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

BRIEF FOR PETITIONER

October 21, 2024

Team 19
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Karl Fischer, et. al.

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QUESTIONS PRESENTED

I. Under the previous factors the Supreme Court has used to overrule its precedent, does *Kelo v. City of New London* need to be overruled?

II. When a legislative body condemns private property and then sells it to a private owner, has an impermissible taking occurred under the Fifth Amendment's Public Use clause?

III. Under the Constitution's Fifth Amendment, is there sufficient to bring a cause of action to the judiciary when no other statute applies?

STATEMENT OF THE CASE

The New Louisiana legislature passed the Economic Development Act ("EDA"), which granted the Governor broad authority to revitalize the state's tourism attractions and create new jobs. R. at 1,2. Governor Anne Chase soon contracted with Pinecrest, Inc. to build an enormous luxury ski resort spanning 1,000 acres across three of New Louisiana's counties. R. at 2. According to Pinecrest, this will increase tax revenue, attract tourists to the area, and provide 3,000 jobs. R. at 2. Local business owners may profit and surrounding property values may increase. Fifteen percent of the tax revenue from the ski resort is promised to provide long-lasting benefits to the surrounding community. R. at 2.

To complete this project, Pinecrest bought out many of the landowners, and now, New Louisiana will condemn the last ten properties and give them to Pinecrest. R. at 2. These landowners are predominantly poor, minority individuals with small farms and single-family homes. Some homes are in poor condition, and some plots are overgrown, but no property can be described as dilapidated, blighted, or posing any risk to the public. After the state seizes their property, these former property owners will struggle to find comparable housing and will certainly be deprived of the historical and sentimental value of the landowner. R. at 2,3.

Karl Fischer is the lead plaintiff and one of ten holdout property owners who did not accept the State's purchase offer. Fischer's land has been owned and farmed by his relatives for 150 years. His family has owned and worked the property in question since the Reconstruction Era following the American Civil War.[1] R. at 3. Like the nine other landowners, Fischer does not want to sell his land, especially not below market value. R. at 3.

[1] The "Reconstruction" refers to the period following the American Civil War. Though there are various dates, the most influential scholar and writer designates the years from 1863 to 1877 as the timespan of the Reconstruction era.

On March 13, 2023, New Louisiana authorized Pinecrest to tear down the ninety purchased properties, and the State initiated eminent domain proceedings, notifying the remaining owners that state law provides no right to just compensation. R. at. 3. Two days later, the ten property owners brought suit against the State under the Fifth and Fourteenth Amendments, seeking temporary and permanent injunctive relief for violating the Taking Clause. The plaintiffs assert that the taking is not for public use, so the State should be enjoined from taking it. In the alternative, they argue that the government must provide just compensation to the landowners. R. at 4.

New Louisiana filed a Motion to Dismiss under 12(b)(6) 28 U.S.C.A., citing the *Twombly* definition, which the district court granted. The Appellate court affirmed on March 13, 2024, stating it must follow the Kelo precedent that public use extends to takings for economic development even when no harm is being remediated and even when the property is given to another private party. The Thirteenth Circuit found *Kelo* to be a binding and controlling law and concluded that New London's taking is permissible for improved economic development. R. at 4.

By deciding that no right to bring a claim for relief exists under the Fifth Amendment, both courts held that the only cause of action would be to claim a violation of constitutional rights under a federal statute. R. at 4. New Louisiana argued that the Tucker Act, 28 U.S.C. §1491, and 42 U.S.C. §1983 are two statutes that provide the cause of action, but the plaintiffs counter that these statutes do not fit their purpose. R. at 4. Caught within the boundaries of New Louisiana's lack of statutory waiver of immunity and no appropriate federal statute to seek relief,

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Because the land has been in Karl Fischer's family for 150 years, that places the beginning of the ownership in 1874. *Reconstruction as an American Era*, Bouvier Law Dictionary Desk Edition.

the plaintiffs are without opportunity for redress, save for a plain English interpretation of the text of the Constitution. This Court granted the petition for a writ of Certiorari on August 17, 2024. R. at 19.

SUMMARY OF THE ARGUMENT

This Court impermissibly expanded the meaning of the Fifth Amendment's public use further than the Constitution allows in *Kelo v. City of New London*, 545 U.S. 469 (2005). The poor reasoning that led to the *Kelo* decision was based on a decades-old conflation of "public purpose" with "public use." The unworkability of the *Kelo* rule has allowed legislatures with loose promises to seize private land. A decision for Fischer will clarify the limits of what constitutes a taking under the Fifth Amendment without upsetting widespread reliance on *Kelo*. The *Janus*, *Dobbs*, and *Loper Bright* factors favor overruling Kelo and returning to a historical and limited view of "public use."

