No. 17-0850

In the Supreme Court of Texas

KMS RETAIL ROWLETT, LP f/k/a KMS RETAIL HUNTSVILLE, LP,

Petitioner,

v.

CITY OF ROWLETT, TEXAS,

Respondent.

AMICUS CURIAE BRIEF OF INSTITUTE FOR JUSTICE IN SUPPORT OF PETITIONER

On Petition for Review from the
Fifth Court of Appeals, Dallas, Texas
Cause No. 05-16-00402-CV

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TO THE HONORABLE SUPREME COURT OF TEXAS:

The Institute for Justice respectfully submits this amicus curiae brief in support of Petitioner KMS Retail Rowlett, LP f/k/a KMS Retail Huntsville, LP ("KMS Retail"), pursuant to Texas Rule of Appellate Procedure 11.

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Founded in 1991, the Institute for Justice (IJ) is a nonprofit, public-interest legal center dedicated to defending the essential foundations of a free society: private property rights, economic and educational liberty, and the free exchange of ideas. As part of that mission, IJ has litigated cases challenging the use of eminent domain to seize an individual's private property and give it to other private parties. Among the cases that IJ has litigated are *Kelo v. City of New London*, 545 U.S. 469 (2005), in which the Supreme Court infamously held that the U.S. Constitution allows government to take private property and give it to others for purposes of "economic development,"

[1] Pursuant to Rule 11(c) of the Texas Rules of Appellate Procedure, *amicus* confirms that no person or entity other than *amicus* made a monetary contribution to the preparation or filing of this brief.

and *City of Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006), in which the Ohio Supreme Court expressly rejected *Kelo* and held that the Ohio Constitution provides greater protection for private property than does the U.S. Constitution.

IJ was also an important voice promoting eminent domain reforms in state legislatures in the wake of *Kelo*. To date, 44 states have enacted reforms limiting the effect of *Kelo*, either through constitutional amendments or statutes.[2] The Texas statute at issue in this case is one of those reforms. It requires that courts provide meaningful, independent review of public use questions in eminent domain cases. IJ has an interest in this case because the decision below disregards the legislative purpose and allows cities to evade these reforms simply by maintaining nominal ownership of seized property that is nonetheless dedicated to the use of a particular private party.

[2] *See* Dana Berliner, *Looking Back Ten Years After* Kelo, 125 Yale L.J.F. 82, 84 (2015), http://www.yalelawjournal.org/forum/looking-back-ten-years-after-kelo.

STATEMENT OF THE CASE

For purposes of this brief, the Institute for Justice incorporates by reference the Statement of the Case provided by KMS Retail in its Petition for Review filed October 16, 2017.

STATEMENT OF JURISDICTION

For purposes of this brief, the Institute for Justice incorporates by reference the Statement of Jurisdiction provided by KMS Retail in its Petition for Review filed October 16, 2017.

ISSUES PRESENTED

For purposes of this brief, the Institute for Justice incorporates by reference the Issues Presented provided by KMS Retail in its Petition for Review filed October 16, 2017.

STATEMENT OF FACTS

For purposes of this brief, the Institute for Justice incorporates by reference the Statement of Facts provided by KMS Retail in its Petition for Review filed October 16, 2017.

SUMMARY OF ARGUMENT

Both the U.S. and Texas Constitutions prohibit government from seizing private property except for "public use." Yet, in *Kelo v. City of New London*, the U.S. Supreme Court interpreted "public use" broadly and held that the government could use the power of eminent domain to seize private property and hand it over to other private parties if the Legislature believed that doing so would promote "economic development." The Court also held that the judiciary has only a limited role in reviewing the government's determination that a particular taking will serve a public use.

That decision was tremendously unpopular, and almost every state, including Texas, reformed their state eminent domain laws to prevent the kinds of takings that occurred in *Kelo*. In the years since *Kelo*, the Texas courts have had few opportunities to interpret or apply the eminent domain reforms enacted by the Texas Legislature. It is clear, however, from both the plain text of the Texas statute and the context in which it was enacted, that Texas intended to repudiate the holding of *Kelo* by defining "public use" narrowly, by prohibiting takings where the asserted public use is merely nominal or pretextual, and by

requiring the judiciary to independently assess the validity of any asserted public use.

