Team 14

No. 24-386

IN THE

SUPREME COURT OF THE UNITED STATES

KARL FISCHER, ET AL.,

Petitioners,

V.

THE STATE OF NEW LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES

COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT

COUNSEL FOR THE RESPONDENT

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ISSUES PRESENTED

1. Under the Fifth Amendment's takings clause, should this Court's precedent *Kelo v. City* of New London be upheld when it permits legislatures and local governments the ability to address and transform poor properties into vibrant public uses for an economic plan with the hope that these plans would form a whole greater than the sum of its parts and result in the revitalization of the community?

2. Is the Takings Clause self-executing, thereby creating an implied cause of action against the State of New Louisiana for just compensation when the taking has not occurred yet and no other federal or state remedy is available?

STATEMENT OF THE CASE

A. STATEMENTS OF THE FACTS

The State of New Louisiana ("the State") has contracted with Pinecrest, Inc. ("Pinecrest") to develop an economic plan to build a new and luxurious ski resort. R. at 2. This project is estimated to produce 3,740 new jobs, dramatically increasing tax revenue for the area and revitalizing surrounding communities to ensure long-lasting benefits. R. at 2. Ninety out of 100 property owners have sold their land for the project. R. at 2. The properties in question have struggled to produce marketable crops because of the soil conditions and many of the plots have become overgrown, depleting their values as farmland. R. at 2. Some of the homes are in relatively poor condition, although none are run down or pose any risk or threat to the public. R. at. 3. However, many homes require substantial improvement and are depressing local market value. R. at 3. In addition, the average income of the neighborhood is $50,000, which is significantly lower than the surrounding neighborhoods. R. at 3. In order for the project to ensue, the State needs 1,000 acres of land owned by 100 different owners in three counties. R. at 2. The State relying on *Kelo v. City of New London*, the State argues that this economic development plan justifies a "public purpose" and a permissible taking should be allowed. R. at 3. A state law allows this taking purely for economic developments. R. at 2. In addition, the State has not waived immunity and in order for the property owners to obtain just compensation, the property owner must bring a claim under a statutory or executive waiver of sovereign immunity. R. at 2. Ten property owners have brought suit against the State's initiation of eminent domain proceedings. R. at 3. The district court has held that the taking is valid, and the plaintiffs have no claim for just compensation because the Fifth Amendment is not self-executing. R. at 4. Additionally, the district court of appeals agreed with the district court that the property owner's claim to enjoin the taking should be dismissed for

failure to state a claim upon which relief could be granted. R. at 10. The court agreed that "public use" allows a state to exercise its power to eminent domain proceedings when it pertains to economic development. R. at 10. The court of appeals also held that the Fifth Amendment was not self-executing and did not create a right to bring a claim for relief. R. at 10.

B. PROCEDURAL HISTORY

Ten holdout property owners brought suit against the State on March 15, 2023, seeking temporary and permanent injunctive relief for the State's alleged violation of the Takings Clause. The State responded to this suit by filing a motion to dismiss both claims under Fed. R. Civ. P. 12, claiming: (1) since *Kelo v. City of New London* allows for takings for economic development, this project satisfies the public use prong, and (2) the property owners cannot bring a claim for just compensation because the Fifth Amendment is not self-executing and does not provide an implied cause of action.

On June 28, 2023, the district Court granted the State's motion to dismiss, finding in favor of the State on both issues. On March 13, 2024, the Court of Appeals for the Thirteenth Circuit affirmed the district Court's decision to grant the State's motion to dismiss. On August 17, 2024, the Supreme Court of the United States granted the writ of certiorari and set the hearing for the October session.

C. STANDARD OF REVIEW

"[D]ecisions on questions of law are reviewable de novo, decisions on questions of fact are reviewable for clear error, and decisions on matters of discretion are reviewable for abuse of discretion." *Highmark Inc. v. Allcare Health Mgmt. Sys.*, Inc., 572 U.S. 559, 563 (2014). The questions presented are questions of law. Therefore, this court does not need to defer to any legal conclusion made by a lower court. *U.S. v. Gaitan-Acevedo*, 148 F.3d 577, 585 (6th Cir. 1998).

SUMMARY OF THE ARGUMENT

This Court should affirm with the appellate court's holding and uphold *Kelo* and find that the State's economic development plan is a "public use." "Given the plan's comprehensive character, the thorough deliberation that preceded its adoption . . . the takings challenged here satisfies the Fifth Amendment." *Kelo v. City of New London*, 545 U.S. 469, 445 (2005). In *Kelo*, the Supreme Court states that an economic development plan is for the public welfare and the concept of public welfare is broad and inclusive. *Id*. at 481. This law is still binding and serves the already broad nature of public use, evidenced by case law. The doctrine of stare decisis provides the means by which courts assures that the law will not merely change erratically but will develop in a principled and intelligible fashion. The doctrine permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals; and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986).

The integrity of *Kelo* is upheld through case law where courts have worked on the issue of eminent domain and what constitutes as a valid taking. The first time the Supreme Court addressed this issue was in 1875, *Kohl v. United States*, where the Court held that federal governments have the power to condemn property for "public use." Following the Supreme Court's decision, Congress developed the authority to broadly equate power to condemn property for public use. Congress has consistently operated on the 1875 reading and defined it broadly, allowing eminent domain power for economic projects such as creating jobs, allowing urban development projects, and constructing utilities. States have not pushed back on the 1875 interpretation and the definition has existed since this clause was incorporated into the states in 1897. Subsequent cases have upheld this general principle, allowing public use to be broadly

defined. Petitioners argue that the development plan is not valid as a "public use" and the ruling of the appellate court is erroneous. However, the ever-changing nature of our society serves as the foundational basis that certain case law does not need to be overturned because it is still workable. Thus, the ruling in *Kelo* should be respected as it is still valuable within this jurisprudence.

