No. 24-386

IN THE

Supreme Court of the United States

OCTOBER TERM 2024

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

---

BRIEF FOR PETITIONER

Team 26
Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—continued:

U.S. Constitution:

Federal Statutes:

State Statutes:

Other Authorities:

Other Authorities—continued:

QUESTIONS PRESENTED

I. Whether the Court should overrule *Kelo v. City of New London* and clarify that "public use" for purposes of the Taking Clause cannot be satisfied by a sovereign by merely demonstrating an incidental benefit to the public.

II. Whether property owners have a direct constitutional right to just compensation under the Fifth Amendment when states take their property, regardless of state sovereign immunity claims or the absence of legislative authorization.

STATEMENT OF THE CASE

A. STATEMENT OF THE FACTS

Petitioner Karl Fischer owns a small farm that has been in his family for a century and a half. R. at 3. Nine similarly situated Petitioners also possess family-owned farmlands, which have been passed down for generations, and single-family homes in the same general area. R. at 2-3. These properties are small, and many are in poor shape thereby harming the local market value. *Id*. The median income of the neighborhood is $50,000 which prevents the residents of the neighborhood from moving elsewhere or fixing the property. *Id*. One of the factors contributing to the depressed economy for the farmers is poor soil conditions, reducing the amount of marketable crops, and simultaneously increasing the number of overgrown plots. R. at 2.

Despite the saddened economic state, this area of New Louisiana has a tight-knit community, and the owners have strong familial and emotional bonds to the land. *Id*. Above all else, the property owned by Petitioner Fischer et al. are neither a threat to the public or is otherwise dilapidated. R. at 3. Indeed, for over a century this low-income, predominantly minority neighborhood, has survived through kinship, hard work, and generations of effort. R. at 2-3. This tough but sentimental and historic way of living was aggressively disrupted by respondent, The State of New Louisiana, in 2023. *Id*.

New Louisiana's legislature passed the Economic Development Act allowing Governor Anne Chase to create contracts with corporations to boost tourism and lower unemployment. R. at 1-2. Governor Chase proceeded to use her new authority to contract with Pinecrest, Inc. to create a new luxury ski resort. R. at 2. The core justifications for this project are that it is projected to increase tax revenue, lower unemployment rates and invite rich tourists. More notably, the State projected that the new tax revenue will revitalize the surrounding community

and create long-term benefits, the property value will increase in surrounding areas and business owners will benefit from new employees. *Id.* Armed with these projected benefits, the respondent acted to seize 1,000 acres of land and in doing so, forced ninety individuals out of their homes for prices substantially below the market value. *Id.*

Petitioners Fischer et al. stood strong against the respondent's attempt to seize their territory for a cost categorically below the market value, and the respondent reacted by initiating eminent domain proceedings against Petitioner Fischer et al. on March 13, 2023. R. at 3. In doing so, respondents clarified that they have not waived sovereign immunity under NL Code § 13:5109. R. at 2. An executive or legislative waiver under NL Code § 13:5109 would allow Petition Fischer et al. to receive just compensation for New Louisiana taking. *Id.* In the absence of such a waiver and pursuant to NL Code § 13:4911, the respondent has a complete right to condemn property purely for economic development and Petitioner Fischer et al. has no right to compensation under state law. *Id.*

B. NATURE OF THE DISTRICT COURT PROCEEDINGS

On March 15, 2023, Petitioners Fischer et al. initiated a suit in the United States District Court for The District of New Louisiana against the respondent. R. at 3. Relying on the Fifth and Fourteenth Amendments, Petitioners Fischer et al. requested for both temporary and final relief. *Id.* Petitioner Fischer et al. put forth two distinct theories, but both relied on the fact that the Supreme Court has incorporated Fifth Amendment protections against the states pursuant to the Fourteenth Amendment. *Id.* The first theory asserted that respondents' conduct was not a valid taking as it was not for public use and the second asserted that there should be just compensation which would mandate the market value for the land. *Id.*

Respondent moved to dismiss the lawsuit by relying on *Kelo v. City of New London* expressed allowance of takings for economic development to rebut the first theory and asserting that the Fifth Amendment is not self-executing to rebut the second theory. R. at 3-4. The district court, while "sympathetic to the plaintiffs" opposition to their property being "taken when it will not be put to pure public use," ultimately accepted both of the respondent's arguments. R. at 4, 8. The district court based its ruling largely on its view that it was bound by Supreme Court precedent. R. at 4.

C. NATURE OF THE APPELLATE PROCEEDINGS

Petitioner Fischer et al. appealed to the United States Court of Appeals for The Thirteenth Circuit. R. at 10. The Thirteenth Circuit affirmed the district court ruling, and it ruled in favor of the respondent on largely similar grounds. *Id*. Those grounds were that because the Supreme Court spoke in *Kelo* the court had no choice. Indeed, the Thirteenth Circuit released a full concurrence and a partial concurrence which both emphasized this fact. R. at 11-19. Judge Willis, echoing the majority and lower court, said he had "no choice" but to rule in favor of the respondent because *Kelo* demanded it, but he proceeded to strongly attack the case and dissented on the just compensation part of the majority opinion. R. at 14-19. In contrast, Judge Hayes, who affirmed the lower court out of precedent and personally agreed with the outcome, recognized *Kelo* "has many detractors" and subtly implied that considering the Supreme Court's "recent trend of reversing precedent," *Kelo* was in danger which compelled him to offer a defense of the case. R. at 11-13.

SUMMARY OF ARGUMENT

I. This Court should overturn *Kelo v. City of New London*, 545 U.S. 469 (2005) as it fails all the stare decisis factors, and its definition of "public use" is inconsistent with history and

tradition. The Court traditionally considers a variety of factors in applying the stare decisis test against a prior decision such as evaluating "the quality of their reasoning, the "workability" of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 268 (2022). *Kelo* fails each factor in its own special way.