The decision below disregards all of these legislative objectives and effectively embraces the jurisprudence of *Kelo*. The evidence plainly showed that the proposed "public road" was, in reality, nothing more than a private driveway serving a private commercial enterprise. Yet the court explicitly held that it had no business inquiring into the legitimacy of the asserted public use. If allowed to stand, this decision would make Texas an outlier among the states, uniquely hostile to private property rights. The Court should grant review to effectuate the will of the Legislature and confirm that Texas stands with those states where the judiciary is an important guardian of private property rights.

Petitioner's brief aptly demonstrates that the decision below is incorrect, even without regard to the eminent domain reforms enacted by the Texas Legislature. The Institute for Justice submits this brief specifically to emphasize the importance of giving full effect to the Legislature's repudiation of *Kelo*. This case meets the standards for this Court's review because the case concerns the construction of a Texas statute, because the court below committed a serious error of law in

interpreting that statute, and because the questions presented are important and unresolved.[3]

ARGUMENT

I. Texas has rejected *Kelo*-style takings.

On June 23, 2005, the United States Supreme Court handed down one of its most reviled decisions in living memory—*Kelo v. City of New London*, 545 U.S. 469 (2005). In *Kelo*, the Court held that the Fifth Amendment to the U.S. Constitution permits government to take private property and give it to another private party, merely for purposes of economic development. *Id.* at 484. Moreover, the Court also emphasized that the judiciary has a limited role to play in reviewing the legality of condemnations. The Court emphasized that it would not "second-guess" the government's "judgments about the efficacy of its development plan." *Id.* at 488. The result of the Court's decision, as Justice O'Connor said in dissent, is that "[t]he specter of condemnation hangs over all property. 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." *Id.* at 503 (O'Connor, J., dissenting).

[3] *See* Tex. R. App. P. 56.1.

The national backlash against this decision was swift and overwhelming. *See* Castle Coalition, Inst. for Justice, The Polls Are In: Americans Overwhelmingly Oppose Use of Eminent Domain for Private Gain, http://castlecoalition.org/the-polls-are-in. And no less so in Texas. Within hours of the Court handing down *Kelo*, Texas officials announced their intention to reform the state's eminent domain laws to ensure that *Kelo*-style takings could not occur in Texas. *See* Mike Snyder & Matt Stiles, *Lawmaker wants Texans safe from home seizure*, Hous. Chron., June 24, 2005, https://perma.cc/D7JS-KE26 ("Texas' cultural commitment to private property rights surfaced quickly Thursday as a state legislator moved to blunt the impact of a U.S. Supreme Court ruling that local governments may seize land for private development."). "A special legislative session was called in response to *Kelo*," *City of Laredo v. Montano*, 415 S.W.3d 1, 4 (Tex. App. 2012), and on August 31, 2005, Governor Perry signed the Limitations on Use of Eminent Domain Act. Press Release, Tex. Gov. Rick Perry, Gov. Perry Signs New Law Protecting Property Rights: Senate Bill 7 Prohibits Seizure of Property for Private Ventures (Aug. 31, 2005). In signing the bill, Governor Perry said, "[t]here is no bigger supporter of economic

development than I. But I draw the line when government begins to pick winners and losers among competing private interests, and the loser is the poor Texan who owns the land to begin with." *Id.*

The 2005 Act provides that private property may not be taken "through the use of eminent domain if the taking: (1) confers a private benefit on a particular private party through the use of the property; (2) is for a public use that is merely a pretext to confer a private benefit on a particular private party; (3) is for economic development purposes, unless the economic development is a secondary purpose [resulting from a blight elimination project that otherwise complies with statutory requirements]." Tex. Gov't Code § 2206.001(b). The Act also clarifies that these reforms do not limit the power of eminent domain when used for a number of traditional public uses, including, *inter alia*, public roads, hospitals, parks, or libraries. *Id.* § 2206.001(c).

