No. 04-108

In The

Supreme Court of the United States

SUSETTE KELO, *ET AL.*,

Petitioners,

v.

CITY OF NEW LONDON and
NEW LONDON DEVELOPMENT CORPORTATION,
Respondents.

On Writ of Certiorari
to the Supreme Court of Connecticut

Brief of *Amicus Curiae* The Claremont Institute
Center for Constitutional Jurisprudence
In Support of Petitioners

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QUESTION PRESENTED

1. Whether the original meaning of "public use" in the Public Use Clause requires the public actually to use the property it takes.

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INTEREST OF *AMICUS CURIAE*[1]

The Claremont Institute for the Study of Statesmanship and Political Philosophy ("the Institute") is a non-profit educational foundation dedicated to restoring the principles of the American Founding to their rightful and preeminent authority in our national life. Through its Center for Constitutional Jurisprudence, the Institute appears as *amicus curiae* in important constitutional cases. Through its Center for Local Government, the Institute defends property rights against abuses of the power of eminent domain, as happened to Susette Kelo and the other petitioners in this case.

This case raises deep questions about the direction of this Court's eminent domain law and especially about the original meaning of the Public Use Clause. As the Institute will show, one cannot appreciate the original meaning of "public use" and other relevant terms without understanding that they are all part of an intricate design to protect the natural right to property. Scholars affiliated with the Institute have published considerable scholarship on eminent domain or on the natural-rights basis of constitutional property rights. *See, e.g.*, Thomas G. West, *Vindicating the Founders: Race, Sex, Class, and Justice in the Origins of America* 37-70 (1997); Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 Cornell L. Rev. 1549 (2003); Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of "Public Use,"* 32 Sw. U. L. Rev. 569 (2003).

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[1] All parties have consented to the filing of this brief by The Claremont Institute Center for Constitutional Jurisprudence. The letters granting consent have been filed with the Clerk's office. No counsel for a party authored this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

STATEMENT OF THE CASE

Suzette Kelo and the other petitioners ("the petitioners") all own homes or rental properties in the Fort Trumbull neighborhood of respondent city New London, Connecticut ("New London"). In 1998, New London approved a proposal by respondent New London Development Corporation ("the development corporation") to condemn petitioners' lots and transfer them to commercial developers. There are no findings in the record below that New London subjected these developers to any duty of public access or any other duty typically owed by cable companies, telephone companies, and other common carriers. New London redistributed petitioners' lots to purely private buyers. *See Kelo v. New London*, 843 A.2d 500, 508-09 (Conn. 2004).

New London did not and could not claim that it condemned the petitioners' lots because they were crime-ridden or otherwise "blighted." The New London city council had originally authorized the development corporation to proceed against petitioners under Connecticut's slum-renewal laws, chapter 130 of Connecticut's statutory code, *see* Conn. Gen. Stat. Ann. §§ 8-124 to –69w (West 2001 & 2004 Supp.), but the city council did not cite alleged "blight" to condemn the petitioners' lots. *See Kelo*, 843 A.2d at 508, 511.

Instead, the development corporation and the city proceeded against petitioners solely on the ground that it would be economically advantageous for New London to redistribute their land to private developers. The corporation and city invoked the authority of chapter 132 of Connecticut's statutory code, the municipal-development chapter. *See* Conn. Gen. Stat. Ann. §§ 8-186 to -200b (West 2001 & Supp. 2004). That chapter gives local development agencies broad powers to "acquire by eminent domain real property" whenever cities allow them to do so. *Id.*. § 8-193. The chapter is open-ended: It encourages those development agencies to "transfer by sale or lease at fair market value or fair rental value . . . the whole or any part of the real property . . . *to any*

person." *Id.* (emphasis added). The law imposes no statutory standards to insure that private land is taken only for the use of the public. Far from it; the statute permits local governments to condemn and redistribute land for any reason they want as long as they do so "in accordance with the project plan." *Id.* The city council found that, if petitioners' land were owned by private developers, the developers would create jobs, increase tax revenues, and encourage economic growth throughout New London. Those findings, the council believed, provided the factual basis it needed to condemn petitioners' lots and resell them to developers. *See Kelo*, 843 A.2d at 508-11.