Paying just compensation to the property owner is part and parcel of the due process element within eminent domain proceedings, but the Framers intended for the State to be able to house the governments and public spaces of a growing nation. Government takings are limited by the plain meaning of "public use," which should produce tangible results with benefits that outweigh the burden the property owner has been made to bear. Promises and projections of future benefits for the greater public good are hollow to Karl Fischer and his neighbors. If this Court continues to let the *Kelo* ruling stand, New Louisiana and other states can justify any land transfer to another party as a matter of law while hiding behind self-serving immunity. This Court has the opportunity to create a bright-line test for what is and what is not a legitimate public use.

The Fifth Amendment is self-executing. In the 2019 *Knick* decision, this Court recently recognized that a Takings violation is complete at the time of the taking. Therefore, the landowners' "pursuit of a remedy in federal court need not await any subsequent state action." *Knick v. Township of Scott, Pa.*, 588 U.S. 180 (2019). The remedy is in the Constitution itself. A self-executing interpretation of the Takings Clause aligns with property rights' fundamental, historical importance. The Fifth Amendment, applied to New Louisiana through the Fourteenth Amendment, limits the reach of government authorities. Unless the Takings Clause is recognized as self-executing, property owners like Fischer will remain helpless, without a cause of action against the overreach of States like New Louisiana, who refuse to waive their immunity.

ARGUMENT

I. With a decision for the Petitioner, the Court should overrule Kelo because it is inconsistent with proper public use doctrine.

Kelo v. City of New London must be overruled it marked a departure from the Court's previous rulings when the definition of "public use" was stretched to include any incidental benefit to the public. As a result of the majority's decision, the *Kelo* departure from the traditional interpretation of "public use" expanded the police power of state and local governments that could be appropriated to serve socio-economic reform without any check on the government's power. By applying the factors set forth by the Court in previous landmark cases to the practical consequences of the *Kelo* misinterpretation of the Takings Clause, the Court must use the questions raised in the *Fischer* case to weigh the factors to find that *Kelo* must be overruled and the public use doctrine clarified.

Although "*Stare decisis* is the preferred course," it is "not an inexorable command." *Pearson v. Callahan,* 555 U.S. 223, 233 (2009). Further, stare decisis "is at its

weakest when we interpret the Constitution," as the Court must in this case. *Agostini v. Felton*, 521 U.S. 203, 235 (1997). Most of all, it is unconscionable to permit a right guaranteed by the Constitution to be "abridged in perpetuity." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 927 (2018).

Almost every year, the Supreme Court, with careful consideration, overrules a precedent. In deciding the *Dobbs v. Jackson Women's Center*, 597 U.S. 215, this Court gave difficult abortion decisions back to the States, overturning the *Roe* and *Planned Parenthood* cases. See *Dobbs v. Jackson Women's Center*, 597 U.S. 215 (2022); but see *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973). In *Janus*, this Court protected free speech rights for union members, overturning *Abood*. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). Most recently, this Court protected the plain meaning of the law and ended an overreliance on deference to a federal agency in *Loper Bright Enters v. Raimondo*, 144 S.Ct. 2244.

To overrule its own precedent, the Supreme Court must assess and weigh several factors: the quality of the reasoning, the workability of the rule, its consistency with other related decisions, and reliance on the decision. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, (2018). The nature of the error and the disruptive effects on other areas of law were considered in *Dobbs,* 597 U.S. at 269. Here, as in *Loper Bright*, the most important factors to consider are the poor quality of the reasoning, the unworkability of the rule, and the lack of meaningful reliance. All three weigh in favor of overruling *Kelo*.

A. Kelo should be overruled because of the low quality of the reasoning.

The reasoning of a line of cases must always begin with the Constitution. A constitutional analysis must begin with "the language of the instrument," *Gibbons v. Ogden*, 9 Wheat. 1, 186–

189 (1824), which offers a "fixed standard" for ascertaining what our founding document means, - J. Story, Commentaries on the Constitution of the United States § 399, p. 383 (1833). The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; *nor shall private property be taken for public use, without just compensation*.

U.S. CONST. amendment 5, emphasis added. The Founders' language demonstrates that holding private property was of utmost importance to them. To the Founders, "public use" meant meeting a practical public need: land for the militia, post offices, or public streets.