Just as important as the substantive limitation on takings for purposes of economic development, the 2005 reforms also provide that reviewing courts owe no deference to the condemning authorities' determination that a proposed taking is for a genuine public use. *Id.* § 2206.001(e) ("The determination by the governmental or private entity

proposing to take the property that the taking does not involve an act or circumstance prohibited by Subsection (b) does not create a presumption with respect to whether the taking involves that act or circumstance."). This is a direct repudiation of the *Kelo* majority's "deference to legislative judgments in th[e] field" of takings, 545 U.S. at 480, a level of deference that Justice Kennedy, in his concurring opinion, described as akin to "the rational-basis test." *Id.* at 490.

In 2009, the Texas Constitution was amended to echo these statutory reforms, providing that takings are not permitted unless for: "(1) the ownership, use, and enjoyment of the property, notwithstanding an incidental use, by: (A) the State, a political subdivision of the State, or the public at large; or (B) an entity granted the power of eminent domain under law; or (2) the elimination of urban blight on a particular parcel of property." Tex. Const. art. I, § 17(a). The amendment further clarified that "'public use' does not include the taking of property . . . for transfer to a private entity for the primary purpose of economic development or enhancement of tax revenues." Tex. Const. art. I, § 17(b).

Finally, in 2011, the statutory reforms were further amended to add a fourth prohibition on the use of eminent domain—takings are impermissible if they are not for a "public use." *Id.* This 2011 Act also amended numerous other provisions of the Texas Code so that wherever the code had previously referenced the use of eminent domain for a "public purpose," the 2011 Act substituted the more restrictive phrase "public use." 2011 Tex. Sess. Law Serv. Ch. 81 (S.B. 18).

These language tweaks might seem redundant—after all, the Fifth Amendment and Article I, Section 17 of the Texas Constitution already prohibit takings that are not for a "public use"—unless one reads this 2011 Act against the backdrop of *Kelo*. The *Kelo* majority had squarely held that the Fifth Amendment's public use requirement should be interpreted "broadly," to encompass anything that the legislature deems a "public purpose." 545 U.S. at 480. Justice Thomas sharply disputed this point, devoting his entire lengthy dissent to arguing that "public use" and "public purpose" are not interchangeable concepts and that the Fifth Amendment prohibits the use of eminent domain unless the government "actually uses or gives the public a legal right to use the property." *Id.* at 521. So the Texas Legislature, by

substituting the phrase "public use" for "public purpose," was siding with Justice Thomas's narrower, historical understanding of "public use." *See Harris Cty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793, 813 (Tex. 2016) (Lehrmann, J., concurring) ("These provisions are aimed squarely at the federal courts' deferential approach to the public-use requirement. The Legislature has clearly exercised its prerogative to protect Texans' property rights by narrowly defining public use.").

II. The decision below is irreconcilable with the eminent domain reforms that Texas enacted in the wake of *Kelo*.

If two things are clear about the Texas eminent domain reforms, it is that the reforms were intended to repudiate *Kelo* and to increase protection for property owners above the previous, constitutional baseline. *See Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, 363 S.W.3d 192, 197 n.13 (Tex. 2012) ("There is no question that S.B. 18 was intended to increase the rights of property owners facing condemnation proceedings."). Accordingly, when a property owner invokes the protection of section 2206.001, the court should address that argument first and should interpret the statute against

the backdrop of the *Kelo* jurisprudence that the Legislature was rejecting.

The Court of Appeals, however, treated these reforms as an afterthought, dismissing them in just one paragraph and noting that petitioner had made "the same arguments and cit[ed] much the same evidence" as it has relied on for its constitutional argument. *KMS Retail Rowlett, LP v. City of Rowlett*, No. 05-16-00402-CV, 2017 WL 3048477, at *7 (Tex. App. July 19, 2017). The implication of the court's statement is that, having rejected Petitioner's argument as a constitutional matter, the court can also do so as a statutory matter. But that is clearly not what the Texas Legislature intended. *See Brown v. Mem'l Villages Water Auth.*, 361 S.W.2d 453, 455 (Tex. Civ. App. 1962) ("It must be presumed the Legislature did not intend to do a useless thing.").