"Although the Takings Clause entitles a plaintiff whose property has been taken to monetary compensation, it does not provide for prospective relief to a plaintiff whose property has not been taken." *Ford v. U.S.*, 101 Fed. Cl. 234, 237–38 (2011). There has been no case that allows a cause of action to directly arise under the Fifth Amendment of the Constitution. In some of the most prominent cases that have been held against governments or states, the courts have decided that property owners have a right to just compensation when a taking occurs, however the claimant also needs to prove that their claim arises from a state statute or other regulation. The state statute or regulation acts as a "vehicle" to bring a cause of action under the Fifth Amendment. Since Congress has not addressed this issue and no case law can support that a cause of action directly arises from the Fifth Amendment's takings clause, this Court should rule that Petitioners have failed to state a claim and the motion to dismiss should be affirmed.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE APPELLATE COURT'S RULING ALLOWING THE LOCAL GOVERNMENT TO UTILIZE EMINENT DOMAIN BECAUSE THE STATE OF NEW LOUISIANA HAD A LEGITIMATE REASON FOR A PERMISSIBLE TAKING, AND THE REASONING IN *KELO V. CITY* OF NEW LONDON PERMITS SUCH A TAKING.

The Supreme Court allows a taking if the property will be used for a "public purpose" and serves a legitimate government purpose. *Kelo v. City of New London*, 545 U.S. 469, 488 (2005). Although "Public purpose" is not defined, courts interpret the phrase in a broad scope. *Id*. at 480. In addition, there must be clear and convincing evidence that the economic benefits of the plan would in fact come to pass. *Id.* at 477. The Supreme Court held in *Kelo v. City of New London* that a city's development plan serves a "public purpose." *Id.* at 490. There is no bright line rule that is used to justify a taking, instead, the courts will view the particular case in light of the entire plan and not on a piecemeal basis. *Berman v. Parker*, 348 U.S. 26, 35 (1954). In a concurring opinion by Justice Kennedy, his opinion outlines certain factors to determine whether a taking is permissible. The factors are (1) the local states must meet a burden of a rational basis standard of review under the Fifth Amendment's public use clause, by a clear showing, that does not intend to favor a particular private party, where the taking is incidental or pretextual public benefits; and (2) where the purpose of a taking is for economic development and that development is to be a carried out by a private party or parties will not benefit. *Kelo,* 469 U.S. at 491. Based on these factors, the court must decide if the stated public purpose is incidental to the benefits of the private parties. If the court is confronted with a plausible accusation of impermissible favoritism to private parties, the court should review the record to see if the objection has merit. *Id.* The court in *Kelo* has addressed that a state may work with a private entity to take advantage of a private entity's presence, so long as the state is not motivated by a desire to aid specific private entities. *Id.* at 492.

This Court should find that the State did not violate Petitioners' constitutional rights. Rather, the State has utilized its right to eminent domain for the general welfare of its community by having a legitimate public purpose to exercise eminent domain. Here, the legitimate public purpose is to help revitalize an economy by dramatically increasing tax revenue for the area, attracting wealthy tourists, and providing thousands of new jobs. In addition, the State is not serving a private entity nor is it allowing a private entity to directly benefit from using their constitutional right to eminent domain. Instead, the State is merely using the private entity's presence to increase the economic status of its state, which serves a public purpose.

A. This Court Should Find That *Kelo v. City of New London* Should be Upheld Under the Fifth Amendment's Takings Clause Because the Law Is Still Workable, Safeguards Reliance Interest, and Gives Local Governments Opportunities to Provide Appreciable Benefits to the Community.

As outlined above, this Court should not overturn *Kelo v. City of New London* because it is still considered workable. The Fifth Amendment is broadly interpreted to allow a taking of property if it serves an economic benefit to a community as a whole. The courts have the discretion to assess this power in order to determine whether a taking is constitutional. One of the determinations behind the constitutionality of a case is based on precedent, the holdings of higher courts, and the reasoning of those courts. These factors address the legal doctrine of *stare decisis*. "*Stare decisis* is the Latin phrase for a foundation stone of the rule of law: that things decided should stay decided unless there is a very good reason for change. It is a doctrine of judicial modesty and humility." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

When courts refer to precedents held by higher courts, they are not just looking to see whether the prior decision was wrong, but grievously or egregiously wrong. *Ramos v. Louisiana*, 590 U.S. 83, 121 (2020). A garden variety error or disagreement does not suffice to overrule. *Id.*

at 122. If the case was not so egregiously decided, then courts are able to utilize the reasoning of the higher courts to guide them through similar issues.

Stare decisis is not an inexorable command and *stare decisis* considerations are most relevant - "if the quality of the precedent case law's reasoning, the workability of the rule it established, and reliance on the decision." *Loper Bright Enters. v. Raimondo*, 144 U.S. 2244, 2270 (2024). The ambiguity of a statute, inconsistent interpretations of a statute, or the need to clarify a doctrine repeatedly, can sufficiently prove the reasoning behind a Supreme Court's holding is erroneous. *Id.* at 2265. The doctrine of *stare decisis* is at its weakest when we interpret the Constitution because a mistaken judicial interpretation of that supreme law is often "practically impossible" to correct through other means. *Ramos*, 590 U.S. at 119 (2020). The Supreme Court has repeatedly explained that *stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne*, 501 U.S at 827 (1991). "The doctrine permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Ramos*, 590 U.S. at 116 (2020). To overrule past precedent, the court demands a special justification or strong grounds. *Id*. at 120. "Special justification" or "strong grounds formulation" eludes a key question: In deciding to overrule an erroneous constitutional decision, how does the Court know when to overrule and when to stand pat? *Id.* at 121.