The Constitution allows the taking of private property for one reason, a public use, and with one condition, "just compensation." The language is clear, and only the judicial branch can interpret the Constitution. *Marbury v. Madison*, 5 U.S. 137, 138 (1803). Instead of the judiciary determining and limiting the meaning of "public use," the legislature has been conflating "use" with "public purpose" for many decades. This misunderstanding led to *Kelo's* poor reasoning.

As Justice Thomas notes, it is "most implausible that the Framers intended to defer to legislatures as to what satisfies the Public Use Clause, uniquely among all the express provisions of the Bill of Rights." *Kelo*, 545 U.S. 469, 517–18 (2005) (Thomas, J., dissenting). Far from granting the legislature the power to take personal property, the Fifth Amendment was meant to limit the government. A review of public use Supreme Court cases shows where the Court's reasoning veered off track, beginning with Justice Peckham in 1896.

Years after the American Civil War, Congress condemned certain private land to build battlefield memorials at Gettysburg, Pennsylvania, which were clearly for public use because the

public would be welcome to enter and occupy that space physically. *United States v. Gettysburg Electric R. Co.*, 160 U.S. 668 (1896). Justice Peckham declared that "when the legislature has declared the use *or purpose* to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation," and the Court quickly incorporated this into its Public Use Clauses. *Id*. at 680, emphasis added.

Later that same year, Peckham again opined in dicta that a public interest was enough for the government to take land. In *Fallbrook*, the Court determined that water used for the irrigation of arid lands was a public purpose, and the statute under review provided that "[a]ll landowners in the district have the right to a proportionate share of the water." *Fallbrook Irr. Dist. v. Bradley*, 164 U.S. 112 (1896). Yet Justice Peckham added that it was a public use because it was a matter of public *interest*: "[t]o irrigate . . . these large masses of otherwise worthless lands would seem to be a public purpose and a matter of public interest, not confined to landowners, or even to any one section of the State." *Id.* at 161.

"This is no statement of constitutional principle," noted Justice Thomas in his *Kelo* dissent, and "the Constitution does not embody those policy preferences any more than it 'enact [s] Mr. Herbert Spencer's Social Statics.'" Thomas's reference to the *Lochner* Court was a jab at the majority, implying that the majority's focus on a fleeting social scheme would eventually be overruled as *West Coast Hotel* overruled *Lochner*. See *Lochner v. New York,* 198 U.S. 45, 75, (1905); *West Coast Hotel Co. v. Parrish et ux*, 300 U.S. 379 (1937); *Kelo v. City of New London, Conn.*, 545 U.S. 469, 516, (2005). As Lochner led to a line of decisions based on poor reasoning, so here, cases continued to rely on Justice Peckham's dicta.

The same off-track language was used in *Clark v. Nash,* 198 U.S. 361 (1905), where the Supreme Court used the same language to affirm the judgment of a Utah county court to

condemn one foot of a right of way across a homeowner's land. The Court held this was a public use, akin to common carriers, because similarly situated people could share in the water. However, as "purpose" was interchanged for "use" in Peckham's opinions, the Court eventually left the plain meaning of use.

By the 1900's the Court veered away from the original meaning of "public use" even more by increasing deference to the legislature in determining the meaning of public use. In 1946, Congress granted vast tracts of land and power to the Tennessee Valley Authority, a federal agency, giving them "broad responsibilities" to manage "navigability, flood control, reforestation, marginal lands, and agricultural and industrial development of the whole Tennessee Valley. *United States ex rel. TVA v. Welch,* 327 U.S. 546, 552 (1946). The T.V.A. was granted authority to manage "acquisitions of rights-of-way, and other necessary acquisitions of land." Although certainly the dams, reforestation, reservoirs, and development of the natural resources were for a "public use," the Court deferred to Congress to define its limits and increase the power of the government to take private property. *Welch* expanded the eminent domain power to the legislature, but at least limited this authority to Congress. *Id* at 553.

Then in 1954, *Berman* created an entirely new rule. *Berman v. Parker,* 348 U.S. 26. The question in *Berman* was whether the Fifth Amendment would prevent the taking of appellant's department store, which was a "non-blighted" entity amid a blighted neighborhood condemned by the city of Washington, D.C. Instead of applying the Constitutional limitation of the Fifth Amendment, the Court announced, "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation." *Berman*, 348 U.S. at 32.

This newly expanded grant of power further stretched the power of condemnation from Congress to the city.