Although the 2005 Act clarifies that eminent domain is still permitted for "transportation projects, including but not limited to, railroads, airports, or public roads or highways," § 2206.001(c)(2), Petitioner correctly pointed out that the City cannot circumvent the eminent domain reforms by simply labeling a small driveway to a

private grocery store a "public road." Indeed, the 2005 Act explicitly prohibits takings for "pretext[ual]" public uses, § 2206.001(b)(2), and the statute likewise prohibits courts from deferring to the condemning authority's conclusion that a taking is for a public use. § 2206.001(e) ("The determination by the governmental or private entity proposing to take the property that the taking does not involve an act or circumstance prohibited by Subsection (b) does not create a presumption with respect to whether the taking involves that act or circumstance."). These provisions require a reviewing court to consider the true nature of a taking and not to defer to mere labels.

The Court of Appeals, however, rejected this argument, explaining that it would not "judicially amend" the statute by adding a requirement that the proposed transportation project be "legitimate." *KMS Retail*, 2017 WL 3048477, at *7. In other words, the court held that it has no business inquiring into whether the supposedly public nature of a taking is simply a sham or a pretext. The court's interpretation transforms a robust statutory repudiation of deferential judicial review into, effectively, a road map to committing a fraud on both the public and the judiciary. Although clothed in the garb of

textualist interpretation, the court's decision is directly contrary to the text of the statute and to this Court's precedent.

The correct approach is illustrated by this Court's decision in *Texas Rice Land Partners v. Denbury Green Pipeline-Texas*, 363 S.W.3d 192 (Tex. 2012). That case concerned a condemnation to build a pipeline. There was no dispute that if the pipeline were a common carrier, then it would be for a public use and the condemnation would be valid. The question was how to determine whether the pipeline was a common carrier. The pipeline builder argued that it had been granted a permit as a common carrier, and it therefore qualified as a public use as a matter of law. *Id.* at 198. But this Court held that it was irrelevant that the pipeline had been legally *declared* a common carrier; the real question was whether the condemnor could prove, *as a factual matter*, that the pipeline would serve the public. Otherwise, the pipeline's technical, legal status as a common carrier would be nothing more than "a ruse to obtain eminent-domain power." *Id.* at 202; *see also The Pipe Line Cases*, 234 U.S. 548, 560 (1914) (noting that a federal statute labeled certain pipelines "common carriers . . . although not technically common carriers" as the term was generally understood). So too here:

Declaring a private driveway to be a "public road" is just the type of "ruse" that this court rejected in *Texas Rice Land Partners*.

The conclusion is further bolstered by this Court's decision in *City of Austin v. Whittington*, 384 S.W.3d 766 (2012). *Whittington* concerned, *inter alia*, whether a proposed condemnation was for a "public building" and for the provision of "utility services"—both of which are public uses that are enumerated in subsection (c) of the 2005 Act. *Id.* at 791. Although this Court ultimately found that the condemnations were legal, it did so without deferring to the City of Austin's mere assertion that the condemnations were for public uses. Rather, this Court carefully weighed the evidence and concluded that the proposed condemnations were *in fact* for legitimate public uses. *Id.* ("We conclude the evidence conclusively establishes that the parking garage is a public building. . . . Moreover, the evidence conclusively establishes that the district plant is for the provision of utility services."). That is a far cry from the deferential review exhibited by the court below.

Finally, although the Texas eminent domain reforms were plainly intended to reject deferential, *Kelo*-style review of takings, the Court of Appeals' approach below is, perversely, even *more deferential* than the

approach taken by the *Kelo* Court. The *Kelo* majority acknowledged that the City of New London could not "take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." 545 U.S. at 478. But the Court emphasized that its deference to the City was justified by the fact that the City had "carefully formulated an economic development plan," which had been preceded by "thorough deliberation." *Id.* at 483–84. The Court explicitly reserved the question whether such private transfers would be acceptable "outside the confines of an integrated development plan." *Id.* at 487. And Justice Kennedy, the crucial fifth vote, wrote separately to underscore that more searching review would likely be necessary when the identities of the parties likely to benefit from a taking are known at the time the plan is formulated. *Id.* at 493. The situation in Rowlett is thus drastically different from the situation in *Kelo*. In Rowlett there was no comprehensive plan or deliberation. There is only a particular, identifiable private party that, having failed to purchase land that it desired through bilateral negotiations, asked the city to acquire the land on its behalf. Even the U.S. Supreme Court would likely balk at rubber-stamping such a transfer.