First, *Kelo's* reasoning is egregiously wrong because its definition of "public use" is inconsistent with the text and structure of the Constitution. U.S. Const. amend. V. If public use meant as *Kelo* said, the Framers would have simply used the term "general welfare" as they do elsewhere in the Constitution. *See* U.S. Const. art. I, § 8, cl. 1.; *see also Kelo*, 545 U.S. at 509 (Thomas, J., dissenting). Second, *Kelo* is unworkable for the exact same reasons *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), *overruled by Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024*)* was. It creates a government always wins situation. Tr. of Oral Arg. 134, *Relentless, Inc. v. Dep't of Commerce*, No. 22-1219 (Justice Gorsuch: "…the government always wins."). Third, it's sharply inconsistent with precedent, such as *Berman v. Parker*, 348 U. S. 26 (1954) which authorized eminent domain to stop societal harm, not to grant some miscellaneous benefit to the public. *Kelo*, 545 U.S. at 498 (O'Connor, J., dissenting). Finally, there is virtually no reliance on the decision as forty-five states enacted eminent domain reform in direct response to *Kelo*. *See* Matthew P. Caylor, *Eminent Domain and Economic Development: The Protection of Property Four Ways*, 36 Ariz. J. Intl. & Comp. L. 165, 173 (2019).

Overturning *Kelo* will give the Court a new chance to define what "public use" means and that definition must be consistent with "history and tradition." *See N.Y. State Rifle & Pistol*

Ass'n, Inc. v. Bruen, 597 U.S. 1, 25 (2022) ("focus[ing] on history also comports with how we assess many other constitutional claims").

II. The Takings Clause of the Constitution, which states that private property shall not "be taken for public use, without just compensation," creates a self-executing right that does not depend on legislative action to be in effect. New Louisiana, in its legislative inaction and attempt to evade its duty to the Constitution through its claim of sovereign immunity, fails in this effort for three fundamental reasons.

First, the Takings Clause's plain text unequivocally mandates the execution of "just compensation" when the government condemns property for public use. While other constitutional provisions explicitly refer to Congress for enforcement, the Takings Clause's "shall not" language demonstrates its superior authority to act independently of legislative bodies. The State may argue that legislative authorization is required for this constitutional mandate to have any effect, thus turning it into a mere suggestion. However, this interpretation sets a dangerous precedent, allowing states to nullify fundamental rights through deliberate legislative inaction.

Second, the Framers deliberately created just compensation as a self-executing constitutional guarantee. James Madison, one of the Founding Fathers, warned that the government has a public duty to protect property rights. Moreover, early Supreme Court decisions from *Great Falls* to *Chicago* acknowledge that just compensation provides a necessary check against overreaching governmental power.

Finally, precedent repeatedly affirms that property owners are not required to seek remedies from their state but can directly pursue relief in a federal suit. Allowing New Louisiana to avoid its obligation through sovereign immunity would create the kind of procedural barrier

rejected by the Court in *Knick*. Such a barrier would leave minority farmers and homeowners with an inherent right to their property but no method to enforce it.

ARGUMENT

This Court should overturn *Kelo*, acknowledge the Takings Clause as self-executing, and reverse the lower court's ruling in its entirety. The standard of review the Court should apply is *de novo*. The lower courts unanimously viewed the issue as "questions of law." R. at 4, 10. Questions of law are "reviewable *de novo.*" *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 (2014). Furthermore, the questions before the Court require constitutional interpretation of central provisions of the Fifth Amendment. "[C]onstitutional issue merits *de novo* review." *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 431 (2001).

I. THIS COURT SHOULD OVERRULE KELO BECAUSE IT IS EGRIOUSLY WRONG AND DEFINES "PUBLIC USE" INCONSISTENT WITH IT'S ORIGINAL MEANING.

A. Kelo Fails All the Stare Decisis Factors and Thus Should Be Overruled.

Every single stare decisis factor counsels strongly in overturning *Kelo*. First, stare decisis is not an "inexorable command" to stand by a past decision no matter how flawed. *Ramos v. Louisiana*, 590 U.S. 83, 105 (2020). Instead, there are factors the Court goes through, such as "the quality of the decision's reasoning." *Id*. at 106 (2020). Furthermore, this Court addresses the decision's "workability." *Id*. at 122 (Kavanaugh, J., concurring in part). Finally, the Court reviews its "consistency with related decisions; … and reliance on the decision." *Id*. at 106. Notably, these are the exact factors the lower court concurrences relied on in evaluating *Kelo*. R. at 11-19.

As the Court has gone through these factors, there are background principles that have historically bent the Court more towards overturning a decision. For example, this Court said stare decisis's preference for adherence to a past decision is at its "weakest when we interpret the

Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." *Agostini v. Felton*, 521 U.S. 203, 235 (1997). Moreover, the Court has expressed hostility to prior decisions on the Constitution when they are inconsistent with the clause's "original understanding." *Collins v. Youngblood*, 497 U.S. 37, 49 (1990).

All these background principles are fully in play here. The Court is faced with a question of constitutional interpretation as the core question before the Court exclusively questions the existing application of the Fifth Amendment. R. at 4, 10. Furthermore, because the majority in *Kelo* itself concedes its decision is based on "over a century of our case law" and not on how the Framers would have understood what "public use" means, the decision doesn't even attempt to deny its foundation on a judicially invented framework rather than original understanding. *Kelo*, 545 U.S. at 490. Indeed, it analogous to how *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by Dobbs v. Jackson Women's Health Org*., 597 U.S. 215 (2022), *holding modified by Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), created the judicially invented "undue burden" framework rather than asking whether the Framers would understand any part of the Constitution to grant an unlimited right to pre-viability abortion. *Dobbs*, 597 U.S. at 270 (2022). Like *Roe*, *Kelo* is a constitutional decision with an ahistorical approach toward its governing constitutional provision and thus should be rejected by this Court.