Thirty years later, the *Midkiff* case was decided, making *Berman* the "very starting point for [their] analysis of the Act's constitutionality." *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984). This reliance on the legislature to determine the meaning of public use allowed the court to transfer property from private owners and transfer it to other private owners to reduce the concentration of land ownership. "We deal, in other words, with what traditionally has been known as the police power," *Berman* had declared, and *Midkiff* followed. Since "[r]egulating oligopoly and the evils associated with it is a classic exercise of a State's police powers," *Midkiff* afforded the Hawaiian legislature almost complete authority. *Id*. at 242. Justice O'Connor reasoned that this qualified as a permissible public use because it mitigated harm, but the *Kelo* decision stretched the police power even further to include any economic benefit.

The *Kelo* ruling further expanded the public use doctrine to include any rationally-related public purpose. "But where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." *Midkiff*, 467 U.S. at 241. If any rational reason serves to justify a State's taking, the Fifth Amendment no longer places a limit a government from condemning land for an illogical purpose. New Louisiana intends to acquire 1,000 acres to build a ski resort, and because the statute allows takings for economic development, an application of the *Kelo* rule merely requires a rational relation to public use. Here, the Act was based on projected benefits and a general anticipation of an increased tax revenue. Unlike the *Midkiff* rule, this taking of non-blighted private property is not a mitigation of harm. Even if the Act is determined constitutional under *Kelo's* expanded public purpose doctrine, it will fail. The New Louisiana

Code requires executive waiver of sovereign immunity from the State for a taking, and this denies the petitioners any compensation. NL Code § 13:5109. By finding for the petitioners in the *Fischer* case, the Court must overrule *Kelo* to make clear that the public use and just compensation requirements must not be abrogated by any state's law.

Here, Respondent New Louisiana highlights the same faulty reasoning. Conflating "public use" with "public purpose," New Louisiana imagines a "better" use for a vague "public purpose" for Karl Fischer's land. This is precisely what Justice O'Connor imagined when she said, "Nothing is to prevent the State from replacing any Motel 6 with a Ritz–Carlton, any home with a shopping mall, or any farm with a factory," or as in this case, a farm with a luxury ski resort. *Kelo v. City of New London, Conn.*, 545 U.S. 513, 503 (2005) (O'Connor, J., dissenting).

When *Kelo* was decided, the Court operated under the *Chevron* doctrine, giving broad deference to federal agencies. New Louisiana's Economic Development Act does not come from a federal agency. However, under the recently decided *Loper Bright* decision that overruled *Chevron*, less deference may be given to the decisions of administrative agencies. "Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority . . . [W]hen a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it." Courts may no longer defer to their judgment when an agency acts outside of Constitutional limits.

B. *Kelo* should be overruled because the rule is unworkable.

The *Kelo* case ruled that an individual's private property can be taken for a "public purpose." This ambiguous rule is unworkable for several reasons. First, it is unworkable because any rule contrary to the Constitution will create a struggle to find justifications for various

interpretations. Second, the vagueness of the rule makes it impossible to apply fairly. A lack of clear standards allows a dearth of due process, inevitably leading to injustice.

Conflating "public purpose" with "public use" makes *Kelo's* rule unworkable because it contradicts a Constitutional right. When interpreting the Constitution, this Court makes the "unremarkable presumption" that every word in the document has independent meaning. *Wright v. United States,* 302 U.S. 583, 588 (1938). The founders chose words like "public use," not "public purpose;" and "public welfare" or "general welfare." The general welfare spoken of in the Constitution had a meaning more akin to general economic benefit. Still, the Founders chose not to use that same word in the Fifth Amendment. U.S. Const. Art. I, §8.

However, the *Kelo* Court has confused "general welfare" with "public use, " just as the Court did in *Midkiff*: "The "public use" requirement is thus coterminous with the scope of a sovereign's police powers." *Midkiff* at 240 (1984). When Suzette Kelo's property was taken by the government and given to a private entity, the Pfizer Corporation, it was for a "public good," under the auspices of creating new jobs and improving the general area. Creating jobs for other people and even "eliminating blight," as in *Berman,* are noble efforts, but they are not a public use as the Founders first intended. The rule will remain unworkable until the Court returns to a true "public use" definition.

Secondly, a public "purpose" is too broad. The danger of the *Kelo* rule is that it is so broad that any government project with a vague promise of new jobs and benefits for business owners can be deemed a public purpose. Under New Louisiana's logic, "incidental public benefits from new private use are enough to ensure the 'public purpose' in a taking," as Justice O'Connor noted in her Kelo dissent, and no one's property will be safe. If the government can

"swoop in at any time and take our homes without the public use test or "actual use" test "[n]othing is to prevent the State from replacing any Motel 6 with a Ritz–Carlton …. *Id*. at 502.

