**IN THE COURT OF APPEALS OF OHIO**
**SIXTH APPELLATE DISTRICT**
**WOOD COUNTY, OHIO**

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| **KINDER MORGAN UTOPIA LLC,**<br><br>Plaintiff/Appellant,<br><br>vs.<br><br>**PDB FARMS OF WOOD COUNTY, LLC, *et al.*,**<br><br>Defendants/Appellees. | **CASE NO.** 2016WD0051<br><br>On Appeal from the Wood County Court of Common Pleas,<br><br>Case No. 2016CV0220 |

# BRIEF OF THE INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES


Dana Berliner*
Jeffrey H. Redfern*
INSTITUTE FOR JUSTICE
901 North Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320
*DBerliner@ij.org*

Matthew W. Fellerhoff (0064005)
Emily T. Supinger (0074006)
STRAUSS TROY CO., LPA
150 East Fourth Street
Cincinnati, OH 45202-4018
(513) 621-2120
*MWFellerhoff@strausstroy.com*

*Attorneys for Amicus Curiae Institute for Justice*

**Pro hac vice* applications pending

Maurice Thompson
208 E. State Street
Columbus, OH 43215
(614) 340-9817
*MThompson@OhioConstitution.org*

Andrew R. Mayle
210 South Front Street
Fremont, OH 43420
(419) 355-9698
*AMayle@mayleraymayle.com*

*Attorneys for Defendants/Appellees*

Gregory D. Brunton
Daniel J. Hyzak
Bruce A. Moore
REMINGER CO., L.P.A.
65 East State Street, 4th Floor
(614) 228-1311
*GBrunton@reminger.com*

*Attorneys for Plaintiff/Appellant*

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## INTEREST OF THE AMICUS CURIAE

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 individuals' 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," 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.

This case exemplifies the kind of eminent domain abuse that IJ has been fighting for years. A wealthy private interest wants to seize land belonging to family farmers. It wants to do so to advance its own purely private ends. IJ submits this *amicus curiae* brief in support of appellees to demonstrate how the *Norwood* decision controls this case and protects appellees' property from this attempted land grab.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Kinder Morgan Utopia, LLC (Kinder Morgan) wants to build a 225-mile pipeline across Ohio. This "Utopia Pipeline" has just one purpose—to supply ethane natural gas liquid to a single customer, a plastics factory operated by Nova Chemicals, in Ontario, Canada. The proposed pipeline would connect with an existing pipeline in Michigan, and then run practically to Nova Chemicals' doorstep. No other customers will use the pipeline. Indeed, no other customers would have any reason to use it because ethane's primary use is as a feedstock for plastics, and Nova is the only plastics company with a manufacturing facility at the pipeline's terminus.

The proposed route for the pipeline crosses farmland that has been owned and farmed by the same families for generations. Understandably, some of these families do not want to sell their land. Yet, rather than routing the pipeline through the land of owners who are willing to sell, Kinder Morgan is attempting to invoke the state's power of eminent domain to seize the land it wants. The Court of Common Pleas correctly ruled that this is illegal.

Kinder Morgan claims that an obscure Ohio statute, enacted in 1953, gives it the power to take property from unwilling owners for use in any pipeline project, even if that pipeline is specially constructed to serve just a single client. The appellees will show that Kinder Morgan's interpretation of the statute is incorrect. But even if Kinder Morgan were correct about the statute, the Ohio Constitution prohibits the use of eminent domain unless the property to be acquired is for a

genuine *public use*. Under controlling precedent, a purely private project such as the Utopia Pipeline is not a public use.