In *Loper Bright Enters. v. Raimondo*, the court exercised its independent judgment in deciding whether an agency acted within its statutory authority. Prior to this case, the Chevron deference allowed agencies to interpret the law within an agency's discretion and precluded courts

from exercising judicial power vested in them by Article III to say what the law is. The court in *Loper Bright Enterprise* found that the Chevron deference allowed ambiguous and inconsistent interpretation of certain laws. Due to this reasoning, the Supreme Court of the United States held that the Chevron deference was unworkable and did not provide a clear or easily applicable standard, therefore, relying on this argument based on its clarity was misplaced. Thus, the long-standing precedent that was valid for nearly 40 years was overturned. In support of precedent being reversed, courts also look to the evenhandedness and consistent developments of legal principles that foster reliance on judicial decisions and contribute to the actual and perceived integrity of the judicial process.

The court in *Ramos v. Louisiana* held that there needs to be a strong justification or strong grounds to overturn precedent. In *Ramos*, the plaintiff was accused of a serious crime. Two of the jurors decided to acquit and a particular state decided to convict the plaintiff. This state was one of the few states that decided to convict individuals even with a ten to two verdict. As a result, the plaintiff received a life sentence in prison without the possibility of parole. The plaintiff brought suit, and the Supreme Court held that it was unconstitutional for the state to decide whether the right to a trial by jury included a right to a unanimous verdict. The state tried to uphold its reasoning with previously held case law and the Supreme Court referred to the legal doctrine of *stare decisis*, holding that the precedence was egregiously wrong because they violated the constitutional rights of the plaintiff. In a concurring opinion in *Ramos*, the court looked at three separate factors when deciding to overturn precedent. First, in the view of the court that is considering whether to overrule, the precedent must be egregiously wrong as a matter of law in order for the court to overrule it. Second, the prior decision caused significant negative jurisprudential or real-world consequences, such as workability, as well as consistency and coherence with other decisions.

Finally, does the consideration of an unduly upset reliance focus on the legitimate expectations of those who have reasonably relied on the precedent?

Additionally, the defendant in *Payne v. Tennessee* tried to argue the statements made by family members of the victims and the prosecutor during the defendant's capital sentencing were highly prejudicial. The defendant referred to two cases in support of his argument, however, the court found that the state had the right to present evidence to counteract evidence presented by the defendant. In addition, the Eighth Amendment presented no per se bar that would violate the defendant's right. Thus, the Supreme Court stated that adhering to precedent "is usually the wise policy, because in most matters it is more important that the applicable rule of law needs to be settled." However, the Supreme Court has never felt constrained to follow precedent when governing decisions are unworkable or badly reasoned.

Unlike in *Loper Bright Enters. v. Raimondo*, the ruling held in *Kelo* is still binding and workable. Although the facts of both cases are not analogous, the court in *Loper* set certain factors that would make precedent unworkable. In *Kelo*, the court held the ruling was still workable because there was "clear and convincing evidence" that supported the holding of that case. In contrast, *Loper Bright Enterprises* dealt with evidence pertaining to the fact that there was no "clear and convincing evidence," but rather, there was ambiguity in determining the interpretation of agency law. Furthermore, the ruling in *Loper Bright Enterprises* showed that there was a history of inconsistency that could not support evenhandedness or reliance on agencies' statutory interpretations of the law. Here, as in *Kelo*, the courts can contradict the reasoning set forth in *Loper Bright Enterprises* because there was evenhandedness and reliance on statutory interpretation set forth by the Supreme Court. First, the State was able to show that an "economic development plan" suffices as a public purpose. Second, the State showed that the sole purpose of

the local government's plan was for the general welfare of the community. Finally, it was proven that the purpose of the plan was not to confer a private benefit on a particular private party. Similar to *Kelo*, the State has an "economic development plan" that's purported to impact the city as a whole. The State's efforts to revitalize the economy by expanding the State's tourism attractions and creating new jobs is an example set in *Kelo* as "public purpose." R. at 2. This new project, as illustrated in our case, will dramatically increase tax revenue for the area, attract wealthy tourists, and provide 3,470 new jobs. R. at 2. The projections, as held in *Kelo*, meet the requirements of "public purpose" that intend to benefit the general welfare of the city's community. R. at 2. These factors were enough to prove that there was evenhandedness in support of the court's reasoning. Furthermore, the Supreme Court has held that promoting economic development is a traditional and long-accepted function of the government. In our case, the governor contracted with Pinecrest to increase the surrounding properties' value, which the Supreme Court has deemed serve a public use. R. at 5. This proves that there is no private benefit to confer to a private entity. Also, *Kelo's* ruling is flexible enough to work with, rather than a strict interpretation of the law, as stated by Justice Hayes. R. at 12. Furthermore, the Supreme Court has relied on this reasoning to allow an eminent domain proceeding. Thus, ambiguity and lack of reliance on the court's analysis was not an issue, making the holding of *Kelo* still workable.

The court in *Ramos v. Louisiana* analyzes certain factors in deciding whether *stare decisis* should or should not be upheld. Such factors consist of when previously held rulings are egregiously wrong as a matter of law or if prior decisions caused significant negative jurisprudential factors, such as coherence with other decisions or inconsistencies. In *Kelo*, it is likely that it was not egregiously held because the court had a rational basis standard to determine whether eminent domain was permissible. By applying a rational basis review, the courts were

able to determine that the city in *Kelo* had a legitimate government interest when utilizing the takings clause under the Fifth Amendment. The city in *Kelo* was a city going through economic distress and this "economic development project" would create more than 1,000 jobs, increase tax and other revenues, and revitalize an economically distressed city. Analogous to *Kelo*, the State in our case, anticipates the same benefits as the city in *Kelo*. The efforts to boost its economy are encompassed within the meaning of "public purpose" and the lower courts in our case have concurred. R. at 10. Although there are no facts in the record that show the State is economically distressed, courts have not viewed this issue narrowly. There is no indication that a city needs to be economically distressed to create a plan where eminent domain proceedings may occur. Rather, the city needs to have a legitimate government interest to justify a taking. Here, the State's legitimate government interest is to revitalize and support its community and the surrounding community to ensure long-lasting benefits. R. at 2. The Supreme Court should view the plan in light as a whole rather than on a piecemeal basis and justify the state's program as an economic rejuvenation. Based on the analysis of the Supreme Court, the State had met its burden by proving a legitimate government purpose. This further supports the fact that this case was not egregiously held because there were no inconsistencies in light of this holding. The redevelopment plan was well thought out and the court laid out specific restrictions which the State did not violate. The court has not established a bright line rule but rather views cases as a whole depending on the circumstances of each case. Here, the State was able to meet their burden by showing the taking was qualified as a valid public use.