New Louisiana promises new jobs, incidentally higher property values, and improvements to the city as reasons to take individuals' land. Without clear rules for "public purpose," this Court and every court have no way to determine if the reasons given by New Louisiana are "good enough" reasons. A bright line rule is needed to make this rule workable.

C. Kelo should be overruled because there is low reliance on the rule.

Since 2005, many states have acted to limit the holding of Kelo. Twelve states have actually amended their state constitutions to strengthen the property rights of individuals: Nevada, Arizona, North Dakota, Texas, Louisiana, Michigan, Mississippi, Florida, South Carolina, Georgia, Virginia, and New Hampshire.[2]

Ohio, Oklahoma, South Dakota, and Iowa State Supreme Courts have explicitly rejected the *Kelo* decision. See *Norwood v. Horney*, 110 Ohio St. 3d 353 (Ohio 2006); *Muskogee County v. Lowery*, 136 P.3d 639 (Okla. 2006); *Benson v. State,* 710 N.W.2d 131 (S.D. 2006). In *Norwood*, the Supreme Court of Ohio held, "[A]lthough economic factors may be considered in determining whether private property may be appropriated, the fact that the appropriation would provide an economic benefit to the government and community, standing alone, does not satisfy the public-use requirement" of the Ohio Constitution. *Norwood*, 110 Ohio St. 3d at 356. The Supreme Court of Ohio, like many states, acted to limit the holding of *Kelo* in its state.

In the first five years after *Kelo* was decided, forty-three states acted through the legislature to provide strong protection against eminent domain abuse. Of those, thirty-five

[2] Institute for Justice, *Eminent domain*, https://ij.org/issues/private-property/eminent-domain/?option=com_content&task=view&id=2412&Itemid=129 (last visited Oct. 18 2024).

states now do not allow condemnations for economic development.[3] More than twenty states narrowed the definition of "blight," so it could not be used to justify transferring property from one individual to another. A few states, including Florida and New Mexico, eliminated the use of blight as a rationale for eminent domain. R. Benjamin Lingle, *Post-Kelo Eminent Domain Reform: A Double-Edged Sword for Historic Preservation*, 63 Fla. L. Rev. 985 (2011). *Kelo* reasoned that the Federal Constitution did not prohibit the takings, but the court invited states to protect property owners in states' courts and legislatures, which remain free to restrict such takings.

State legislatures have acted to protect their citizens from an overreaching government. State courts have rejected *Kelo*. Since there is little practical reliance on that rule, this factor weighs against upholding *Kelo*. Instead of clarifying the issue, a ruling for New Louisiana here would clash against the rules in almost every state. However, returning to a more straightforward and narrow meaning of "public use" would comport with the way the States have already decided.

Three main factors urge an overturning of Kelo: the poor reasoning, the unworkability of the rule, and the low reliance. The faulty reasoning in the cases leading up to *Kelo* and the *Kelo* rule itself created the unworkability of the implied "public purpose" test, leading to States acting contrary to Kelo's holding. If New Louisiana is permitted to seize the Fischers' land to create a recreational ski park under the Kelo definition of public use, that injustice requires this Court to re-examine Kelo and "revis[e] its theoretical basis ... in order to cure its practical deficiencies." *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009). Only months ago, Justice Kagan opined that

[3] Castle Coalition, 50 State Report Card, http://castlecoalition.org/index.php?option=com_content&task=view&id=2412&Itemid=129 (last viewed Oct. 18 2024).

part of "judicial humility" is "admitting and in certain cases correcting our own mistakes, especially when those mistakes are serious." *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2272 (2024).

Holding that New Louisiana may not seize the Fischers' land to hand it over to a private developer to create a luxury ski resort returns this country to the original understanding of the takings clause that must satisfy the two prongs of the Fifth Amendment, that the taking provides "just compensation" and be for a genuine "public use." Finding in favor of the plaintiffs puts the Court back on the path the Founders intended and protects property rights from an overreaching government.

II. A permissible taking for public use follows the plain meaning of the Takings Clause.

A permissible taking meets the public use requirement in the Constitution. The Fifth Amendment is one of the first ten constitutional amendments, "in the nature of a bill of rights," adopted soon after the ratification of the founding document to reassure the constituents that the government would not abuse its power to interfere with "unalienable rights." *Monongahela Navigation Co. v. United States,* 148 U.S. 312, 324 (1893). This protection extends to the people within the states by incorporation of the Fourteenth Amendment. The words limit the government's power to take private property, expressly: "[No] state [shall] deprive any person of life, liberty, or property without the due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. 14 §1. The doctrine of public use has been developed through this Court's interpretation of a section of the amendment commonly known as the "Takings Clause," which states that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. 5. The most straightforward interpretation of the Takings Clause adheres to a strict public use requirement.