The Ohio Supreme Court's authoritative treatment of the concept of public use was in the 2006 case of *City of Norwood v. Horney*, 853 N.E.2d 1115. The Institute for Justice represented the property owners in that case, which concerned the City of Norwood's attempt to condemn private property in an allegedly "deteriorating" neighborhood. The city wanted to transfer IJ's clients' homes to a private developer. In ruling for our clients, the Ohio Supreme Court expressly rejected the reasoning of the U.S. Supreme Court's infamous decision in *Kelo v. City of New London*. The Ohio Supreme Court held that the Ohio Constitution provides greater protection for private property than does the U.S. Constitution as interpreted in *Kelo*. Accordingly, the court held, economic development is not a "public use" within the meaning of the Ohio Constitution.

Kinder Morgan largely pretends that *Norwood* does not exist. Its chief argument is that the Ohio legislature has categorically declared that pipelines are "common carriers" and a "public use." Kinder Morgan seems to think that such a legislative determination would settle the issue. But *Norwood* is the squarely controlling case on the question of public use, and it articulates several principles that demonstrate the illegality of Kinder Morgan's attempted land grab. *First*, the courts have a crucial independent duty to determine whether a proposed condemnation is consistent with the Ohio Constitution's public use requirement, *regardless* of whether the legislature has explicitly concluded that a taking is for a

public use. *Second*, this duty is even more important when the property at issue is being transferred to another private party and when the power of eminent domain is being wielded at the sole discretion of a private party. *Third*, the Ohio Constitution is not satisfied by condemnations for hypothetical or speculative future public uses. *Fourth*, mere economic benefits are not public uses under the Ohio Constitution.

*Norwood* is noteworthy for being one of the strongest judicial repudiations of *Kelo* in favor of more robust constitutional protection for private property. Ohio is not alone, however, in rejecting these kinds of condemnations for private gain. Courts in many states have rejected similar attempts to abuse the power of eminent domain for private projects like the Utopia Pipeline. In fact, even under *Kelo*, more stringent judicial review is called for in cases like this one, where it is a private party, rather than the government, that attempts to wield the power of eminent domain.

The Court of Common Pleas correctly held that Kinder Morgan's proposed condemnations are inconsistent with the private property rights protected by the Ohio Constitution, and this Court should affirm.

## ARGUMENT

### A. *Norwood* controls this case.

In 2006, the Ohio Supreme Court decided *Norwood v. Horney*, Ohio's definitive case on the meaning of "public use" under the Ohio Constitution. 853 N.E.2d 1115. The case concerned a city's plan to seize private homes in an allegedly

"deteriorating" neighborhood and give those homes to a private developer that would supposedly put the land to better use. In a thorough opinion addressing the history and interpretation of public use requirements since the Founding, the Ohio Supreme Court held that a taking is not permitted by the Ohio Constitution when the only "public use" for the property is the supposed economic benefit that will result from its being put to "better" use. *Id.* at 1141.

Although public use is central to this case, Kinder Morgan devotes just a few sentences at the end of its brief to *Norwood*. Br. at 15. Kinder Morgan would limit the applicability of *Norwood* to the specific issue of allegedly "deteriorating" property. But the Ohio Supreme Court did not write a unanimous 58-page opinion to settle such a narrow issue. The rules established by *Norwood* are broad. In the present case they are dispositive.

### 1. The public use requirement of the Ohio Constitution is independent of any statutory determinations by the legislature.

Kinder Morgan argues that the trial court erred because, under Ohio statutes, as "a company . . . engaged in the business of transporting petroleum through pipes . . . it is a common carrier." Br. at 5. This purported common-carrier status is, according to Kinder Morgan, sufficient to satisfy the public use requirement of the Ohio Constitution. Br. at 11 ("[A]ppropriation by a private commercial enterprise with common carrier status . . . is statutorily defined to be for a public use."). Kinder Morgan is mistaken. Although Kinder Morgan is *not* a statutory common carrier (as appellees demonstrate in their brief), the public use

determination hinges on more than the legislature's invocation of magic words such as "common carrier." "The mere recitation" of those words "is not an automatic shield" against judicial review. *Norwood*, 853 N.E.2d at 1140 (internal quotation omitted). Indeed, in virtually every eminent domain case, there is a legislative determination of public use. That is the beginning of the inquiry, not the end. As the Ohio Supreme Court explained in *Norwood*:

> [O]ur 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. Accordingly, questions of public purpose aside, whether proposed condemnations are consistent with the Constitution's 'public use' requirement is a constitutional question squarely within the Court's authority.