Similarly, in *Payne v. Tennessee*, the defendants tried to reason that precedent case law should be followed to show deference to previous court rulings, however, the Supreme Court held that precedent case law is not an inexorable command but rather a guide for courts to follow if

they have similar issues. The Supreme Court has also held that *stare decisis* should not be honored if there is evidence that precedent is badly reasoned or causes inconsistencies. Applying *Kelo*, the courts were able to reduce inconsistencies by laying out standards of when a permissible taking is allowed. The projected economic benefits displayed in *Kelo* would not have been characterized as too insignificant because it was to foster an economically depressed city. In our case, Justice Hayes concurs and justifies that *Kelo* should not be overturned because *stare decisis* is strongly presumed since it promotes stability and even-handedness. R. at 11. Unlike other cases, *Kelo* stated specific facts of when a taking would be unconstitutional, such as conferring a benefit to a sole entity or if the taking is inconsistent with the meaning of "public use." This reasoning supports the opinion that *Kelo* creates a straightforward rule that provides flexibility for the government to serve the public good. R. at 12. Here, there is no conferment to a private party and an economic development plan suffices as "public use." The reasoning set forth in *Kelo* has not been so inconsistent to produce a badly reasoned precedent but rather it sets forth a ruling that is flexible enough to work with in order to better serve the purpose of the takings clause. R. at 12. Arguably, there are other rulings that may seem inconsistent with *Kelo*, however, other cases such as *Knick v. Twp. of Scott*, only address the mechanism to bring forth a claim for just compensation and not about whether a valid taking has occurred or when it may occur. R. at 13.

B. <u>This Court Should Broadly Interpret Public Use When a Permissible Taking Occurs, Allowing Local Governments and States to Utilize the Takings Clause for an Economic Benefit.</u>

This Court should uphold *Kelo v. City of New London* and permit the taking of the petitioner's land as it is permissible under "public use." The Supreme Court's decision in *Kelo* has broadened the interpretation of the phrase "public use" to "public purpose." "A city's plan to take private property and transfer it to a private developer for economic development constituted a valid

'public use' under the Fifth Amendment." *Kelo*, 545 U.S. at 490 (2005). Historically, the term "public use" was narrowly interpreted to mean that the property had to be used by the general public. *Id.* at 479. However, it was more practical given the diverse and evolving needs of society to broaden the interpretation. *Id.* at 480. The Supreme Court emphasized judicial deference to legislative judgments in determining what constitutes a public purpose. *Id.* at 481. A government cannot take property solely to favor a private party, however, it can do so if the transfer serves a public purpose such as economic rejuvenation which benefits the community as a whole. *Id.* at 491.

Previous case law has held that protecting and promoting the welfare of inhabitants by eliminating all such injurious conditions by employing all means necessary are considered "public use." *Berman*, 348 U.S. at 28 (1954). "The concept of public welfare is broad and inclusive, which includes spiritual as well as physical, aesthetics as well as monetary." *Id.* at 33. "The acquisition and assembly of real property and the leasing or sale thereof for redevelopment pursuant to a project area development plan is declared to be public use." *Id.* at 29. Condemnation and redistribution of property to address the issue of concentrated property ownership is considered public use. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 242 (1984).

"Redevelopment of a blighted area, even standing alone, represents a classic example of a taking for public use." *Goldstein v. Pataki*, 516 F.3d 50, 59 (2d Cir. 2008). Community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis - lot by lot, building by building. *Id.* at 60. Although a taking from one private party that will ultimately go to another private party complies with this broader interpretation of public use, the state is free to "impose 'public use' requirements that are stricter than the federal baseline." *Benson v. State*, 2006 S.D. 8, 42, 710 N.W. 2d 131.

In *Kelo v. City of New London*, a city approved a development plan that had been submitted by a development agent. The plan was carefully formulated to produce thousands of new jobs and increase tax revenue. In order for the development plan to proceed, the agent needed to purchase most of the required property, but nine property owners refused to sell. The property owners brought suit, and the court held that the development plan served a public purpose, and the taking was valid under the Fifth Amendment. However, the Supreme has noted that a taking would be forbidden if the taking of the petitioner's land conferred a private benefit on a particular private party. In addition, the courts have decided to broaden the interpretation of "public use" to "public purpose," allowing a broad latitude in determining what public needs justify the use of the takings power.

For example, in *Berman v. Parker*, a city decided to undergo a project to redevelop an entire area. The property owners who brought the suit owned commercial property rather than residential property and objected to the appropriation of their property. One particular property owner argued that condemnation was a violation because his property was not blighted, however, the court disagreed with this argument. The Supreme Court of the United States held that it was within the state's legislative powers and rights to take on a project to beautify the community. It was within the legislative determination to protect and promote the welfare of the inhabitants by eliminating all such injurious conditions by employing all means necessary, which constituted a "public purpose." The city had established a public purpose, and the city was entitled to redevelop an entire area rather than on a piece-meal basis. In addition, the city in *Hawaii Housing Authority v. Midkiff* enacted an ordinance condemning and redistributing property to reduce the concentration of property ownership. The Supreme Court held that concentrated property ownership was perceived

as evil and laws preventing such ownership by transferring the title from the lessors to the lessees were deemed as "public purpose."