The Takings Clause permits governments to take land under the power of eminent domain as long as it is for public use. Eminent domain has always been within the Sovereign's power, even though it is not expressly stated in the Constitution. *PennEast Pipeline Co. v. New Jersey*, 594 U.S. 482, 494 (2021). The right to acquire land for its use was intentionally conferred by the Founders to the federal government to "enable [the United States government] to perform its proper functions." *Kohl v. United States*, 91 U.S. 367, 368 (1875). The government may not "forc[e] some people alone to bear public burdens, which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The Takings Clause requires that permissible takings only occur for the sake of public burdens.

This Court has moved away from the plain text meaning of the Takings Clause to include other interpretations of public use. In the *Kelo* dissent, Justice O'Connor provided a framework for analyzing the evolution of "public use." *Kelo v. City of New London, Conn.*, 545 U.S. 495, 497 (2005) (O'Connor, J., dissenting). Penning her dissent, Justice O'Connor categorized previous landmark rulings on questions of the public use requirement into three groups. *Id.* at 497-98. Her framework recalls permissible takings of private property (1) from private owners to the government for public ownership or (2) to common carriers (private parties who serve a public utility). See, e.g., *U.S. v. Great Falls Mfg. Co.*, 112 U.S. 645, 656 (1884) (where Congress approved the construction of a dam to supply wholesome water to the cities of Washington and Georgetown). The third category includes rulings where the Court upheld legislatively facilitated transfers of private property from one private party to another. See, e.g., *Berman v. Parker*, 348 U.S. 26, 28 (1954); see also *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 229

(1984) (where legislatures resolved to remediate a social harm and enacted condemnation proceedings).

The early court decisions closely adhered to the plain meaning of public use. Land was regularly taken by the government to build schools, courthouses, and roads. For example, in *Strickley v. Highland Boy Gold Min. Co.*, 200 U.S. 527 (1906), the state condemned a right of way across private property to allow an aerial bucket line to carry mined materials because the ores in the mine were so valuable to the community. This condemnation of land was permissible because it legitimately served a public need. Albeit unusual, an aerial bucket line was utilized by the public as much as any school, courthouse, or hospital, because the local government recognized it as a public use. New Louisiana's Act does not claim land for a public use in the same way. The ski resort is not analogous to a property utilized and occupied by the government or the public.

Taking land from a private owner to be used by a common carrier has also been historically viewed as a permissible public use. Common carriers were privately owned but were occupied by the public and used to transport mail and other goods. Justice O'Connor classified these uses as common carrier takings. Unlike *Fischer* and his co-plaintiffs, transferring land from a private property owner to a common carrier served a public utility.

The third category of takings deviated from the plain text interpretation of public use by affirming property transfers from one private party to another. With legislative powers over the District of Columbia, Congress used private enterprise to redevelop a "slum" neighborhood in the nation's capital. *Berman*, 348 U.S. 26 at 31. Justice Stevens wrote for the majority that "public safety, public health, morality, peace and quiet, [and] law and order" are applications of a government's police power. Id. at 32. The Court moved around the traditional

rule that "transfer of property from one to another is unconstitutional" and conferred any benefit related to the police power as a valid public use for a permissible taking. "We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects." Id. at 34. This rationale in the Berman case was used to justify the property transfers from lessors to lessees in Hawaii. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 231 (1984). In both cases, this Court deferred to the respective local legislatures' declarations that mitigating public harm is a permissible public use under the Takings Clause. See Berman v. Parker, 348 U.S. 26 at 32 (1954) ("where the legislature has spoken, the public interest has been declared in terms well-nigh conclusive"); see also Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 240 (1984) ("The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers.") This Court explained that attempting to define the police power is "fruitless. . .[t]he definition is essentially the product of legislative determinations addressed to the purposes of the government" and not "historically capable of complete definition." Berman v. Parker, 348 U.S. 26 (1954) at 32. By expanding the definition of public use to include a government's police powers, there is a greater opportunity for the transfer of property from one private party to another, with the only justification placed on the legislature's declaration of what is best under the local police power. The majority in the Kelo case moved the boundary lines of what qualifies as a permissible public use even farther away from the plain text meaning of the Takings Clause by ruling that economic development takings are constitutional.

