 678, 695 (1872). Rather, as the case law on privately operated and publicly accessible grist mills (and later on privately owned railroads) demonstrates, the narrow view simply meant, in the words of the Maine Supreme Court, that "private property can only be said to have been taken for public use when . . . the public have certain well-defined rights to that use secured, as the right to use the public highway." "But when it is so appropriated that the public have no rights to its use secured, it is difficult to perceive how such an appropriation can be denominated a public use." *Jordan v. Woodward*, 40 Me. 317, 323 (1855). Several other state courts that adopted the narrow view took the same position that public use did not necessitate public ownership but *did* require public access or utilization. *See* Somin, *supra*, at 47–49.

This Court eventually endorsed this view in a case dealing with "mill acts," echoing Justice Chase's narrow prescription for public use. *See Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 26 (1885) (reasoning that "the validity of general mill acts as taking private property for public use, in the strict constitutional meaning of that phrase . . . is clearly valid as a just and reasonable exercise of the power of the

legislature"). This stands in stark contrast to the Court's late-20th century off-road adventure, in which it stretched "public use" to cover "public purposes" and other buzzwords for ordinary police powers. *See Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984).

After the Fourteenth Amendment's ratification, courts continued to debate the broad versus narrow view of "public use," though these conversations did not anticipate the extent to which this Court would depart from even the broadest approach in under a century's time. Indeed, less than a quarter-century before *Berman v. Parker*, 348 U.S. 26 (1954), erased the historical treatment of the public-use limitation in favor of radical legislative deference, the Court "still clung to the position that legislative declarations of public use were subject to de novo judicial review." *See* Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61, 68 (1987) (citing *Cincinnati v. Vester*, 281 U.S. 439, 446 (1930), which held it "well established that in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one").

The same year the states ratified the Fourteenth Amendment, Thomas Cooley, among the most prominent legal scholars of the post-Civil War period, summarized the then-prevailing narrow view (which would not survive *Berman*): "The public use implies a possession, occupation, and enjoyment of the land by the public or public agencies; and there could be no protection whatever to property, if the right of the government to seize and appropriate it could exist for any other use." Thomas Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the*

Legislative Power of the States of the American Union 531 (1868). As discussed above, at the close of the 18th century there were already hints of a jurisprudential muddle that in the next century would pave the way for *Berman*'s complete (and wholly unjustified) break with the past. As Professor Somin summarizes:

> The terms "public use" and "public purpose" were sometimes used interchangeably even in the nineteenth century. An 1894 treatise on eminent domain noted that, in the context of takings "use . . . is interchangeable with purpose. But it was only in the twentieth century that, in the dominant view of jurists and commentators, public use was equated to public purpose in such a way as to require virtually unlimited judicial deference.

Somin, *supra*, at 55–56 (internal citations omitted).

II. *KELO*'S RELIANCE ON *BERMAN* AND *MIDKIFF* IS MISPLACED, AND FURTHER WEAKENS ITS INTERPRETATION OF THE PUBLIC USE CLAUSE

Kelo minimized more than a century of case law in favor of a select few prior rulings that supported the tautological argument that a legislature's *definition* of public use means anything that legislature *defines* as serving a public purpose:

> On the one hand, it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B* . . . On the other hand, it is equally clear that a State may transfer property from one private party to another if

> future "use by the public" is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example.

545 U.S. at 477. *See* Gideon Kanner, *The Public Use Clause: Constitutional Mandate or Hortatory Fluff*, 33 Pepp. L. Rev. 335, 337–38 (2006) ("The process created by the Supreme Court thus has a built-in circularity. Under this process, little is left to the courts to do other than de facto rubber-stamp the condemnor's decision. Thus, the Court has constructed a process in which the constitutional mandate of 'public use' is reduced to unenforceable hortatory fluff.") (cleaned up).

Kelo's reasoning above is partly correct; its take on railroads mirrors most 19th-century jurisprudence. Beyond that, however, it is unsalvageable, reliant as it is on *Berman* and *Midkiff*, two opinions that also misinterpreted the original meaning and historical judicial treatment of the Takings Clause's public-use limitation. From them *Kelo* drew the false conclusion that the established definition of "public use" is broad enough to cover actions for which legislatures have a future public use in mind. 545 U.S. at 477.

In one sentence, Justice Stevens jettisoned the narrow view that had won over courts post-1791: "Indeed, while many state courts in the mid-19th century endorsed 'use by the public' as the proper definition of public use, that narrow view steadily eroded over time." *Id*. at 479. In *Berman* and *Midkiff*, he found the means to wash the slate clean. That was a mistake then, and it ought to be corrected now.

Berman upheld the condemnation of a shopping center *outside* a blighted area in D.C., reasoning that "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. . . . This principle admits no exception merely because the power of eminent domain is involved." 348 U.S. at 32. This conclusion obviously confused "public use" and "public interest," and missed that the Takings Clause works a clear "exception" from ordinary public-interest actions for seizures of private property.