*Id.* at 1138 (internal quotations and alterations omitted).[1] Kinder Morgan's reliance on statutory definitions, to the exclusion of the Ohio Constitution, is therefore misplaced.

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[1] The Ohio Constitution speaks of "public use," not "common carriers," *see* OH Const. art. I, § 19, but Kinder Morgan treats these terms as equivalent without explaining why. To the extent that a party's status as a common carrier might be relevant to the constitutional public use inquiry, it would be "common carrier" status as the term was understood under common law, at the time of ratification. *See Kelo*, 545 U.S. at 512 (Thomas, J., dissenting) (discussing founding-era practice regarding use of eminent domain for common carriers). The fact that a legislature might label an entity a "common carrier" does not mean that the entity is in fact a common carrier as the term was understood at common law. *See 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).

The importance of an independent, judicial determination of public use is at its height in a case like this one, where the power of eminent domain is being wielded by a private party, seeking property for its own private use, without a hint of government oversight. Again, *Norwood* is squarely on point: "[W]hen the authority [of eminent domain] is delegated to another," such as a private pipeline company like Kinder Morgan, "the courts must ensure that the grant of authority is ***construed strictly and that any doubt over the propriety of the taking is resolved in favor of the property owner***." *Id.* at 374–75 (emphasis added).

### 2. The hypothetical "right" of the public to use the pipeline does not satisfy the public use requirement when it is clear that the pipeline will in fact be used by only one party.

Kinder Morgan also claims that—statutory authorization aside—the Utopia Pipeline satisfies the Ohio Constitution's public use requirement because Kinder Morgan held an "Open Season," during which any member of the public could reserve capacity on the pipeline and because FERC regulations require 10% of the capacity of the pipeline be offered to the public, even if a single shipper wants to reserve all of the capacity. Br. at 6. Yet Kinder Morgan admits that Nova Chemicals is the *only* shipper that has committed to use the pipeline. Br. at 7. This is not surprising because the pipeline runs directly to Nova's facility. Who else would ever want to use the pipeline? The public use for a proposed taking must be real, not speculative. The public's hypothetical right to use the pipeline does not satisfy the Ohio Constitution.

In *Norwood*, the city attempted to condemn the homeowners' property because it was supposedly located in a "deteriorating area." The Ohio Supreme Court rejected that attempt, explaining that "what [an area] might become may be no more likely than what might not become. Such a speculative standard is inappropriate in the context of eminent domain." 853 N.E.2d at 1145. The court then squarely held that "[a] municipality has no authority to appropriate private property for only a contemplated or speculative use in the future," and that "[p]ublic use cannot be determined as of the time of completion of a proposed development, but must be defined in terms of ***present commitments*** which in the ordinary course of affairs will be fulfilled." *Id.* (emphasis added) (internal quotation omitted). The only "present commitment" to use the Utopia Pipeline is Nova's. That is insufficient under *Norwood*.

### 3. The other proposed "public benefits" of the Utopia Pipeline are all economic, but mere economic benefit is not a public use under the Ohio Constitution.

The core holding of *Norwood* is that economic development is not a public use sufficient to satisfy the Takings Clause of the Ohio Constitution. 853 N.E.2d at 1141. Nevertheless, Kinder Morgan offers a list of supposed economic benefits that it brazenly claims can each "independently" satisfy the Ohio Constitution. Br. at 12. It argues that the Utopia Pipeline will:

- "support[] the development of Ohio's Marcellus and Utica Shale play,"

- "supply the market with feedstock to produce synthetic materials which will return to Ohioans in the form of consumer products which all Ohioans need and use every day,"
- "enabl[e] the continued development of [Ohio] mineral estates,"
- prevent "50,000 barrels of petroleum from being transported per day by fuel trucks on the highway system,"
- and "create approximately 1,000 jobs, with $150 million in payroll, with all of the incidental tax revenues and economic activity."