Justice O'Connor wrote the majority opinion for the Midkiff case, overruling the Court of Appeals finding that the state's "Land Reform Act of 1967" violated the public use requirement under the Constitution. *Midkiff*, 467 U.S. 229 at 239. The same Justice went on to disagree with this Court's majority in the Kelo case thirty years later. The dissent was joined by Justices Scalia and Thomas, stating that "all private property is now vulnerable to being taken and transferred to another private owner."

New Louisiana burdened Karl Fischer by requiring him to sacrifice the land his family had held for generations. He has been denied remedy. As Sovereign, the State owes greater deference to this man's lot than to the legislators who decided to confer an economic benefit on New Louisiana by building a 1,000-acre ski slope. Any economic benefit that New Louisiana has perceived is not a benefit that matches the burden imposed on the *Fischer* property owners.

III. The Fifth Amendment Takings Clause is self-executing, thereby creating a cause of action against a state.

The Founders intended the Fifth Amendment to be self-executing. Although both Federal law and States' laws have created further legislation that could create an additional cause of action, the Fifth Amendment itself provides a remedy for a governmental taking. Constitutional rights provide more than defenses. This Court has set precedent by hearing cases that so egregiously offended the nature of due process and fundamental rights under the Fourth, Fifth, and Eighth Amendments, and should do so in the case at bar. The *Fischer* case provides the Court with the opportunity to resolve the issue of whether the Fifth Amendment specifically is self-executing because this case is extraordinary: the New Louisiana law itself curtails the constitutional rights of its citizens.

A. The Founders' viewed the Fifth Amendment as self-executing.

The Founders intended the Fifth Amendment to be self-executing. The colonists came from England for various freedoms, not the least of which was ample land that could be owned by individuals and not the Crown. The influential Enlightenment philosopher John Locke argued that every man had a property right in what he acquired or produced through his own labor. *See* John Locke, The Second Treatise of Government § 27, at 15 (3d J.W. Gough ed. 1966) (1689). Adam Smith argued that the right to pursue a lawful occupation was an essential element of the right to property.[4] In the Federalist papers, Alexander Hamilton averred that private property is essential to liberty. The Founders clearly understood that just as life and liberty are fundamental to a free society, so is property. As with all of the other rights in the Bill of Rights, it was obvious to the Founders that such an inviolate right would not need more legislation to create a remedy if this right was breached.

In the Fifth Amendment, the Founders intentionally and precisely limited the reach of the government to "just compensation" and "public use." As noted by the *First English* court, "[M]any of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them." *First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal.*, 482 U.S. 304 at 321 (1987). The petitioners in *First English* did not have to rely on the Fifth Amendment, because it was unnecessary for the Court to address the question because the claim was brought under a state law.

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[4] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, bk. 1, ch.10, pt. 2 (Modern Library ed. 1937 (1776).

B. Constitutional rights do more than define defenses.

Constitutional rights are both a sword and a shield. This Court has set precedent by deciding questions of whether an egregious injury to due process and fundamental rights without relying on a separate statute or state law, and the Court should do the same thing for the *Fischer* plaintiffs. This Court, in *DeVillier*, agreed that a property taking claim could be brought under the Fifth Amendment if the State's law provided no recourse. Notwithstanding the remedial factors in the *Dohaney* case, ignoring a right to just compensation denies the petitioners due process under the Takings Clause, and this Court should use the opportunity provided by the *Fischer* case to not only clarify the *Kelo* ruling but also to specify what type of relief the Constitution affords in Takings cases. The respondents claim that the petitioner is better suited to bring action under the Tucker Act or 42 U.S.C. §1983, but these statutes are inapplicable to the petitioners and leave them exactly where they started: without due process and without remedy.

In the past, the Court has heard questions of Constitutional protection under other amendments. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); *Davis v. Passman*, 442 U.S. 228 (1979); *Carlson v. Green*, 446 U.S. 14 (1980) (where the petitioners sought to enforce their rights under the Constitution when no state or federal statute provided a direct cause of action). This Court must grant relief for the *Fischer* parties by establishing a precedent that the rights set forth in the Fifth Amendment are also afforded protection, without leave of the State. For example, the renowned "*Bivens* claims" allow individuals to bring a cause of action directly under the Fourth Amendment when a federal actor violates basic civil rights. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Karl Fischer's property rights should be just as highly regarded as in the *Bivens* case. There, an individual, arrested after a warrantless entry, claimed damages under a federal cause of action directly under the Fourth Amendment regardless of any other

statute. *Id*. The Fourth Amendment "guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority," and the Takings clause provides a guarantee that takings of private land for public use can only occur when just compensation is provided. *Id*. at 392. New Louisiana law does not waive the immunity required for a property owner to obtain just compensation as part of the condemnation proceedings, and this leaves the petitioners without a cause of action. Just like the plaintiffs in *Bivens*, the *Fischer* parties have no other recourse but to seek justice under the applicable Constitutional amendment and the Court must use this opportunity to set precedent that the Fifth Amendment applies to all individuals, in every state.