1. Kelo Is Poorly Reasoned as It Defies the Text and Structure of the Constitution.

Kelo is inconsistent with the text and structure of the Constitution. In *Dobbs*, the Court explained that *Roe* was poorly reasoned because its constitutional interpretation was fully divorced from "constitutional text." *Dobbs*, 597 U.S. at 270. Likewise, the Court concluded that *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), *overruled by Janus v. AFSCME*, 585 U.S. 878 (2018), was poorly reasoned because it failed to give "careful consideration to the First

Amendment" by relying on cases that did not address the First Amendment. *Janus*, 585 U.S. at 918. Finally, *Pace v. State*, 106 U.S. 583 (1883), *overruled by McLaughlin v. Florida*, 379 U.S. 184 (1964), was repudiated by this Court for having a "limited view of the Equal Protection Clause." *Loving v. Virginia*, 388 U.S. 1, 10 (1967).

In *Dobbs*, the Court looked to the text of the Constitution to evaluate *Roe* and *Casey* but struggled as the right to abortion has "no basis in the Constitution's text." *Dobbs*, 597 U.S. at 300. Since there is no constitutional "reference to abortion, and no such right is implicitly protected by any constitutional provision," the Court proceeded to analyze the right to abortion as an inherent right based on history and tradition. *Id*. at 231. After finding nothing there, the Court ruled that "abortion is not a fundamental constitutional right" thereby abrogating *Roe* and *Casey* for being inconsistent with the text of the Constitution. Likewise in *Janus*, the Court evaluated whether "*Abood* 's holding is consistent with standard First Amendment principles" by immediately going to the text of the Constitution. *Janus*, 585 U.S. at 891. The Court focused on the First Amendment's explicit prohibition against the government "abridging the freedom of speech" of its citizens. *Id*. at 892; U.S. Const. amend. I. The Court reasoned that mandating speech was the same as abridging it. *Janus*, 585 U.S. at 892. Given this, the Court ruled that "[b]y overruling *Abood*" the Court would "bring a measure of greater coherence to our First Amendment law." *Id*. at 926. Furthermore, the Court added that *Abood's* inconsistency with the Constitution occurred because *Abood* relied on cases that did not give "careful consideration to the First Amendment." *Id*. at 918.

Finally, and most famously, the Court in *Loving* went to the text of the Constitution in evaluating *Pace*. The Court quickly noted that *Pace's* "limited view of the Equal Protection Clause" had "not withstood analysis in the subsequent decisions of this Court." *Loving*, 388 U.S.

at 10. This is because the Court looked at the Fourteenth Amendment in its entirety and deduced the "clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." *Id*. By relying on the structure of the entire Fourteenth Amendment, the Court ruled that the Equal Protection Clause prohibition of states ability to "deny to any person within its jurisdiction the equal protection of the laws" could not be reconciled with *Pace* and "reject[ed] the reasoning of that case" accordingly. U.S. Const. amend. XIV, § 1; *Loving*, 388 U.S. at 10.

When going to the text of the Constitution, *Kelo* fails immediately. *Kelo's* core holding is that when the framers used the term "public use" in the Fifth Amendment they meant "general welfare." *Kelo*, 545 U.S. at 509 (Thomas, J., dissenting). Not so. If the Framers truly believed that government taking private property could be satisfied by incident benefits to the public, they would've used the word "general welfare" as they do throughout the Constitution. *See* U.S. Const. pmbl; U.S. Const. art. I, §8, cl. 1. However, they didn't. As a result, when the *Kelo* majority converted the term "public use" into "general welfare", despite "general welfare" having no place in the Fifth Amendment, *Kelo* engaged in the same error as *Roe*. Whereas *Roe* found a right to abortion despite the word abortion appearing nowhere in the Constitution, *Kelo* found a right to take property to benefit the "general welfare" of society despite those words appearing nowhere in the Fifth Amendment. U.S. Const. amend. V.

Worse, *Kelo* is readily distinguishable from *Loving* as it ignores the structure of the Constitution when evaluating the text. In *Loving*, this Court looked at the structure of the Fourteenth Amendment to deduce what the Equal Protection Clause does. *Loving*, 388 U.S. at 10. Here, despite the word "use" being used multiple times through the Constitution but with a narrow purpose, the majority defines "use" in a sweeping way. *Kelo*, 545 U.S. at 509 (Thomas,

J., dissenting) (explaining how Article I's use of the word "use" did not grant the treasury the ability to use funds so long as there was an incidental benefit to society, U.S. Const. art. I, § 10, nor did it grant the military to use its authority to achieve any military end, U.S. Const. art. I, § 8). In other words, whereas *Loving* looked at the structure of the Constitution to determine meaning, *Kelo* completely ignores the structure of the Constitution resulting in radically distinct meanings of the exact same word depending on where in the Constitution it appears and thus distinguishes itself as a worse case.

Finally, *Janus* says to engage in careful consideration of the words of the Constitution. *Janus*, 585 U.S. at 918. The Court used very basic formal logic to deduce that the First Amendment's prohibition on an abridgment of speech must prevent mandated speech. *Id*. at 892. In contrast, *Kelo* sees the words "nor shall private property be taken for public use, without just compensation" and then goes awry in its deduction by concluding that it means that private property can be taken for private use so long as there is some incidental benefit to the public. U.S. Const. amend. V; *Kelo*, 545 U.S. at 494 (O'Connor, J., dissenting). Of course, there will almost always be some miscellaneous benefit to the public when transferring private property to another for private use, so the public use requirement is read out accordingly under *Kelo*. *Id*. at 501. This faulty reading strongly correlates with *Abood's* reading of how the Court substituted the plain meaning of the Constitution to say almost the exact opposite of what it means. Whereas in *Abood*, the Court read the First Amendment's prohibition against abridgment of speech to allow a mandate of speech, here *Kelo* reads the Fifth Amendment requirement that private property is only taken for public use to allow a taking for private use. *Janus*, 585 U.S. at 892, 926; *Kelo*, 545 U.S. at 501 (O'Connor, J., dissenting). In sum, *Kelo* is a poorly reasoned decision

as it is inconsistent with the plain text of the Constitution provision it purports to draw its authority from and the structure of the Constitution itself.