III. Numerous other states have rejected the deferential eminent domain review exhibited by the Texas Court of Appeals in the decision below.

Texas is not alone in rejecting *Kelo*. In fact, most states have implicitly or explicitly rejected *Kelo*—either by statute, constitutional amendment, or judicial decision. Although the precise contours of each state's eminent domain jurisprudence are not identical, there are at least two ways in which the decision of the Court of Appeals is out of step with recent eminent domain caselaw from other jurisdictions. First, the decision below displays total deference to the government's assertion that a taking will be for a public use. Second, the decision below treats the mere label "public road" as conclusive, rather than considering whether a nominally public use will *in fact* serve the public.

A. Courts in other states insist that the judiciary has an independent duty to ensure that takings are only permitted for genuine public uses.

Despite the *Kelo* majority's insistence that the courts have a limited role to play in reviewing public use determinations, state courts in recent years have repeatedly insisted that the judiciary has an independent duty to ensure that takings are only permitted for genuine public uses. For instance, the Rhode Island Supreme Court held that,

even under the Fifth Amendment, *Kelo*-style deference is limited to situations where the condemning authority had adopted a "deliberative and methodical approach." *Rhode Island Econ. Dev. Corp. v. The Parking Co., L.P.*, 892 A.2d 87, 104 (R.I. 2006). The court went on to hold that, whatever deference is due to a condemning authority, its findings on the question of public use are "far from dispositive" and that "[w]hether a public purpose is being served must be decided on a case by case basis, in light of the particular facts and circumstances of that case." *Id.* (internal quotations and citations omitted); *accord id.* at 103 ("[W]e have never retreated 'in any degree from our previous declarations' on the public use prong of a Takings Clause analysis and continue to endorse 'the well-established rule that what constitutes a public use is a judicial question.'") (citation omitted).

Other courts have gone further, insisting as a matter of state law that *no deference* is due to a condemning authority's public use determination. For instance, the Michigan Supreme Court, just one year before *Kelo*, rejected the use of takings to promote economic development. Crucially, the court held that, "[q]uestions of public purpose aside, whether the proposed condemnations were consistent

with the Constitution's 'public use' requirement was a constitutional question squarely within the Court's authority." *Cty. of Wayne v. Hathcock*, 684 N.W.2d 765, 785 (Mich. 2004).

Two years later the Ohio Supreme Court, in a decision explicitly rejecting *Kelo*, quoted the *Hathcock* decision extensively and explained that "our precedent does not demand rote deference to legislative findings in eminent-domain proceedings, but rather, it preserves the courts' traditional role as guardian of constitutional rights and limits." *Norwood v. Horney*, 853 N.E.2d 1115, 1138 (Ohio 2006) (internal quotations and alterations omitted); *see also City of Marietta v. Summerour*, No. S17G0057, 2017 WL 4870931, at *3–5 (Ga. Oct. 30, 2017) (interpreting Georgia's post-*Kelo* statute in light of "text, structure, and history of the statute as a whole" and concluding that the statute imposes "meaningful and judicially enforceable limits upon condemnations"); *In re Opening Private Rd. for Benefit of O'Reilly*, 5 A.3d 246, 258 (Pa. 2010) (reversing the trial court because "the court's reasoning speaks merely to the presence of some public benefit * * * [and] there is no attempt to confirm that the public is the primary and paramount beneficiary"); *Bd. of Cty. Comm'rs of Muskogee Cty. v.*

Lowery, 136 P.3d 639, 647 n.12 (Okla. 2006) ("In public funding cases, courts are required to give great deference to the legislature's determination whether a particular project will serve a public purpose. In contrast, the Oklahoma Constitution expressly provides 'in all cases of condemnation of private property for public or private use, the determination of the character of the use shall be a judicial determination.'") (citation omitted).

This Court should grant review to correct the Court of Appeals' erroneous interpretation of Texas law and to establish that Texas stands with those states where the independent judiciary safeguards the sanctity of private property against the whims of government.