Br. at 12–13. But even assuming the truth of Kinder Morgan's rosy predictions, they are self-evidently nothing more than incidental economic benefits, of the type rejected in *Norwood*. *See* Brief for Appellee City of Norwood at 33–34, *Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006) (No. 05-1210) (arguing that the taking at issue would "preserve and create jobs in Norwood and . . . improve the local economy," "double" the amount of housing in the area, and protect residents from "high traffic volumes generated by other, incompatible land uses.").

The Ohio Supreme Court rightly recognized that a predicted "economic benefit" was meaningless as a standard to constrain the abuse of eminent domain. Particularly in an integrated, modern economy, every transfer of property will have ripple effects, some of which could be characterized as benefits. But as *Norwood* explained (quoting the Michigan Supreme Court):

> Every business, every productive unit in society, contributes in some way to the commonwealth. To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain. **[The] 'economic benefit' rationale [for takings] would validate**

> **practically any exercise of the power of eminent domain on behalf of a private entity.** After all, if one's ownership of private property is forever subject to the government's determination that another private party would put one's land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, 'megastore,' or the like. Indeed, it is for precisely this reason that this Court has approved the transfer of condemned property to private entities only when certain other conditions are present.

*Norwood*, 853 N.E.2d at 1141 (quoting *Cty. of Wayne v. Hathcock*, 684 N.W.2d 765, 786 (Mich. 2004)) (alterations omitted, emphasis added).

Kinder Morgan does not even present a fig leaf of an argument to distinguish *Norwood*. What it does offer is nothing more than a naked invitation to disregard binding precedent. This Court should decline the invitation.

### B. Other states have likewise rejected the use of eminent domain for projects like the Utopia Pipeline.

Ohio has taken a leading role in providing constitutional protection for private property rights. In *Norwood* and in "consistent holdings throughout the past two centuries," the Ohio Supreme Court has held that the Ohio Constitution requires "that a genuine public use must be present before the state invokes its right to take." *Id.* at 1141. In rejecting Kinder Morgan's attempt to invoke eminent domain for the Utopia Pipeline project, however, the trial court was in good company. Courts in other states—some of which have not demonstrated the same commitment to private property as Ohio—have also rejected the use of eminent domain for projects like the Utopia Pipeline.

***Oklahoma:*** Two months before the Ohio Supreme Court decided *Norwood*, the Oklahoma Supreme Court issued a decision that also rejected *Kelo* as a matter of state constitutional law. In a case remarkably similar to the one before this Court today, the Oklahoma Supreme Court held that the Oklahoma Constitution does not permit government to seize private property for the mere purpose of furthering economic development. *See Bd. of Cty. Comm'rs of Muskogee Cty. v. Lowery*, 136 P.3d 639, 651 (Ok. 2006) ("In other words, we determine that our state constitutional eminent domain provisions place more stringent limitation on governmental eminent domain power than the limitations imposed by the Fifth Amendment of the U.S. Constitution."). *Lowery* concerned a proposed pipeline that, like the Utopia Pipeline, "would be solely dedicated to the purpose of serving a private entity"—in that case an electric power plant. 136 P.3d at 649. The court did not deny that the project had the potential for "incidental enhancement of tax and employment benefits," but explained that "[t]o permit the inclusion of economic development alone in the category of 'public use' or 'public purpose' would blur the line between 'public' and 'private' so as to render our constitutional limitations on the power of eminent domain a nullity." *Id.* at 652. This explanation echoes the analysis of the Michigan Supreme Court and foreshadows the analysis of the Ohio Supreme Court just two months later.