Similar to *Berman*, the city in *Goldstein v. Pataki* was undergoing a development plan in a blighted area and fifteen property owners brought suit. The reconstruction of the properties would serve a well-established public use, such as the redress of blighted areas, the construction of a sporting arena, and the creation of new housing, which included affordable housing for thousands of people. The petitioners tried to argue that the city had pretextual reasons, but the court disagreed with this notion, stating that the public-use requirement is satisfied as long as the purpose involves developing an area to create conditions that would prevent a reversion to blight in the future. However, in *Benson v. State*, the Supreme Court gave deference to the states and allowed states to implement even stricter standards of what constitutes "public use."

Like in *Kelo*, the State reasons that the taking is encompassed within the meaning of "public purpose." The State's intent in passing the Economic Development Act is to expand the State's tourism attractions and create new jobs. R. at 1. It is expected that the project will dramatically increase tax revenue for the area, attract wealthy tourists, and provide 3,740 new jobs. R. at 2. These factors will benefit the community as a whole and the Supreme Court has held that "development plans" are valid reasons for a state to take property. Petitioners may argue that the State has contracted with an agent, and this would be more beneficial to the agent than to the community. However, the Supreme Court has addressed this issue by holding a state may contract with a private entity so long as the initial intent or overarching goal is not to entirely benefit the private entity. Here, the State is benefiting more from the contractual relationship with Pinecrest and the intent of the State is to revitalize the economy, not to primarily benefit Pinecrest. Not only will the project increase tax revenue but also fifteen percent of the tax revenue from the ski resort

will be used to support the surrounding community. R. at 2. These reasons support the notion that the State's plan is considered a "public use" and a permissible taking should be allowed.

Unlike our case, in *Berman*, the city was dealing with a blighted area. There is no indication in the record that the State had blighted areas however, just like in *Berman*, the petitioners may argue that because their property was not dilapidated, their property should not be subject to the State's taking for the development plan. R. at 3. Although Petitioners' land was not dilapidated, the condition of the soil made it difficult to produce marketable products and many plots have become overgrown, depleting their value as farmland. R. at 2. In addition, this resulted in the land not being fertile and rendered the land useless for the purpose of growing crops. Furthermore, many homes require substantial improvements, depressing local market value. R. at 2. Following the reason in *Berman*, states are allowed to take property to increase the value of the land. This would be a valid reason to take property for public use. Although the ruling in *Berman* and *Hawaii Housing* had a narrower approach, the overall principle was for the general welfare of the community. The general welfare concept circumscribes situations such as eliminating injurious environments that have a harmful impact on the citizens of that city or addressing an evil oligopoly that harms tenants of that community. Although our case does not address a blighted area or a societal evil, it focuses on the common welfare and the positive societal impact that is expected from this development plan. Synonymous with the State's reasoning, the appellate court in our case supports the broadened term to rehabilitate the city and promote long-term economic growth. R. at 12.

Just like in *Goldstein v. Pataki*, the State is faced with property owners who may argue the city has pretextual reasons to benefit Pinecrest, a private company. However, courts have repeatedly noted that so long as there was no intent to serve the interest of a private entity, then

there is no pretextual reason to prevent an eminent domain from proceeding. The record shows no proof that Pinecrest will primarily benefit from the project but rather, the State will benefit the most from increasing tax revenue, helping surrounding communities, and creating thousands of more jobs. R. at 2. The dissent in the record does address that the government cannot take property from one individual for the benefit of another person. R. at 15. However, if there is a legitimate reason for the State's actions then the State has met its burden to prove that the intent of the State is not to benefit a private entity, like Pinecrest, but rather acting on behalf of the general welfare of the State. If this project comes to a halt, it is likely to produce more damage and cause a significant time delay. The appellate court in our case, has addressed that such plans could come to a stop and communities could suffer because one property owner refuses to sell. R. at 13. The State's long-term plans to help the economic rejuvenation of the community would be suspended and the likelihood that the State would recover from the damages caused by the suspension would be hindered.

Furthermore, *Benson* addresses that the Supreme Court has given deference to states to set their own limitations that may be stricter than the federal baseline. If other states are allowed to implement stricter standards, then in our case, the State should be allowed to follow the federal baseline as supported by the Supreme Court. The baseline here is addressed in *Kelo*, where an economic development plan suffices as a permissible taking for "public use." Previously held Supreme Court cases suggest that a taking is permissible when it serves a benefit to the community, rather than enclosing a narrower standard of only benefiting a few individuals. This is binding case law, and this Court should find that the State's take is permissible as defined in *Kelo*. Thus, allowing the State to continue the development plan and continue the process of eminent domain proceedings against the ten holdout property owners.

II. THE TAKINGS CLAUSE IS NOT SELF-EXECUTING BECAUSE THE CLAUSE PROVIDES A RIGHT TO RECOVER JUST COMPENSATION UPON A TAKING, NOT AN IMPLIED CAUSE OF ACTION.

"Constitutional rights do not typically come with a built-in cause of action to allow for private enforcement in courts." *DeVillier v. Tex.*, 601 U.S. 285, 291 (2024). "When a party seeks to assert an implied cause of action under the Constitution itself . . . separation-of-powers principles are . . . central to the analysis. The question is who should decide whether to provide for a damages remedy, Congress or the courts? The answer most often will be Congress." *Ziglar v. Abbasi*, 582 U.S. 120, 135 (2017) (emphasis added).

A. A Suit Cannot Be Brought Against the State of New Louisiana Under the Takings Clause Because the Taking Has Not Occurred.