While some courts in the late 19th and early 20th centuries had begun to accommodate broader definitions of "public use," they still mostly used their independent judgment to determine whether the purported "public use" was justified. *See Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co.*, 240 U.S. 30 (1916) (upholding seizure of land to be used for the construction of a hydroelectric dam that would sell power to the public); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 160 (1896) (finding that "in a [s]tate like California, which confessedly embraces millions of acres of arid lands, an act of the legislature providing for their irrigation" through the appropriation of private water rights, "might well be regarded as an act devoting the water to a public use, and therefore as a valid exercise of the legislative power."). This stance stands in stark contrast to Justice Douglas's view in *Berman* that public use is whatever a legislature needs it to be. *See* Note, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 Yale L.J 599, 613–14 (1949) (anticipating *Berman*, "so far as the federal courts are concerned *neither state legislatures nor Congress need be concerned* about the public test

in *any* of its ramifications") (emphasis added); Bruce A. Ackerman, *Private Property and the Constitution* 190 n.5 (1977) (reflecting *Berman*, "any state purpose otherwise constitutional should qualify as sufficiently 'public' to justify a taking").

Berman and the scholarship bookending it demonstrate a fundamental confusion over the weight of an *express* constitutional provision. As Justice Thomas put it:

> The phrase "public use" contrasts with the very different phrase "general welfare" used elsewhere in the Constitution. . . . The Framers would have used some such broader term if they had meant the Public Use Clause to have a similarly sweeping scope. Other founding-era documents made the contrast between these two usages still more explicit.

Kelo, 545 U.S. at 509 (Thomas, J., dissenting) (cleaned up).

Midkiff's confusion of the state's eminent-domain power with its police powers repeated *Berman*'s error, though with a tactfulness that perhaps mostly reflects differences between the writing styles of Justice O'Connor and Justice Douglas. "By focusing on the breadth of a state's police power and on the deferential standard of review," one contemporary law review put it, "the [*Midkiff*] Court successfully avoided an independent examination of public use, a traditional judicial function." Note, *Constitutional Review of State Eminent Domain Legislation:* Hawaii Housing Authority v. Midkiff, 9 U. Puget Sound L. Rev. 233, 235 (1985). The *Midkiff* Court had reasoned, incorrectly, that "the 'public use' requirement . . . is

coterminous with the scope of a sovereign's police powers." 467 U.S. at 240; *see also* Richard A. Epstein, *Public Use in a Post-*Kelo *World*, 17 Sup. Ct. Econ. Rev. 151, 168 (2009) ("[T]he conscious equation of the police power with the public use in *Midkiff* by calling them 'coterminous' shows a complete unawareness of the wholly different requirements to take property with compensation versus the right to regulate property use without compensation.").

The precedents that *Berman* claimed supported its conflation of public purpose with public use—upon which *Midkiff* would build—had in fact done no such thing. *Old Dominion v. United States* involved the confiscation of land leased to the federal government for "military purposes," to ensure that buildings erected on the property were not destroyed. 269 U.S. 55, 66 (1925). While this use was not "public" in the obvious sense—not like a highway or a city hall—it is implausible to suggest that the government's seizure of land to fulfill an authority the Constitution *expressly* accorded it does not qualify as a "public use" simply because the public does not have direct access. *Old Dominion* fits seamlessly with Justice Thomas's estimation of the Public Use Clause as "allow[ing] the government to take property only if the government owns, or the public has a legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever." *Kelo*, 545 U.S. at 508 (Thomas, J., dissenting).

And while *United States ex rel. Tenn. Valley Auth. v. Welch* called the eminent-domain action to construct a hydroelectric dam a "public purpose," it used it interchangeably with "public use" and it's unlikely the Court meant to broaden the scope of the

latter to include the former. 327 U.S. 546, 552 (1946). The "purpose" in *Welch* was without question coterminous with the bona fide public use of providing electricity to millions—then perhaps the apogee of a state's public-service capacity.

For all of *Berman*'s flaws, the ruling was incredibly influential inside and outside the courts, and there was no equally prominent public-use case standing between it and *Midkiff*. The Court in 1984 might thus be excused for seeking to fold its reasoning into the established line of thought. *See* Somin, *supra*, at 58 ("In addition to establishing the dominant interpretation of the federal Public Use Clause, *Berman* also exercised enormous influence over state court interpretations of their state public use clauses."); *see also Kelo*, 545 U.S. at 522 (Thomas, J., dissenting) ("In the 1950s, no doubt emboldened in part by the expansive understanding of 'public use' this Court adopted in *Berman*, cities 'rushed to draw plans' for downtown development.") (internal citation omitted).