The Oklahoma courts have also had little difficulty rejecting speculative claims that the public *might someday* use a facility as a basis for finding that a proposed condemnation was constitutional. In *City of Muskogee v. Phillips*, the city

attempted to condemn private property to build a parking garage. Although the garage was to be publicly owned, a particular business was to be given priority access to the parking spaces, ahead of the general public. 352 P.3d 51, 54 (Okla. Civ. App. 2015). The Oklahoma Court of Civil Appeals held that the proposed condemnation was unconstitutional because the *primary purpose* of the taking was to benefit a single entity and because, "depending upon the number" of spots to be used by the preferred party, "the parking spots may never be offered to any member of the public." *Id.* at 55. Of course, it was theoretically possible that some members of the general public might have access to the garage, just as it is theoretically possible that someone other than Nova Chemicals may someday wish to use the Utopia Pipeline. But that is insufficient under both the Oklahoma and the Ohio Constitutions.

***West Virginia:*** Just a few weeks ago, the West Virginia Supreme Court held that its state constitution prohibits a private entity from exercising the power of eminent domain to build a private pipeline to transport natural gas from West Virginia's gas-producing regions to mid-Atlantic markets. *Mountain Valley Pipeline, LLC v. McCurdy*, No. 15-0919, 2016 WL 6833119, at *1 (W. Va. Nov. 15, 2016). The court emphasized that over 95% of the gas to be transported would be owned by the pipeline builder or its affiliates and that there was "no definitive evidence" that the pipeline would transport gas to any West Virginia customers, despite the pipeline builder's protestation that future local distribution agreements were "likely." *Id.* This argument brings to mind Kinder Morgan's claim that it "has had numerous

potential shippers consider utilizing the pipeline." Br. at 7. Again, speculative possibilities do not satisfy the public use requirement.[2]

***Texas:*** The Texas Supreme Court has rejected another of Kinder Morgan's arguments.[3] In *Texas Rice Land Partners v. Denbury Green Pipeline*, a pipeline builder argued that it was entitled to exercise the power of eminent domain because it held itself out as a "common carrier." 363 S.W.3d 192, 202 (Tex. 2012). Yet the proposed pipeline would run directly from one private facility to another. There was nothing in the record suggesting that the public would ever have any reason to use the pipeline at issue. *Id.* at 203 ("He did not identify any possible customers and was unaware of any other entity unaffiliated with Denbury Green that owned CO2 near the pipeline route in Louisiana and Mississippi."). Accordingly, the court held that, notwithstanding the pipeline builder's technical, legal status as a "common carrier," it could not exercise the power of eminent domain unless it could demonstrate a "reasonable probability" that the pipeline would *in fact* serve the

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[2] Notably, although West Virginia courts, like Ohio courts, apply "greater scrutiny" when private parties are attempting to wield the power of eminent domain, *McCurdy*, 2016 WL 6833119 at *11, n.8, the court found it unnecessary in that case to rely on heightened scrutiny because it was "patently clear . . . that private property may not be taken for a private use" such as the pipeline at issue. *Id.* at *10.

[3] Although the decision was rendered on statutory grounds, the court interpreted the Texas statutes against the backdrop of the Texas Constitution's public use requirement, which was amended in 2009 to clarify 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." *See* Tex. Const. art. I, § 17.

general public in the future. *Id.* at 202. The court properly recognized that it is meaningless for a private party to accept the duties of a common carrier if it is plain that no members of the public will ever avail themselves of their right of access. As the court explained:

> Suppose an oil company has a well on one property and a refinery on another. A farmer's property lies between the oil company's two properties. The oil company wishes to build a pipeline for the exclusive purpose of transporting its production from its well to its refinery. Only about 50 feet of the proposed pipeline will traverse the farmer's property. The farmer refuses to allow construction of the pipeline across his property. **The oil company knows that no party other than itself will ever desire to use the pipeline. In these circumstances, the application for a common-carrier permit is essentially a ruse to obtain eminent-domain power.** The oil company should not be able to seize power over the farmer's property simply by applying for a crude oil pipeline permit with the Commission, agreeing to subject itself to the jurisdiction of the Commission and all requirements of Chapter 111, and offering the use of the pipeline to non-existent takers.