Petitioners sued, alleging that New London had taken their properties for a private use, in violation of the incorporated Fifth Amendment, which states, "[N]or shall property be taken for public use . . . ." U.S. Const. amend. V. Petitioners also argued that diffuse local economic benefits do not count as "public uses," and that there can be no public use when "private parties retain control over the parcels' use." *Kelo*, 813 A.2d at 519.

In the decision below, the Connecticut Supreme Court ("the court below") held otherwise. It gave the Public Use Clause "a broad construction," embraced a "purposive formulation" of public use doctrine, and took a "deferential approach to legislative declarations of public use." *Id.* at 523. Specifically, it concluded,

> "Public use" may therefore well mean public usefulness, utility or advantage, or what is productive of general benefit; so that any appropriating of private property by the state under its right of eminent domain for purposes of great advantage to the community, is a taking for public use.

Id. at 522 (italics removed). This Court granted certiorari.

SUMMARY OF ARGUMENT

This Court should correct the "broad," "purposive," and "deferential" reading of the Public Use Clause propounded by the court below, and restore the Clause's original public meaning: "Public use" requires the public to "use" the property, either by owning it or by controlling how it is used. The alternative, that "public use" means "public usefulness," "purpose," or "advantage," confounds the Constitution's structure, for it makes the term "use" basically repetitive of the term "necessary" in the Necessary and Proper Clause. The relevant evidence of original meaning confirms what text and structure already make clear. The term "public use" marks off a principled distinction: Government violates the terms of the social compact when it redistributes one private owner's land to another. By contrast, government stays within the social compact if it takes property in such a manner that citizens enjoy the taken property on the same terms that partners enjoy property acquired by their partnership.

This Court can enforce the Public Use Clause's original meaning by applying a simple test. Government takes property for a public use if it retains ownership of the property, or if it assigns the property to a private party subject to common carrier duties of public access. But if the government transfers property to private party not subject to common carrier duties, the taking is for a private use and violates the Public Use Clause.

To restore the original meaning of the Public Use Clause, this Court should also limit excessive language from *Berman v. Parker*, 348 U.S. 26 (1954), which suggested that governments may circumvent the Public Use Clause merely by citing the police power. Police-power analysis is relevant to the question whether a taking has occurred, not to whether that taking is for public use. The latter question should be judged only by whether the government owns the property taken or controls how it is used.

ARGUMENT

I. This Court Should Ascertain and Follow the Original Meaning of "Public Use."

This Court holds that takings, public use, and just compensation principles apply to the States by incorporation of the Fifth Amendment through the Due Process Clause of the Fourteenth Amendment. *See, e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). The proper way to interpret these clauses is to ascertain their original public meaning. The Court should strive to do what Justice Thomas did for Commerce Clause doctrine in his concurring opinion in *United States v. Lopez*: Construe its public use "jurisprudence in a manner that both makes sense of [its] more recent case law and is more faithful to the original meaning of that Clause." 514 U.S. 549, 584 (U.S. 1995). To that end, this brief examines the original meaning of the Fifth Amendment, relying primarily on "the text, structure, and history" relevant to the phrase "public use," and the early cases that conscientiously tried to carry into effect constitutional guarantees with the same meaning as the Public Use Clause. *Id.* at 585.[2]

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[2] Strictly as a matter of original public meaning, public use principles may not apply by incorporation; they may flow directly from the guarantees of the Fourteenth Amendment—from its Due Process Clause, *see Missouri Pacific Ry. v. Nebraska*, 164 U.S. 403 (1896); or from its Privileges or Immunities Clause, *see Saenz v. Roe*, 526 U.S. 489, 521, 522-27 (1999) (Thomas, J., dissenting); *The Slaughter-House Cases*, 83 U.S. (1 Wall.) 36, 83-101 (1871) (Field, J., dissenting). In this brief, however, the Institute follows this Court's current precedent and focuses on the Fifth Amendment as incorporated by the Fourteenth.

II. The Public Use Clause Requires that Taken Property Be Owned or Controlled by the Public.

A. The Plain Meaning of "Public Use" Requires that the Public Use the Property It Takes.

Strictly as a matter of plain textual meaning, "public use" of property means government ownership of, or government control over the employment of, the property. This definition most closely approximates the plain meanings of the terms "public" and "use" when the Fifth Amendment was proposed and ratified.