2. Kelo Is Unworkable as It Grants Limitless Deference to the Government.

Kelo has proven unworkable because it stray jackets lower courts to come to an unconstitutional outcome even if they oppose it. Under *Chevron*, judges had to "abandon the best reading of the law" to simply defer to whatever the federal government wanted. *Loper Bright Enters.*, 144 S. Ct. at 2285. Likewise, before *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024), individuals charged with fraud by the Securities and Exchange Commission largely couldn't even access actual judges, but rather administrative law judges who effectively made sure the odds "were stacked against" the individual challenging the government. *Id*. at 2141 (Gorsuch, J., concurring). Finally, before *Shelby County v. Holder*, 570 U.S. 529 (2013), states that fell under an arbitrary coverage formula could not amend their election laws unless it was to the satisfaction of the "Attorney General." *Id*. at 537.

Chevron created a universe where courts were forced to rule in favor of the government even if they didn't agree with its legal interpretation. *Loper Bright Enters.*, 144 S. Ct. at 2265. ("It demands that courts mechanically afford *binding* deference to agency interpretations, including those that have been inconsistent over time."). The question was not about the best interpretation but rather was the government's nonperfect interpretation reasonable. *Id*. at 2283. A strong concern for the Court wasn't the oppressive effect this had on corporations, but rather the effect it had on low-income or otherwise non-powerful civilians. Tr. of Oral Arg. 132, *Relentless, Inc. v. Dep't of Commerce*, No. 22-1219 (Justice Gorsuch: "I think this is what niggles at so many of the lower court judges -- are the immigrant, the veteran seeking his benefits, the Social Security Disability applicant, … I didn't see a case cited, and perhaps I

missed one, where *Chevron* wound up benefitting those kinds of peoples."). Judges were categorically powerless to recognize nonpowerful people's rights against the government coming after them, even if they had a correct statutory interpretation. *Loper Bright Enters.*, 144 S. Ct. at 2288. (Gorsuch, J., concurring) ("But ordinary people can do none of those things. They are the ones who suffer the worst kind of regulatory whiplash *Chevron* invites."). This was a critical factor in why this Court reversed *Chevron* in *Loper Bright Enters*, as it constrained judicial recognition of "rights and responsibilities" in a way that harmed disproportionately less powerful classes. *Id*.

It was also a critical factor in why this Court ruled as it did in *Jarkesy*. By "concentrat[ing] the roles of prosecutor, judge, and jury in the hands of the Executive Branch", the government created a bizarre paradigm whereby the one hearing the case was on the same team as the one prosecuting the case. *Jarkesy*, 144 S. Ct. at 2139. This made sure the odds "were stacked against" the individual challenging the government. *Id*. at 2141 (Gorsuch, J., concurring). Even on appeal in front of actual judges, such judges were commanded by law to be deferential to the government. *Id*. at 2126. This Court overruled that system and re-established that "even the least popular among us has an independent judge and a jury of his peers resolve his case under procedures designed to ensure a fair trial in a fair forum." *Id*. at 2141 (Gorsuch, J., concurring).

Finally, in *Holder,* this Court did a similar thing. It struck down a preclearance system, and in doing so it spared states, subject to preclearance, from having to beg the national government for approval of election laws no matter how modest. *Holder*, 570 U.S. at 544 ("States must beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own"). Of course, states could also goto

"three-judge court" but "the process can take years" and thus it's effectively a nonstarter for states seeking election changes for an upcoming election. *Id*. When this Court struck down that system and allowed states to change their election laws immediately, it ended extraordinary deference to the federal government at the cost of state rights. *Id*. at 530 ("States retain broad autonomy, however, in structuring their governments and pursuing legislative objectives.").

As Judge Willis correctly noted in his concurrence, a decision is "unworkable [if] its holding preclude[s] full access to a constitutional right." R. at 15 (Willis, J., concurring in part). As the lower court proceedings demonstrate, *Kelo* categorically precludes access to a constitutional right. *Id*. Indeed, despite strong opposition, the lower courts were forced by *Kelo* to come to the unconstitutional outcome and automatically declare the government the winner and disregard Petitioner Fischer et al. Fifth Amendment rights against taking for flagrantly nonpublic use. R. at 5, 14-19. In doing so, it suspended a critical right dating back to the antebellum period rights which the Framers, consistent with their time, saw as borderline sacrosanct. 1 William Blackstone, *Commentaries on the Laws of England* 134-135 (1765) ("the law of the land ... postpone[s] even public necessity to the sacred and inviolable rights of private property."); *see also Kelo*, 545 U.S. at 505 (O'Connor, J., dissenting). Worse yet it did so to a group of low-income minorities who did nothing wrong. R. at 2. Whereas the Court in *Loper Bright Enters.* worried about nonpowerful people losing in a system biased to the government and the *Jarkesy* Court worried about unpopular people not getting their day in court, the *Kelo* court ignores that fully and thus distinguishes itself from recent workable decisions. *Loper Bright Enters.*, 144 S. Ct. at 2288. (Gorsuch, J., concurring); *Jarkesy*, 144 S. Ct. at 2141 (Gorsuch, J., concurring).

At the same time, *Kelo* is not just analogous to unworkable cases like *Chevron* but stands out as an outright twin. *Kelo* is the property law equivalent to *Chevron* because it commandeers judges to ignore the correct reading of law or concern for rights, in favor of the government at the harm of non-powerful individuals. *See* R. at 15 (Willis, J., concurring in part) ("*Kelo* is unworkable because it ignores the intended limit on the government's power, making the rule easy to apply but detrimental to a constitutional right."). Of course, *Kelo* is worse than the regimes *Loper Bright Enters.*, *Jarkesy* and *Holder* ended because it was theoretically possible for the government to lose under those regimes. Indeed, an agency's interpretation could be unreasonable, an administrative law judge could rule against their enforcement division and the three-judge panel could approve an election law change by a state. *Kelo* offers no such relief. Instead, in reverse Robin Hood fashion courts are forced to rubber-stamp the government's ability to seize private property from the poor and give it to the rich. *Kelo*, 545 U.S at 506 (Thomas, J., dissenting) ("suspiciously agreeable to the Pfizer Corporation"); *id.* ("these losses will fall disproportionately on poor communities.").