"Although the Takings Clause entitles a plaintiff whose property has been taken to monetary compensation, it does not provide for prospective relief to a plaintiff whose property has not been taken." *Ford v. U.S.*, 101 Fed. Cl. 234, 237–38 (2011). In *Ford*, the petitioner filed an emergency petition for injunction or a writ of mandamus, seeking to prevent the destruction of their cabin. *Id.* at 237. The court stated that for the petitioner to collect under the Tucker Act, their claim must be for money damages based on a money-mandating source of substantive law, and they must show that they are within the class of plaintiffs who are entitled to recover under the money-mandating source. *Id.* The court ruled in favor of the respondent, holding that the Fifth Amendment does not provide relief for a claimant whose property has yet to be taken.

The situation before the court today is analogous to the one described in *Ford*, where a claimant is seeking an injunction to prevent a taking under the Fifth Amendment. R. at 3. Therefore, the court should rule the same way and deny Petitioners' injunction because the Takings Clause does not provide an avenue to stop a taking, it only provides an avenue to collect just

compensation. Additionally, Petitioners are not able to show that they are part of a class that can collect just compensation because the people who accepted the State's offer are materially different since they had their land taken by the State and already collected just compensation for the taking. R. at 2.

"[A] takings claim accrues when 'all events which fix the government's alleged liability have occurred and the plaintiff was or should have been aware of their existence.'" *Boling v. U.S.*, 220 F.3d 1365, 1370 (Fed. Cir. 2000) (quoting *Hopland Band of Pomo Indians v. U.S.*, 855 F.2d 1573, 1577 (Fed. Cir.1988)). In *Boling*, owners of properties adjacent to the Atlantic Intracoastal Waterway brought a suit against the United States, claiming that a taking occurred due to erosion caused by the government-created waterway. *Id.* at 1368. Recognizing one's ability to collect just compensation from the government once a taking occurred, the court emphasized that "the key date for accrual purposes is the date on which the plaintiff's land has been clearly and permanently taken." *Id.* at 1370.

Applying *Boling's* holding to the present case, Petitioner's land has not been "clearly and permanently taken," evidenced by the fact they are still living in their homes seeking an injunction to prevent the taking as opposed to seeking just compensation. R. at 2. The State has not taken the land or substantially intruded on the land of the holdout property owners, and thus, no claim for just compensation may be brought yet.

For the foregoing reasons, this Court should determine that the Takings Clause *only* creates an avenue to collect just compensation after a taking occurs, and since Petitioners' land has not been taken yet been taken, they do not have a claim against the State.

1. This Court's Decision in *Knick* Is Not Controlling Because the Facts Are Materially Different.

The Supreme Court held in *Knick*, "that the takings clause provides a right to just compensation immediately upon the taking without the need to exhaust state remedies." *Knick v. Twp. of Scott*, 588 U.S. 180, 192 (2019). Additionally, the Court found that property owners have an actionable Fifth Amendment takings claim when the government takes property without paying for it. *Id.* at 186.

However, the facts in the *Knick* are materially different, and Petitioners in the present case mistakenly rely on the holding in *Knick* to support their claim. The Court in *Knick* held that the government must provide just compensation in advance of a taking or risk having its action invalidated, so long as the property owner has some way to obtain compensation after the fact. Governments need not fear that courts will enjoin their activities, but it does mean that the property owner has suffered a violation of their Fifth Amendment rights when the government takes their property without providing just compensation and, therefore, may bring the claim in federal court *Id.* at 187. Additionally, the Court held that if a state provides an adequate procedure for seeking just compensation, then property owners cannot claim a violation of the [Takings] Clause until it has used the procedure and has been denied just compensation. *Id.* at 192.

The petitioner in *Knick* violated a government ordinance and was ordered to correct her violation. The petitioner's land contained grave markers and was not open to the public. The government ordered her to open the cemetery to the public and the petitioner responded by seeking a declaratory judgment. The court found the petitioner had the right to compensation for the taking. Unlike in *Knick,* the taking in controversy in the present case has not occurred yet. R. at 2. Petitioners in our case have not had their property taken and were offered just compensation for their land, which was ejected by Petitioners. R. at 3. The petitioners in *Knick* were entitled to a suit

because a taking had occurred, unlike in our case. Additionally, Petitioners in our case were offered compensation and have decided against accepting it. R. at 3. Therefore, despite the issues in controversy being similar, the holding in *Knick* cannot be applied to the case at hand because the facts are materially different.

B. Cases For Just Compensation are Typically Brought Under Other Sources of Law, Such as a *Bivens* Claim, 28 U.S.C. § 1491, or 42 U.S.C.A. § 1983.

"Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law when a suit for compensation can be brought against the sovereign subsequent to the taking." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984) (quoting *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 697 (1949)). "The [Takings] Clause is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." *First Eng. Evangelical Lutheran Church of Glendale v. Los Angeles Cnty., Cal.*, 482 U.S. 304, 315 (1987).

1. The Petitioner Cannot Sue the State of New Louisiana Under a *Bivens* Claim Because the State of New Louisiana is Not a Federal Agent, and the Present Case is Materially Different from the Cases in Which a *Bivens* Claim May Be Brought.

The Supreme Court of the United States held that citizens may sue federal agents for damages for civil rights violations under the Fourth Amendment and that the Amendment provides a cause of action. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971). The court subsequently found that this power extended to the Fifth and Eighth Amendments. *Davis v. Passman*, 442 U.S. 228, 230 (1979)[1]; *Carlson v. Green*, 446 U.S. 14, 17-8 (1980).[2]

[1] Davis sued for damages and back pay based on sex discrimination in a federal workplace.
[2] Respondent sued on behalf of her deceased son due to inadequate care while he was in prison.