At that time, the primary definition of the adjective "public" was "belonging to a state or nation; not private." 2 Samuel Johnson, A Dictionary of the English Language (8th ed. 1786). The primary meaning of "use" as a noun was "the act of employing any thing to any purpose." *Id.* This definition tracked the primary meaning of "use" as a verb: "to employ to any purpose." *Id.* Although the term "use" sometimes meant "convenience" or "help," *id.*, this was merely a secondary meaning, not the most common meaning of the word. Adopting the definition that did most closely approximate the primary meaning of "use," the phrase "public use" requires the government to *employ* the asset in question, and do so for *ends chosen by the government*. Equally important, this phrase has a meaning conceived in opposition to and in exclusion of "private use," which occurs when a private owner employs the asset, and does so for ends she chooses on her own without state supervision or control.

B. The Structure of the Constitution Confirms that the Public Must Use the Property It Takes.

Furthermore, the Constitution's structure virtually requires what plain meaning analysis strongly suggests. On the one hand, the Constitution employs the term "use" consistently with its primary meaning: "employment for one's own purpose." Article I, section 10 anticipates that certain

state taxes "shall be for the Use of the Treasury of the United States." U.S. Const. Art. I, § 10, cl. 2. The U.S. Treasury is clearly meant to "use"—to own or direct the employment of—the tax levies. *See* Roger Clegg, *Reclaiming the Text of the Takings Clause*, 46 S.C. L. Rev. 531, 542 (1995). *Accord* U.S. Const. Art. I, § 8, cl. 12 (restraining "appropriation[s] of money to th[e] *use*" of supporting armies) (emphasis added).

On the other hand, the Constitution's structure makes it extremely awkward for the term "use" to mean "usefulness," "convenience," or "benefit" in the context of the Public Use Clause. If "public use" had such a broad meaning, the Public Use Clause might actually broaden rather than limit the eminent domain power implied in the Necessary and Proper Clause of Article I, section 8—when the very purpose of the Fifth Amendment, as with the other provisions of the Bill of Rights, was to clarify limits on the exercise of powers already granted.

Congress gets whatever eminent domain power it has from the Necessary and Proper Clause, *not* the Fifth Amendment. This Court appreciated that fact full well in the case of *Kohl v. United States*, 91 U.S. 367 (1875), which upheld Congress's power to take property within State boundaries for its enumerated ends. *Kohl* involved a taking to establish a post office and other federal offices in Cincinnati. As this Court recognized, Congress could use eminent domain to promote its enumerated postal power "so far as is *necessary* to the enjoyment of the powers conferred upon [Congress] by the Constitution." *Kohl*, 91 U.S. at 372 (emphasis added). Correctly, this Court also recognized that the Fifth Amendment does *not* confer to Congress any power of eminent domain. To the contrary, that Amendment provides only an "implied recognition" of the eminent domain power "beyond what may justly be implied from the express grants" in the Necessary and Proper Clause and Congress's enumerated powers. *Id.* Therefore, as a matter of original meaning and structure, the limitations of the Public Use Clause never ap-

plied unless and until Congress had already determined that eminent domain was publicly "necessary" pursuant to the Necessary and Proper Clause.[3]

The Institute maintains that the term "necessary" requires that a law have a "direct, obvious, and precise connection" to the enumerated end that it is supposed to further. Gary Lawson, *Making a Federal Case out of It*, 2003-04 Cato S. Ct. Rev. 119, 151. To be sure, this Court has construed the term somewhat more loosely—in Marshall's definition, "'needful,' 'requisite,' 'essential,' 'conducive to,'" or "most advantageously effect the object to be accomplished." *M'Culloch v. Maryland*, 17 U.S. (4 Wheaton) 316, 413 (U.S. 1819). But under either reading, the term "necessary" incorporates the requirement that a condemnation be useful.[4]

The Fifth Amendment's Takings Clause was clearly meant as a limitation on the eminent domain power, with two components: The taking had to be for "public use," and "just compensation" was required. If "public use" were synony-

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[3] A similar relation applies between the States' sovereign powers and the Fourteenth Amendment. As *Kohl* explained, as a basic principle of international law, States enjoy the power of eminent domain by "political necessity; and [the eminent domain power] is inseparable from sovereignty, unless denied to [a State] by its fundamental law," specifically by its constitution. 91 U.S. at 371-72. The Fourteenth Amendment then imposes a separate public-use limitation on the States as the Fifth Amendment does on Congress.