Kelo mirrors the pre-*Jarkesy* world as it subjects judges to such an unreasonably deferential standard to governments that violates their citizens rights. *Kelo*, 545 U.S. at 469 ("Without exception, the Court has defined that concept broadly, reflecting its longstanding policy of deference to legislative judgments as to what public needs justify the use of the takings power."). The only difference is that in pre-*Jarkesy* it was the Seventh Amendment and in *Kelo* it's the Fifth. Of course, *Kelo* distinguishes itself for the worse as it calls for complete abdication of the judicary with its extremely deferential standard. *Id*. Finally, it should be noted that under the pre-*Holder* regime, states had to beg the national government for freedom to make innocuous changes to election laws. Under *Kelo*, now it is the people begging the states to leave their

property alone, and as ninety landowners who sold their houses well under the market value because of Respondent's demands demonstrate, the states are not any more sympathetic than the national government. R. at 2. In sum, *Kelo* is unworkable because it constrains judges to come to an incorrect and intolerable conclusion, rather than allowing them to remedy constitutional violations, especially for the nonpowerful and nonpopular who need the court's protection the most.

3. Kelo Is Inconsistent with Related Decisions in Its Definition of Public Use.

Kelo is inconsistent with cases that both predate it and have come after it and thus sticks out as especially flawed. First, in *Berman v. Parker*, 348 U.S. 26 (1954), Congress declared an area in question "injurious to the public health, safety, morals, and welfare" and to remedy that harm to society, the government engaged in takings which the Court upheld. *Kelo*, 545 U.S. at 498. Likewise, in *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984), the Hawaii legislature declared an oligopoly was actively "injuring the public tranquility and welfare" of the state and then proceeded to engage in land condemnation which this Court upheld. *Kelo*, 545 U.S. at 499. As of recent, this Court has ruled that "[t]he Fifth Amendment right to full compensation arises at the time of the taking, regardless of post-taking remedies that may be available to the property owner." *Knick v. Twp. of Scott*, 588 U.S. 180, 190 (2019).

Kelo is inconsistent with all of the aforementioned cases. First, it distinguishes itself from *Midkiff* given the divergent intent of the government in that case. Both in *Kelo* and here, the government is seizing property for economic development. *Kelo*, 545 U.S. at 469; R. at 3. Remedying economic distress is not what the government in *Midkiff* was doing. There was active harm to the "public tranquility and welfare" as determined by the state legislature. *Kelo*, 545 U.S. at 499 (O'Connor, J., dissenting). Respondent, much like *Kelo*, doesn't plan to address any

serious harm. The Court knows this because the property being seized is not "dilapidated or pose any risk or threat to the public." R. at 3. And the Court knows there was no harm in *Kelo* because the plan never happened and the city is fine. *See* David S. Yellin, *Masters of Their Own Eminent Domain: The Case for A Reliance Interest Associated with Economic Development Takings*, 99 Geo. L.J. 651, 656 (2011) ("Although the harm resulting from the condemnation of Susette Kelo's home received substantial coverage in the wake of the *Kelo* decision, … Pfizer announced that it would be closing down its facility in New London"). Despite the economic development not happening, the City of New London is still there. Of course, the fact that *Kelo* evolved into a lie is not the key distinction from its predecessor cases. It was the fact that *Kelo* itself acknowledged the government it was allowing to seize private property was not trying to remedy an "affirmative harm on society" caused by the property it was taking. *Kelo*, 545 U.S. at 500 (O'Connor, J., dissenting).

Kelo's concession that it was allowing a taking for economic development dooms it from relying on *Berman* as well. *Berman* is extraordinarily analogous to *Midkiff*, except the harm the government was attempting to remedy in *Berman* was especially stark. *Berman*, 348 U.S. at 28 ("Congress made a 'legislative determination' that … the use of buildings in alleys as dwellings for human habitation, are injurious to the public health, safety, morals, and welfare"). Congress used its powers under the taking clause to "eliminate these housing conditions." *Id*. Since the national government was trying to remedy societal harm caused by the property, not boost the economy, the distinction from *Kelo* could not be more blatant.

Finally, *Kelo* clashes with a *Knick* as well. In *Knick,* the Court said, "[b]ut there were no general causes of action through which plaintiffs could obtain compensation for property taken for public use." *Knick*, 588 U.S. at 199 (2019). To justify that claim, the Court cited a law review

article which defined public use, and, unlike *Kelo*, does so consistent with history and tradition. In footnote 218, the article, pointing to state constitutional conventions in the 1700s, states the founding generation thought "[t]hat private property ought to be subservient to public uses, when necessity requires it; nevertheless, whenever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money." Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 Vand. L. Rev. 57, 141 (1999). In other words, the *Knick* court, per its citation, asserted that "public use" was satisfied when the private property taken was used by the public. It did not say "public use" is satisfied when given to another private actor with mere incidental benefits to the public or failed to address it at all, as the concurrence erroneously asserts. R. at 13 (Hayes, J., concurring) ("*Knick* only addressed the right to compensation; it did not address when a taking may occur."). In sum, *Kelo* is radically different from the critical "public use" cases that predate it and the cases that come after it.

4. There's Virtually No Reliance on Kelo Given Widespread Backlash.

Kelo has virtually no reliance interest because of widespread backlash, but even if it did have reliance it's misplaced. There was widespread, yet fundamentally misplaced reliance on *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by Brown v. Board of Education*, 347 U.S. 483 (1954) which perpetrated "half-century of state-sanctioned segregation and generations of Black school children." *Dobbs*, 597 U.S. at 293. Sometime after the fall of *Plessy* academia responded by establishing and relying on an admission paradigm that "unavoidably employ race in a negative manner" and "involve[d] racial stereotyping." *Students for Fair Admissions, Inc. v. Pres. and Fellows of Harvard College*, 600 U.S. 181, 230 (2023). Not just reliance on racial classifications, but there has also been heavy reliance on hostility to same-sex marriages, a view

that has long "been held … throughout the world." *Obergefell v. Hodges*, 576 U.S. 644, 657 (2015).