Yet the *Midkiff* Court was still careful to draw one crucial limitation that Justice Douglas in *Berman* had not bothered to sketch: "There is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power." 467 U.S. at 240. But *Midkiff* continued: "[L]ong ago" the Court had "rejected any literal requirement that condemned property be put into use for the general public." *Id.* at 245. *Midkiff* thus dropped any pretense that eminent-domain and police-power actions still need be distinguished in order to measure the legislative deference due one or the other.

Midkiff, while different from a blight-based taking, followed from the tragically low bar set by *Berman*. The *Midkiff* takings were designed "to reduce the concentration of ownerships" in Hawaii, which included "22 landowners own[ing] 72.5% of the fee simple titles" on Oahu, the state's most populous island. 467 U.S. at 232. At least in *Midkiff*, however, the "public purpose" could be seen as ameliorating the problem of a status quo that had "forced thousands of individual homeowners to lease, rather than buy, the land underneath their homes." *Id*. at 242. That's arguably different (but no more justified under the Takings Clause) than *Kelo* and what Chicago is attempting here, where one party stands to lose its property so that another may privately benefit.

The Takings Clause puts private property beyond the reach of ordinary police powers for good reason. *Berman*, *Midkiff*, and *Kelo* all discount that idea in favor of legislative deference, one so wide that it pulls "public use" away from the Takings Clause and into the gravitational force of ordinary state actions. Deference to legislative judgments can be warranted, but it should not be so extensive as to prevent a court from determining whether those judgments are within established constitutional bounds:

> We give considerable deference to legislatures' determinations about what governmental activities will advantage the public. But were the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff.

Kelo, 545 U.S. at 497 (O'Connor, J., dissenting).

As discussed above, the Framers' conception of government—designed to protect rather than delineate property rights—motivated the inclusion in the Takings Clause of the two novel safeguards of just compensation and public use. *Midkiff* and especially *Berman* ignored that and stretched the meaning of "public use" far beyond what the clause was designed to accommodate. In doing so, they opened the door to *Kelo*'s "economic distress"-based transfer, and now, fearfully, to Chicago's attempt at a future-blight-based transfer. *Kelo* upset many commentators out of fear that it would engender a type of class warfare on lower-income property owners. Now, with the concept of "future blight"—if this Court allows it to stand—no one would be safe.

III. THIS CASE AFFORDS A PRIME OPPORTUNITY TO LIMIT *KELO* OR EVEN OVERTURN IT

While *stare decisis* counsels against overturning established precedent, its force is "at its weakest" when a court "interpret[s] the Constitution." *Agostini v. Felton*, 521 U.S. 203, 235 (1997). In *Knick v. Township of Scott*, the Court overturned an 8-1 longstanding takings precedent that required exhaustion of state-level remedies before a takings claim could be presented in federal court. *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985), *overruled by Knick*, 139 S. Ct. 2162, 2179 (2019).

The *Knick* Court was apparently so concerned with the unconstitutionality of that doctrine that it did not consider the societal reliance on *Williamson County* to be remotely dispositive, rejecting Justice

Kagan's dissenting argument that *Knick* did *not* involve "a special justification—over and above the belief that the precedent was wrongly decided"—the threshold at which *stare decisis* may be overcome. 139 S. Ct. at 2189 (Kagan, J., dissenting) (citing *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015)). As the Court held, "*Williamson County* was not just wrong. Its reasoning was exceptionally ill founded and conflicted with much of our takings jurisprudence. . . . The decision has come in for repeated criticism over the years from Justices of this Court and many respected commentators." *Id.* at 2178.

Kelo's error demands the same bold pushback. The ruling misreads history and misinterprets flawed precedent; it "was wrong the day it was decided" and should be overturned. *See Planned Parenthood v. Casey*, 505 U.S. 833, 863 (1992) (referring to the Court's endorsement of "separate but equal" race-based segregation in *Plessy v. Ferguson*, 163 U.S. 537 (1896)). The critiques made of *Williamson County*, at least insofar as they license a break with *stare decisis*, could easily sound against *Kelo*.

One prominent difference between Eychaner's predicament and those of Fort Trumbull's holdouts is that the Court here could conceivably confine a ruling in Eychaner's favor to the question of future blight, circumventing *Kelo* altogether. But in all other relevant respects, this case is nearly identical to *Kelo*. It involves the same A-to-B private taking, masked as an eminent domain action under the attenuated banner of public purpose. In 2005, this interpretation infuriated the American public and frustrated the academy. The error need not be perpetuated.

With a proper incorporation of history and a focus on relevant case law, the Court can and should overturn *Kelo*, setting public-use doctrine back onto its proper course and "restoring" those "takings claims to the full-fledged constitutional status the Framers envisioned when they included the Clause among the other protections in the Bill or Rights." *Knick*, 139 S. Ct. at 2170.

CONCLUSION

For the foregoing reasons and those offered by petitioner and other *amici*, this Court should grant the petition, reverse the state appellate court, and reconsider *Kelo*.

Respectfully submitted,

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