The Court has the opportunity to address the specific question of whether the Fifth Amendment is self-executing by providing relief to the *Fischer* plaintiffs. In the *DeVillier* case, the petitioner argued that the Takings Clause is self-executing and this Court granted certiorari to determine whether that was true. *Devillier v. Texas*, 601 U.S. 285, 290 (2024). The Court vacated and remanded, because there was an applicable state law by which Mr. DeVillier could seek just compensation for his property. *Id*. at 293. Constitutional causes of action do not arise when the state provides a remedy that aligns with the Takings Clause, but this is not the case with Karl Fischer. Here, New Louisiana does not provide a remedy, and the petitioners must rely on the Fifth Amendment.

The petitioners are unable to use a New Louisiana statute to seek just compensation for their taking, and respondents argue that the *Fischer* plaintiffs should bring their claim under the Tucker Act because they seek monetary damages. If only monetary damages were sought, the Tucker Act may apply. In 1933, petitioners brought an action directly against the United States government through the Tucker Act. *Jacobs v. United States*, 290 U.S. 13 (1933). The

government had built a dam that flooded the plaintiffs' land. *Id*. The Supreme Court held that not only would they receive the appropriate damages, they were even entitled to the interest on the money the United States paid at a later date. *Id*. In the opinion, Chief Justice Hughes wrote that such a promise to compensation was "implied" because the Takings Clause directly imposed the duty to do so. *Id*. at 16. Similarly, the respondents in *Knick* argued that the petitioner must bring a claim under the Tucker Act in order to seek relief, "but a claim for just compensation brought under the Tucker Act is not a prerequisite to a Fifth Amendment takings claim—it is a Fifth Amendment takings claim." *Knick v. Township of Scott, Pa*., 588 U.S. at 181. The violation and the remedy are enumerated in the Takings Clause itself, and the Court has a duty to provide Karl Fischer and his co-plaintiffs with just compensation and set the precedent that the Fifth Amendment is self-executing.

C. Because the Fifth Amendment creates a cause of action, this Court must remand to provide just compensation, or in the alternative, enjoin the taking.

Petitioners have, in fact, have a sufficient pleading. According to the respondent's argument, Karl Fischer's case should be dismissed because it fails to state a claim for a cause of action. Under *Twombly*, relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). Here, the petitioners provide that the cause of action exists plainly under the Takings Clause of the Fifth Amendment, just as a *Bivens* action exists under the Fourth Amendment, meeting the requirements of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 12(b)(6).

In summary, the Founders intended that individual property rights be protected from the government as a main tenet of a free society, and they enshrined this notion in the Takings Clause. Property rights are basic rights equally fundamental to those of privacy rights that

prevent unreasonable search and seizure. The State cannot hold due process captive under its own statutes, and the Takings Clause limitations have the power to reach into the offending State. The Fifth Amendment is self-executing because it operates as more than a shield—it is also a sword that pries open the door to have the case heard to protect the most basic Constitutional rights.

While the petitioner acknowledges that appropriation of land under the Takings Clause is nothing new, it must be done for public use, and even then, requires just compensation. New Louisiana avers that the Founders did not intend a remedy for the Takings Clause without a waiver of its own immunity. An interpretation of the Takings Clause under a theory that requires legislative action to assert a claim does not align with the fundamental importance of property rights. This is patently inconsistent, illogical and contrary to the intent of the Framers. This is an untenable position.

This Court should overturn the *Kelo* decision under the *Loper Bright* factors and hold lower courts accountable to the application of public use requirements of the Takings Clause. While the petitioner acknowledges that appropriation of land under the Takings Clause is nothing new, it must be done for public use, and even then, requires just compensation. The *Fischer* plaintiffs ask this court to protect them from the actions of a rapacious state. Since the Fifth Amendment is self-executing, the petitioners have sufficiently pled a cause of action. By determining whether New Louisiana's immunity law specific to economic development takings complies with the Takings Clause, this Court will set a precedent that the Fifth Amendment has teeth.

CONCLUSION

For the preceding reasons, the Court should vacate the Court of Appeals' judgment and remand for further proceedings.

SIGNATURE BLOCK

Respectfully Submitted.

Hassell Moot Court Competition Team 19 for the Petitioner.

October 22, 2024.