Kelo has substantially less reliance than all the aforementioned cases. *Kelo* was so egregiously wrong that after it came out, forty-five states acted to limit its damage by restricting their eminent domain powers. Matthew P. Caylor, *Eminent Domain and Economic Development: The Protection of Property Four Ways*, 36 Ariz. J. Intl. & Comp. L. 165, 173 (2019). However, even assuming *Kelo* did have reliance, which it doesn't, it does not match the reliance *Plessy* had. For decades certain states created a way of life around harassing and abusing minorities, and yet the Court correctly reversed that precedent despite the heavy societal reliance. Tr. of Oral Arg. 94, *Dobbs v. Jackson Women's Health Org.*, No. 19-1392 (Justice Alito: "there was a lot of reliance on *Plessy*. The -- the South built up a whole society based on the idea of white supremacy. So there was a lot of reliance. It was rely -- it was improper reliance."). If *Plessy* failed to satisfy reliance interests, then so does *Kelo*, both because *Kelo* isn't even two decades old and because of the near-unanimous backlash to the decision by the states. Matthew P. Caylor, *Eminent Domain and Economic Development: The Protection of Property Four Ways*, 36 Ariz. J. Intl. & Comp. L. 165, 173 (2019). Likewise, hostility to same-sex marriages was not just a view that "existed for our entire history." *Obergefell*, 576 U.S. at 712. It was a view that has "been held … throughout the world." *Id*. at 657 (2015). This Court rightly rejected all that reliance, despite it being historic and ubiquitous, and *Kelo* distinguishes itself from the pre-*Obergefell* regime by having even less societal reliance. Finally, up until last year, higher education had insidiously used race in admission decisions and the Court ended that. *Students for Fair Admissions, Inc. v. Pres. and Fellows of Harvard College*, 600 U.S. 181 (2023). That's a recent example of this Court seeing active reliance and still correcting a flawed paradigm, and

Kelo distinguishes itself by not having any reliance to begin with. *Kelo* analogies to a lot of the regimes the Court found unlawful because today it is being used to harass a predominantly minority community. R. at 2. Just as *Plessy* and the pre-*SFFA* allowed hardships on minorities, so does *Kelo*. *Id*. In sum, *Kelo* has created no reliance interest, but even if it did, that would not be enough to save it.

B. After Discarding Kelo's Boundless Definition of "Public Use" This Court Should Define the Term Consistent with History and Tradition.

This Court defined "public use" wrong because it relied on a judicially-created definition made up throughout the last century rather than sticking with what the Framers understood what public use meant. "[R]eliance on history to inform the meaning of constitutional text is more legitimate, and more administrable, than asking judges to" make an arbitrary policy decision. *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 2 (2022). This Court has recently and rightly been eradicating all judicially made tests such as "the endorsement test" in favor of constitutional interpretation that make "reference to historical practices and understandings." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 510 (2022). Not just when evaluating the actions of citizens, but even when evaluating the actions of government the Court goes to the "Constitution's text, the history against which that text was enacted, and congressional practice immediately following ratification." *Consumer Fin. Protec. Bureau v. Community Fin. Services Assn. of Am., Ltd.*, 601 U.S. 416, 416 (2024).

Kelo's use of history is non-existent. If *Kelo* did address history, it would realize that "[t]he rights of property are committed into the same hands with the personal rights." The Federalist No. 54 (James Madison). Indeed, property rights were treated seriously, and thus a taking for "public use" was not done by a state in the founding era unless it could be used by the entire public for purposes such as "public roads, toll roads, ferries, canals, railroads, and

public parks." *Kelo*, 545 U.S. at 512 (Thomas, J., dissenting). The founding era view was "[t]hat private property ought to be subservient to public uses, when necessity requires it; nevertheless, whenever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money." Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 Vand. L. Rev. 57, 141 (1999). Therefore, like in *Kennedy*, *Bruen*, and *Community Fin. Services Assn. of Am., Ltd.*, this Court should define "public use" consistent with history and clarify that a "public use" taking of private property is only satisfied when the entire public can use the property, not just a private party with some incidental benefits to society writ large.

II. THE FIFTH AMENDMENT'S JUST COMPENSATION CLAUSE IS SELF-EXECUTING BECAUSE IT IS A DIRECT CONSTITUTIONAL REMEDY THAT CAN NOT BE DEFEATED BY STATE LEGISLATIVE INACTION

A. The Framers Established Justice Compensation as a Fundamental Constitutional Right.

The Framers viewed property rights as fundamental to liberty and required protection against governmental interference. In *The Federalist No. 54*, James Madison specifically warned that "government is instituted no less for the protection of property than of the persons of individuals." Thus, the mandatory language of the Takings Clause avoids referencing Congress's role in protecting inherent rights. Moreover, this Court recognized the importance of property rights by incorporating the Takings Clause against the states. *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 239 (1897).

B. Courts Have Consistently Enforced Just Compensation as a Direct Constitutional Command

As originally understood in *United States v. Great Falls Mfg. Co.*, 112 U.S. 645, 657 (1884), the Court recognized a direct obligation for the government to compensate property

owners when taking private property for public use. This understanding reflected the widespread view that just compensation was an inherent limitation on government power, not a right dependent on legislative grace. *See* "the self-executing character of the constitutional provision with respect to compensation. . . ." 1 P. Nichols, *Eminent Domain § 25.41* (3d rev.ed.1972) (supporting the notion that just compensation is not reliant on legislative intervention).