*Id.* at 201–02. For all material purposes, this hypothetical oil pipeline is no different from the Utopia Pipeline. Even if both are technically "open" to the public, the public has no possible need for these pipelines.

***Pennsylvania:*** The Supreme Court of Pennsylvania has repeatedly rejected the use of eminent domain in cases similar to this one. For instance, in 2003, the court rejected the use of eminent domain for the construction of a private road, which like the Utopia Pipeline was specifically intended to serve a single, private entity. The court conceded that

> society as a whole may receive a collateral benefit when landlocked property may be accessed by motorized vehicles, and thus presumably be put to its

> highest economic use; yet, it cannot seriously be contended that the general population is the primary beneficiary of the opening of a road that is limited to the use of the person who petitioned for it.

*In re Forrester*, 836 A.2d 102, 105 (Pa. 2003) (plurality opinion). The court reaffirmed this holding a few years later. *See In re Opening Private Rd. for Benefit of O'Reilly*, 5 A.3d 246, 258 (Pa. 2010) ("This Court has maintained that, to satisfy this [public use] obligation, the public must be the primary and paramount beneficiary of the taking.").

Just a few months ago, the Supreme Court of Pennsylvania unanimously found unconstitutional a state statute that purported to give natural gas companies the right to construct underground holding tanks on private property. *Robinson Twp. v. Commonwealth*, 147 A.3d 536, 588 (Pa. 2016). The court explained that this statutory authorization was not limited by its terms to public utilities that were actually providing energy to consumers. Rather, the statute "allow[ed] any corporation empowered to transport, sell, or store natural gas or manufactured gas in this Commonwealth to exercise the power of eminent domain over the private lands of another." *Id.* at 587 (internal quotation omitted). The court had little trouble concluding that this was unconstitutional, explaining that there was not even a "reasonabl[e]" argument "that the public is the 'primary and paramount' beneficiary when private property is taken in this manner." *Id.* at 588. The *Robinson* court likewise rejected arguments that eminent domain could be used to "advance the development of infrastructure in the Commonwealth." *Id.* The court explained that "[s]uch a projected benefit is speculative, and, in any event, would

be merely an incidental one and not the primary purpose for allowing these type of takings." *Id.*

The Supreme Court of Pennsylvania's analysis is equally applicable in the present case. Kinder Morgan implies throughout its brief that the importance of natural gas extraction to Ohio's economy justifies treating the Utopia Pipeline as a public use. *E.g.*, Br. at 1 ("Over the last five years, Ohio has experienced an unprecedented increase in oil and gas development in the Utica and Marcellus Shale regions."). But natural gas is even more important to Pennsylvania's economy. The Supreme Court of Pennsylvania nonetheless recognized that private uses do not become public merely because a private party is connected with a large or important industry.

***Kentucky:*** In a recent case cited by the trial court, the Kentucky Court of Appeals considered whether a pipeline, the sole purpose of which would be to carry natural gas to the Gulf of Mexico, would be "in the public service of Kentucky." *Bluegrass Pipeline Co., LLC v. Kentuckians United to Restrain Eminent Domain, Inc.*, 478 S.W.3d 386, 392 (Ky. Ct. App. 2016). The court concluded that it would not, and accordingly it held that the pipeline could not exercise the power of eminent domain. Kinder Morgan protests that *Bluegrass Pipeline* is distinguishable because the Utopia Pipeline would "allow[] the exporting of Ohio's products, benefitting Ohioans," Br. at 14, whereas the Bluegrass Pipeline was merely passing through Kentucky. But the Kentucky court's analysis never hinted that the result hinged on whether the pipeline was transporting resources extracted in Kentucky.