Recently, the Supreme Court of the United States limited the situations where *Bivens* Claims may be brought to cases that are facially and materially similar to *Bivens*, *Davis*, and *Carlson* to stop courts from overstepping their powers and making decisions that should be reserved for the legislature. *Egbert v. Boule*, 596 U.S. 482, 491-92 (2022). "If there is a rational reason to think that [Congress should decide whether to provide for a damages remedy], as it will be in most every case . . . no *Bivens* action may lie." *Id*.

The present case is not facially or materially similar to the scenarios where a *Bivens* claim is allowed because Petitioners are suing the State for allegedly violating the Takings Clause. R. at 3. Again, the three allowed situations a *Bivens* claim may be brought deal with unlawful searches and seizures, sex discrimination in a federal workplace, and inadequate care in prison. More importantly, the State is not a federal agent, it is a state, evidenced by the record where it says property owners brought this suit *against the state*. *Id*. (evidence added).

Although the State cannot be sued under a *Bivens* Claim because it is not a federal agent, Petitioner's claim would be defeated regardless because "a claim may be defeated in two situations." *Carlson,* 446 U.S. at 18 (1980). "The first is when defendants demonstrate 'special factors counseling hesitation in the absence of affirmative action by Congress.'" *Id.* at 17 (quoting *Bivens*, 403 U.S. at 396); *Davis*, 442 U.S. at 245; *see also Butz v. Economou*, 438 U.S. 478, 503 (1978). "The second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective." *Id.* at 18-9 (quoting *Bivens*, 403 U.S. at 397); *Davis*, 442 U.S. at 245-47. "When Congress provides an alternative remedy, it may . . . indicate its intent, by statutory language, by clear legislative history, or perhaps even by the statutory remedy itself, that the Court's power should not be exercised." *Bush v. Lucas*, 462 U.S. 367, 378 (1983). The second

situation would be met here because Congress has provided an explicit alternative within the Takings Clause, which provides the people with a right to just compensation after a taking has occurred. U.S. Const. amend. V, cl. 4.

In short, suing the State under a *Bivens* claim is inappropriate in the present case because the State is not a federal agent, the present case is materially different from the narrow applications of how a *Bivens* claim may be brought, and Congress has provided an alternative remedy within the Takings Clause.

2. The Application of The Tucker Act, 28 U.S.C. § 1491, and 42 U.S.C.A.§ 1983 is Invalid.

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. "The primary purpose of the [Eleventh] [A]mendment is to assure that the federal courts do not interfere with a state's public policy and its administration of internal public affairs." *Melendez v. Com. of Puerto Rico Pub. Recreation & Parks Admin.*, 845 F. Supp. 45, 48 (D.P.R. 1994).

a. The Tucker Act, 28 U.S.C. § 1491, Does Not Apply Because the Act is For Claims Against the Federal Government, not a State.

The Tucker Act gives the Court of Federal Claims exclusive jurisdiction to render judgment upon any claim against the United States for money damages exceeding $10,000 that is "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." *E. Enterprises v. Apfel*, 524 U.S. 498, 520 (1998) (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016–1019 (1984)). "The 'founded upon the Constitution' clause of the Tucker Act has been limited to apply only to the Takings Clause, however, because only that clause contemplates payment by the *federal government*." *Rothe Dev.*

Corp. v. U.S. Dep't of Def., 194 F.3d 622, 625 (5th Cir. 1999) (emphasis added). The plaintiff in *Rothe* brought a suit against the United States Department of Defense and the Department of the Air Force for injunctive and declaratory relief and monetary damages for a potential violation of their equal protection rights after they lost a bid to a higher bidder. *Id.* at 623.

Although the situation in *Rothe* is materially different, the unambiguous language of the holding paired with the plain language of the Tucker Act[3], suggests that the Act may be used to bring suits against the federal government and the federal government only. *Id.* at 625. The State is not a federal agency or part of the federal government and, although the Supreme Court is not bound by any lower court, through Congress' unambiguous language within the statute and the subsequent rulings based on the language of the statute, this Court should find that the State cannot be sued under the Tucker Act because it is not part of the federal government.

b. <u>If the Court Determines the Tucker Act, 28 U.S.C. § 1491, Applies to the Present Case, a Claim Under the Tucker Act Would be Premature Because the Taking Had Not Occurred and the Court of Federal Claims Would Lack Jurisdiction to Hear the Issue.</u>

Petitioner's claim should be dismissed since a "failure to make use of the available Tucker Act remedy renders their takings challenge . . . premature." *Preseault v. I.C.C.*, 494 U.S. 1, 17 (1990). "When property is taken and the government fails to compensate the owner, the Tucker Act . . . provides jurisdiction to enforce the owner's compensatory right." *Boling v. U.S.*, 220 F.3d at 1370 (Fed. Cir. 2000). Although the court in *Boling* did not give an answer on their issue at hand, the court gave a clear standard to determine when an individual's property has been taken

[3] Throughout the Tucker Act, it is stated that the individual bringing the action may bring an action against the "United States." Nowhere in the Act is it expressly stated that a claim may be brought against "a State within the United States." The Act also refers to Federal Agencies and agents of those agencies. Congress covered their bases by using clear language for who can be sued, and their omission of language allowing a State of the United States to be sued under the Act should be viewed as intentional and therefore, prohibits a State from being sued under the Tucker Act.

for purposes of the Takings Clause. *Id.* at 1370. As previously mentioned, the court stated the key date is the date on which the plaintiff's land has been clearly and permanently taken." *Id.*

Determining the date in time which land has been clearly and permanently is significantly easier in the present case than in previous cases argued. In *Boling*, the court had to remand the case for factual determinations in the first instance to establish when the erosion damage occurred on the plaintiffs' property. *Id.* at 1373. The Supreme Court has even determined that government-caused loss of private property can constitute a compensable taking. *U.S. v. Dickinson*, 331 U.S. 745, 747 (1947). In *Dickinson*, the Supreme Court had to determine when property had been taken for eminent domain purposes when flooding occurred on properties as a result of a dam the government built. *Id.* at 746-47. While wrestling with the issue of when the property had been "taken," the court stated that a "[p]roperty is taken in the constitutional sense when inroads are made upon an owner's use of it to the extent that, as between private parties, a servitude has been acquired either by agreement or in the course of time. *Id.* at 748. The court ultimately concluded that the property had been taken as a result of flooding from the dam's construction because "when the Government chooses not to condemn land but to bring about a taking by a continuing process of physical events, the owner is not required to resort either to piecemeal or to premature litigation to ascertain the just compensation for what is really 'taken.'" *Id.* at 749.