As James Madison highlighted in *The Federalist Papers*, property rights are essential to prevent the government from encroaching on the rights of individuals. The State's attempt to avoid its compensation obligation through sovereign immunity directly contradicts this vision. Here, the property owners come from single-family, small farms in poor, predominantly minority neighborhoods. Thus, if they fall to hard times, making them susceptible to eminent domain takings, they will require equitable, just compensation. However, what's alarming is that the New Louisiana Code § 13:5109 requires a statutory/executive waiver of sovereign immunity, making relief practically impossible.

Looking at the Takings Clause through *Chicago* nullifies New Louisiana's attempt to evade its constitutional obligation. The affected property owners, who include predominantly minority farmers and homeowners who have held their land for generations, represent the kind of established property rights that incorporation was meant to protect against state interference.

C. Precedent Confirms Just Compensation as an Independent Constitutional Right

This Court's most recent precedent confirms the self-executing nature of the Takings Clause. *Devillier v. Texas*, 601 U.S. 285, 288 (2024) is instructive because it involves a claim for just compensation under the Takings Clause. However, unlike *Devillier*, where the plaintiffs could seek relief under state law, this case presents a more egregious situation of New Louisiana intentionally circumventing the possibility of just compensation through its legislative inaction.

Devillier leaves unresolved the question of whether the Takings Clause creates an independent cause of action when no state remedy exists. In the present case, the State's deliberate creation of a legal barrier to just compensation raises a public policy issue: can the government, by legislation inaction, trample on individual rights that the Constitution expressly protects? The economic hardships the affected farmers faced nearly made it impossible to challenge the state in federal or state litigation and further demonstrate the self-executing nature of the Takings as a necessary constitutional safeguard.

Moreover, allowing New Louisiana to evade its constitutional obligations incentivizes other states to strategically orchestrate legislation to circumvent their duty to vulnerable communities lacking political power. New Louisiana must be held accountable to the people it serves and the constitution it is led by. This deliberate circumvention of constitutional rights is precisely what the Founding Fathers designed the Taking Clause to prevent.

Dohany v. Rogers, 281 U.S. 362 (1930) further confirms that a state cannot just do what it wants with procedural rules to defeat the constitutional right to just compensation. The *Dohany* Court reaffirmed that the "right to compensation…under the due process clause… is guaranteed by the Fourteenth Amendment and Article 13 of the Michigan Constitution." Id. at 366. Although *Dohany* involved a procedural barrier rather than sovereign immunity, the principle remains the same: states cannot create mechanisms that obstruct access to constitutionally guaranteed compensation. Here, New Louisiana's sovereign immunity defense represents a more direct violation of this principle because it denies property owners any remedy for the government's takings. Just as procedural barriers cannot undermine the right to compensation, sovereign immunity cannot serve as a shield to evade this constitutional obligation.

This understanding is reinforced by this Court's precedents rejecting procedural barriers to constitutional rights. While *Bivens v. Six Unknown Named Agents,* 403 U.S. 388 (1971) established a direct cause of action for damages for constitutional violations by federal officers who violate a person's Fourth Amendment rights, the Takings Clause differs because it explicitly imposes an obligation to compensate. This distinction is crucial because, unlike *Bivens,* where the Court had to create a remedy, the Takings Clause already includes one within its text.

A potential counter to this position comes from *Hans v. Louisiana,* 134 U.S. 1 (1890), where the Court recognized broad state sovereign immunity. However, *Hans* cannot override the Takings Clause's explicit compensation requirement, especially after its incorporation through the Fourteenth Amendment. Sovereign immunity does not excuse a state from its constitutional obligation to provide just compensation when it takes property for public use.

Furthermore, even temporary regulatory takings, which deprive landowners of all beneficial use of their property, require compensation under the Fifth Amendment's Just Compensation Clause. In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304 (1987), the Court explicitly recognized that denying fair compensation for the period during which the property was taken constitutes an insufficient remedy, given the self-executing nature of the Just Compensation Clause. *Knick v. Twp. of Scott,* 588 U.S. 180 (2019), further affirmed this principle holding that property owners are not obligated to exhaust state remedies before asserting their federal claim for just compensation. *Knick's* rejection of state procedural barriers shows that the right to compensation exists independently of state law.

In the present case, New Louisiana's actions clearly trigger the compensation requirement, just like any other taking. While *Bivens* dealt with Fourth Amendment violations by

federal officers, the present case involves an even more explicit constitutional right because the Takings Clause expressly demands compensation. The State's sovereign immunity defense fails because it cannot override an explicit constitutional command, just as *Hans* recognized limits on sovereign immunity when the Constitution directly addresses an issue.

Moreover, *First English* illustrates why New Louisiana's attempt to avoid compensation through sovereign immunity must fail. Just as the Court required compensation for temporary takings, here, the State cannot escape its constitutional obligation merely by refusing to provide a remedy. Fischer and his neighbors, whose connections to their land span generations, exemplify why the Constitution does not leave compensation to state discretion.

Additionally, *Knick's* rejection of state procedural barriers applies directly to New Louisiana's immunity barrier. The State's position would create exactly what *Knick* rejected—a situation where property owners have a constitutional right but no avenue to enforce it. This is especially troubling because the affected owners are predominantly minority farmers and homeowners who lack the political power to secure legislative remedies.

D. State Sovereign Immunity Cannot Override the Constitution's Express Compensation Requirement

Respondents argue that statutory authorization is required for just compensation claims, citing *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003) where the Indian Tucker Act (28 U.S.C. § 1505) provided only a waiver of sovereign immunity, allowing the White Mountain Apache Tribe to bring a claim for damages against the United States. However, this comparison fails because the Just Compensation Clause operates fundamentally differently. Unlike the statutory duties in *White Mountain Apache Tribe*, the Takings Clause creates an independent constitutional right to compensation when property is taken for public use. The

Tucker Act and § 1983 merely provide procedural mechanisms to enforce this pre-existing constitutional right, not the right itself.