B. Courts in other states do not allow takings for nominally public uses when the evidence shows, as a factual matter, that the taking will not serve the public.

The court below, by refusing to consider whether the driveway at issue in this case was a "legitimate" public road, treated the city's invocation of a label as conclusive. That is a ploy that has been rejected not only by this Court in *Texas Rice Land Partners*, but also by courts in other states. The "mere recitation" of magic words such as "public road" should not be "an automatic shield" against further inquiry. *Norwood*,

853 N.E.2d at 1140. "It cannot be sufficient" for the City of Rowlett "to merely wave the proper statutory language like a scepter under the nose of a property owner and demand that he forfeit his land for the sake of the public. Rather, there must be some substantial and rational proof by way of an intelligent plan that demonstrates informed judgment to prove that an authorized public purpose is the true goal of the taking." *Middletown Twp. v. Lands of Stone*, 939 A.2d 331, 340 (Pa. 2007).

For instance, an Oklahoma court recently rejected a proposed taking to build a parking garage. *City of Muskogee v. Phillips*, 352 P.3d 51, 54 (Okla. Civ. App. 2014). Although the garage was to be publicly owned, the court carefully considered the evidence and concluded that the primary purpose of the condemnation was to benefit a particular private party that would lease the majority of the parking spaces. *Id.* at 55–56. Accordingly, the proposed taking was illegal under the Oklahoma Constitution. The court did not allow the nominal public ownership of the garage to obscure the reality of what the government was trying to do.

A similar decision was issued by an Ohio trial court just last year. The case concerned whether eminent domain could be used to build a pipeline to a privately owned plastics factory. *Kinder Morgan Utopia, LLC v. PDB Farms of Wood County, LLC*, No. 2016CV0220 (Wood Cnty., Ohio, Ct. C.P. Oct. 12, 2016), https://tinyurl.com/kindermorgan-pdbfarms. The pipeline builder had argued that it was entitled to exercise the power of eminent domain because, under an Ohio statute, the pipeline would be classified as a common carrier—a traditionally accepted public use. The court, however, recognized that the pipeline would, in practice, serve only a single private party. Accordingly, it was irrelevant that the pipeline might be legally *labeled* a common carrier because the pipeline was not "a common carrier as a matter of fact." *Id.* at 6. The court rejected the proposed taking.

A similar consideration of the evidence in the present case would lead to a similar result. There can be little doubt that the primary purpose of the proposed taking is to support the new grocery store. For instance, although the City of Rowland tries to justify this taking by referring to the need for better emergency vehicle access, that need was not discovered until the grocery store decided that it wanted a new

driveway. *KMS Retail*, 2017 WL 3048477, at *4 ("The staff report also indicated the drive approach 'is needed for emergency vehicle access and first responder service.'"). Only the most deferential review could credit such transparently pretextual public use claims.[4]

PRAYER

In response to *Kelo*, the Texas legislature enacted explicit, meaningful eminent domain reforms. The decision below undermines these reforms and threatens to make Texas an outlier in its hostility to private property rights. This Court should grant the petition for review in order to faithfully apply the will of the Texas legislature and clarify that Texas does indeed stand with those states where the judiciary has an independent duty to ensure that eminent domain is only used for legitimate public uses.

[4] Indeed, the primary "public purpose" of the proposed taking was to "provide circulation between retail locations" and to "facilitate retail activity." *KMS Retail*, 2017 WL 3048477, at *4. That is not even a pretext. It is simply economic development, described with a greater degree of specificity.

RESPECTFULLY SUBMITTED this 17th day of November 2017,

INSTITUTE FOR JUSTICE

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CERTIFICATE OF COMPLIANCE

This brief contains 4,033 words, excluding the portions of the brief exempted by Rule 9.4(i)(1) of the Texas Rules of Appellate Procedure.

/s/ Arif Panju
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CERTIFICATE OF SERVICE

I certify that on November 17, 2017, I caused a true and correct copy of the foregoing Amicus Curiae Brief of Institute for Justice in Support of Petitioner to be sent to the following counsel via the ProDoc electronic filing:

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