To the contrary, the court categorically held that: "[i]f these [natural gas liquids] are not reaching Kentucky consumers, then Bluegrass and its pipeline cannot be said to be in the public service of Kentucky." 478 S.W.3d at 392. The same is true of the Utopia Pipeline.

### C. Even under *Kelo*, the proposed condemnations in this case are unconstitutional.

Although this case is straightforward under the Ohio Constitution, the result is even the same under the *Kelo* Court's interpretation of the U.S. Constitution because Kinder Morgan is a private party, attempting to exercise the power of eminent domain for its own benefit, without a hint of government oversight. In *Kelo*, a crucial aspect of the Court's rationale was that the decision to exercise the power of eminent domain had been made by the city, which had "carefully formulated an economic development plan" that was "comprehensive" and preceded by "thorough deliberation." 545 U.S. 469, 483–84. It was these considerations—totally absent in this case—that justified the Court's deferential approach to governmental determinations that the condemnations at issue would serve a public use.

Justice Kennedy, the crucial fifth vote in *Kelo*, even wrote separately to underscore that more searching review would likely be appropriate when such "thorough deliberation" was absent. He explained that "transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause." 545 U.S. at 490 (Kennedy, J., concurring). He went on to express his opinion that "[t]here may be

private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause." *Id.* at 493; *see also Mountain Valley Pipeline, LLC v. McCurdy*, No. 15-0919, 2016 WL 6833119, at *8 (W. Va. Nov. 15, 2016) (noting that *Kelo*'s deferential review was applied in a case where it was the government that was exercising the power of eminent domain—not a private party). Justice Kennedy nevertheless concluded that there was no such risk on the facts in *Kelo* because:

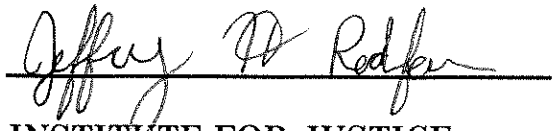
> This taking occurred in the context of a comprehensive development plan meant to address a serious citywide depression, and the projected economic benefits of the project cannot be characterized as *de minimis*. The identities of most of the private beneficiaries were unknown at the time the city formulated its plans. The city complied with elaborate procedural requirements that facilitate review of the record and inquiry into the city's purposes.

*Kelo*, 545 U.S. at 493. The present case, however, is even worse than Justice Kennedy imagined. There is more than a mere "risk of undetected impermissible favoritism of private parties." Rather, this is a case where there is no need for covert favoritism because the private party is conferring a benefit on itself, without government mediation or approval. Under such circumstances, the need for independent judicial review of public use is plain.

## CONCLUSION

The judgment of the Court of Common Pleas should be affirmed.

*Respectfully submitted,*



**INSTITUTE FOR JUSTICE**
Dana Berliner
Jeffrey H. Redfern
901 North Glebe Road
Suite 900
Arlington, VA 22203
Phone: (703) 682-9320
Fax: (703) 682-9321
DBerliner@ij.org

Matthew W. Fellerhoff (0064005)
Emily T. Supinger
STRAUSS TROY CO., LPA
150 East Fourth Street
Cincinnati, OH 45202-4018
(513) 621-2120
MWFellerhoff@strausstroy.com

*Attorneys for Amicus Curiae*
*Institute for Justice*

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via electronic mail on December _____ on the following:

Maurice Thompson
208 E. State Street
Columbus, OH 43215
(614) 340-9817
*MThompson@OhioConstitution.org*

Andrew R. Mayle
210 South Front Street
Fremont, OH 43420
(419) 355-9698
*AMayle@mayleraymayle.com*

*Attorneys for Defendants/Appellees*

Gregory D. Brunton
Daniel J. Hyzak
Bruce A. Moore
REMINGER CO., L.P.A.
65 East State Street, 4th Floor
(614) 228-1311
*GBrunton@reminger.com*

*Attorneys for Plaintiff/Appellant*

/s/_____