This understanding aligns with historical practice. Before modern statutory frameworks, takings claims were brought directly under the Constitution through equitable relief. See *Norwood v. Baker*, 172 U.S. 269, 293 (1898) (where the injured party received an injunction that permanently restrained the village from enforcing the assessment against her property). *Norwood* establishes that imposing disproportionate costs can constitute an unconstitutional taking. Equally important, the Treasury Department routinely paid compensation claims based on the Fifth Amendment without requiring statutory authorization. *Library of Congress v. Shaw*, 478 U.S. 310, 316 n.3 (1986). This historical practice reflects the Framers' recognition of property rights as fundamental and self-executing, requiring no legislative implementation to be effective. This same principle applies here, where New Louisiana cannot avoid its constitutional obligation merely by refusing to provide a statutory remedy.

In the present case, New Louisiana allowed takings for economic development under NL Code § 13:4911. However, this approach is not legally sound. While Respondent compares this to the *White Mountain Apache Tribe*, this case neither involves legislation enabling statutory interpretation, and even if it did, it would not matter because the Constitution, specifically the Just Compensation Clause, operates independently in protecting property rights. New Louisiana has intentionally sought to circumvent its obligation by exploiting state authority and the lack of federal enforcement to avoid providing compensation.

Furthermore, statutory interpretation is not necessary to gain compensation. Just as the Treasury Department enabled compensation in *Shaw* without statutory authorization, this Court

should recognize that the Takings Clause stands independently as a robust protection of property rights.

E. Allowing States to Evade Just Compensation Would Nullify a Fundamental Constitutional Protection

In *Knick*, the Court stressed the importance of directly enforcing the Takings Clause without requiring property owners to exhaust state-level remedies. Notably, the *Knick* Court overruled the state litigation requirement previously established in *Williamson County*. In *Williamson County*, the plaintiff sought equitable relief under 42 U.S.C. § 1983 and alleged a violation of the Fifth Amendment in federal court after failing in state court, but her federal claim was initially rejected. The Court ultimately held that a property owner has an actionable Fifth Amendment takings claim as soon as the government takes property without just compensation. Thus, the owner may immediately bring a claim in federal court under § 1983 without first resorting to state remedies, overruling *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). *See Knick v. Township of Scott*, 588 U.S. 180 (2019). Chief Justice Roberts explained, "The state-litigation requirement has also proved unworkable in practice." *Id.* at 204. An injured plaintiff now has the right to bring a claim in federal court without first exhausting state remedies. Roberts also noted that "Federal courts will not invalidate an otherwise lawful uncompensated taking when the property owner can receive complete relief through a Fifth Amendment claim brought under the Tucker Act." *Id.*

In the present case, Fischer had no opportunity to pursue a state claim because there were no available state remedies through statute or other legal avenues. Moreover, since the state has not waived its sovereign immunity, there is no opportunity for Fischer to actually sue the government. Thus, Fischer's only recourse is to file suit in federal court. It is an injustice to Fischer and the other property owners to be denied just compensation for such an egregious

taking. Even with partial compensation, the requirement of just compensation is rooted in fairness, justice, and equity. As noted in *Knick*, pursuing any state litigation would be "unworkable." Similarly, in this case, the framework for Fischer to receive compensation is virtually impossible. With the advent of this case law, injured plaintiffs now have the opportunity to seek direct relief through federal courts.

F. The Self-Executing Nature of the Takings Clause

The right to just compensation is inherent in eminent domain, even when the government takes private property for public use without formal condemnation proceedings. In *United States v. Great Falls Mfg. Co.*, 112 U.S. 645, 656-57 (1884), the Court held that the Constitution itself creates a direct obligation for the government to provide just compensation when property is appropriated. In *Great Falls*, the government took private property for a dam and reservoir without following condemnation procedures, but the Court ruled that this did not relieve the government of its duty to compensate. The Court reasoned, "The government took the property for the public uses designated; we do not perceive that the court is under any duty to make the objection to relieve the United States from the obligation to make just compensation." *Id.* This holding demonstrates that the constitutional right to compensation exists independently of any statutory authorization.

Equally important, the Court has established that "just compensation" applies to both physical property and intangible rights, such as the right to collect tolls. In *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 324-26 (1893), the Court ruled that compensation must include intangible rights, rejecting Congress's attempt to deny compensation for a company's toll-collection franchise after taking its property. The Court held that "just compensation" must cover tangible property and the franchise to collect tolls, reaffirming the government's obligation

to compensate for all property rights taken under the Takings Clause. *Id.* at 344. This broad understanding of compensable rights confirms that the Just Compensation Clause operates independently of statutory limitations.

Great Falls speaks directly to the present situation. Similar to how the *Great Falls* Court rejected the argument that property owners need statutory authorization to seek compensation, this Court should reject New Louisiana's attempt to condition compensation on legislation and sovereign immunity. Moreover, just as in *Monongahela*, where all property rights, including the franchise to collect tolls, were considered for compensation, the present case involves self-executing principles that require just compensation without additional legislative action.

Chicago reaffirmed that due process under the Fourteenth Amendment protects the right to "just compensation" for takings, even when the amount seems minimal. In *Chicago*, the city awarded a railroad company only $1 for condemned land. Although the railroad argued this violated its rights, the Court upheld the compensation, reasoning that it accurately reflected the actual value of the appropriated property. 166 U.S. at 258. This case demonstrates that nominal compensation can satisfy constitutional requirements only if it corresponds to the fair value of the property taken.

In this case, the situation differs markedly from *Chicago,* where nominal compensation satisfied constitutional requirements because it reflected fair value. Here, the compensation provided to petitioners and the other property owners falls far below market value. Unlike the $1 awarded in *Chicago*, which accurately represented the property's worth, the compensation here disregards both the actual market value and the personal significance of the land. These properties include minority-owned farms and family homes passed down through generations carrying value that far exceeds any compensation the government has offered.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Thirteenth Circuit should be reversed.

Respectfully submitted,

_____

Team 26
Counsel for Petitioner

October 2024