In the present case, it is clear when the property owner's land will be "clearly and permanently taken." *Boling*, 220 F.3d at 1370 (Fed. Cir. 2000). Petitioner's land will be taken for purposes of the Takings Clause when the State actually takes the property. There is nothing in the record that suggests the surrounding takings have resulted in government-caused destruction, like in *Boling* and *Dickinson*. Therefore, even if the court holds that the Tucker Act creates an avenue to sue a State, Petitioner's claim under the Tucker Act would be premature because the State has

not taken their property. R. at 2-3. Again, the Tucker Act creates an avenue to sue for just compensation, it does not create an avenue to sue for injunctions. If the State conducted the taking before Petitioners brought the claim, and Petitioners brought the claim to collect just compensation, then the Tucker Act *might* apply, depending on whether or not the court finds that a state can be sued under Tucker Act. However, those are not the facts before the court in this case. A taking had not occurred at the time the suit was brought, and Petitioners' property suffered no damages. These facts render the application of the Tucker Act inappropriate.

"The Tucker Act is only a jurisdictional statute and does not create any independent substantive rights enforceable against the United States for money damages." *Ford*, 101 Fed. Cl. at 237 (2011) (citing *U.S. v. Mitchell*, 463 U.S. 206, 216 (1983)). In *Ford*, the court determined that the Court of Federal Claims lacked jurisdiction over the Tucker Act claim because the plaintiff was seeking equitable relief to prevent a taking, as opposed to just compensation for a taking that had already occurred. *Id.* at 238. The Tucker Act, 28 U.S.C.A. § 1491(a)(1), provides what courts have jurisdiction to hear Tucker Act claims:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

The plain language of the statute makes it clear that the Court of Federal Claims is the court with jurisdiction to hear issues arising under the Tucker Act. The statute gives the language, and *Ford* gave the interpretation of the statute for when a plaintiff brings a suit seeking equitable relief under the Tucker Act. The situation in *Ford* is identical to the scenario at hand here, Petitioners are seeking a temporary and permanent injunction to prevent the State from taking their property. R.

at 3. Therefore, this Court should follow its interpretation of the Tucker Act given in *Ford* and find that the Court of Federal Claims lacks jurisdiction to hear the issue in the present case.

For these reasons, this Court should find that the Tucker Act does not apply to Petitioners' claims because the State has not taken their property, and the Court of Federal Claims does not have jurisdiction due to the relief sought by Petitioners.

c. The Application of 42 U.S.C.A § 1983 is Improper Because Petitioners' Civil Rights Have Not Been Violated.

Civil actions for the deprivation of rights are codified within 42 U.S.C.A. § 1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

"Section 1983 creates a species of liability in favor of persons deprived of their federal civil rights by those wielding state authority." *Felder v. Casey*, 487 U.S. 131, 139 (1988). The plaintiff brought a suit against the Milwaukee police department, claiming they violated his Fourth and Fourteenth Amendment rights when he was beaten by police officers, alleging it was racially motivated. *Id.* at 131. Although the Supreme Court of Wisconsin granted the defendant's motion to dismiss for failure to comply with the state's notice-of-claim statute, this case shows what kind of claim fits within the parameters of 42 U.S.C.A. § 1983. *Id.* 131-32. "[Section] 1983 'is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred'" *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (quoting *Bennett v. City of Kingman*, 543 F. Supp. 3d 794, 805 (D. Ariz. 2021)). The court stated that the first step in any

claim is to identify the specific constitutional right allegedly infringed. *Albright*, 510 U.S. at 271 (1994). In *Albright*, the constitutional rights claimed to be infringed upon were an arrestee's due process rights. *Id.* 271-72. The court dismissed the plaintiff's claim because Illinois law provides a tort remedy for malicious prosecution, but if Illinois did not provide this remedy, then the use of § 1983 would be proper. *Id.* at 285.

The case at hand is far from dealing with an individual's substantive due process rights. It can hardly be argued that a violation of the Takings Clause could fit within the parameters of what courts across the United States have held to be substantive due process. "As a general matter, the Court has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decision-making in this unchartered area are scarce and open-ended." *Albright*, 510 U.S. at 271–72 (1994). "[The] substantive due process doctrine is designed to protect those rights that are fundamental rights – that are implicit in the concept of ordered liberty." *Dacosta v. Nwachukwa*, 304 F.3d 1045, 1048 (11th Cir. 2002). The right to just compensation is a constitutionally protected right with avenues to bring suit against a state or the federal government, and the right to just compensation has never been held to be a substantive due process right, and this Court should not start doing so now.

For these reasons, this Court should uphold the rulings made by the lower courts and find that 42 U.S.C.A. § 1983 does not apply in the present matter.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the lower court's decision and find that the trial court ruled correctly in allowing the State to utilize its eminent domain power because the State's action constituted a permissible taking. The holding in *Kelo v. City of New London* is still binding. Therefore, this Court should find that the State's economic development plan fits within the broad definition of public use. Additionally, this Court should find that the Fifth Amendment's takings clause is not self-executing because the clause provides an avenue to recover just compensation upon a taking, not an implied cause of action.

Team 14

Representing Respondent