[4] Gary Lawson and Patricia Granger maintain that the word "proper" also limits Congress's ability to utilize the eminent domain power as a means to enumerated ends; takings for private use, or uncompensated takings for public use, would simply not be "proper" in a government designed to protect unalienable rights. *See* Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L.J. 267 (1993); *cf. Printz v. United States*, 521 U.S. 898, 924 (1997). Under this reading, both components of the Fifth Amendment's Takings Clause simply make *explicit* the limitations that were already *implicit* in the Necessary and Proper Clause. The Institute finds much to recommend this view.

mous with "public purpose," the Clause would cease to limit the power already implied in the Necessary and Proper Clause. In other words, the "Public Use" phrase would become, in Chief Justice Marshall's words, "mere surplusage." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (U.S. 1803). It would simply parrot what the Necessary and Proper Clause already says when it authorizes Congress to make all laws "*necessary* and proper for carrying into execution" the federal government's power. U.S. Const. Art. I, § 8, cl. 18 (emphasis added).

C. The Original Meaning of "Public Use" Confirms that the Public Must Use the Property It Takes.

Moreover, the development of eminent domain law explains why the Public Use Clause requires that the public really "use" the property it takes. In republics dedicated to the social compact, the only way to make a citizen sacrifice his property rights is to guarantee that the sacrifice goes to the "public." The social compact treats citizens as partners. It can require that they yield their possessions for public purposes, but only on the proviso that they yield it to the entire partnership and not to any one partner.

The term "eminent domain" originated in the seventeenth century, with treatise writers who systematized European constitutional and international law. In 1625, Hugo Grotius explained that a monarch may:

> take away from his subjects [property] by the power of eminent domain. In order to do it by the power of eminent domain, first, the public welfare must require it, and, second, compensation must be made to the loser, if possible, from the public funds.

Hugo Grotius, *The Law of War And Peace* Vol. 2, Ch. XIV, § 7 (L. Loomis, trans., Walter J. Black 1949). Similarly, in 1673, Puffendorf wrote that "when urgent necessity of the state demands, any subject's property which the immediate

situation especially requires, can be seized and applied to public purposes." Samuel von Puffendorf, *Second Book on the Duty of Man and Citizen* 136 (Oceana Pub. 1964). In 1758, Emmerich de Vattel described this power as "[t]he right which belongs to the State, or to the sovereign, to make use of all property within the State for the public welfare in time of need." 1 Emmerich de Vattel, *The Law of Nations or The Principles of Natural Law* § 244 (James Brown Scott, ed., Carnegie Institute of Washington, 1916).

Grotius, Puffendorf, and Vattel all illustrate the early view: Eminent domain was an incident of sovereignty; it was associated with the prerogatives of kingship; and it was governed by some standard of necessity, phrased differently by different authors. *See* Sandefur, *supra*, at 571-72. Two points deserve mention. First, all of the treatise writers presupposed that the monarch would keep the property he took. Therefore, none of these writers confronted "public use" issues in considerable depth. Second, the treatise writers' views also explain why, in *Kohl*, this Court agreed that eminent domain was governed in part by a determination of public necessity. Grotius, Puffendorf, and Vattel were restating conclusions both of political theory and of international and constitutional law. The term "necessary" in the Sweeping Clause incorporated the international-law understanding of eminent domain by reference. *See Kohl*, 91 U.S. at 372.

Nevertheless, this sovereign understanding of eminent domain was heavily qualified in England, and then even more so in the United States. English and American authorities balked, as this Court has put it, at leaving "so potent a Hobbesian stick in the Lockean bundle" of property rights. *Palazzolo*, 533 U.S. at 627. Locke approved of eminent domain, but he warned that "[t]he Supreme Power cannot take from any man any part of his property without his own consent." John Locke, *Second Treatise on Government*, §§ 138-39 (Cambridge 1988). In Locke's understanding, and more generally the English understanding, "consent," or approval

by one's elected representative, subtly transferred the power of eminent domain from the monarch or executive to the legislature. *See* William B. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 552, 562-67 (1972). Later, in 1758, Thomas Rutherforth argued that this power:

> is not a right to take the whole or indeed any part of it from them causelessly or arbitrarily. The preservation of each man's property, is one of the ends which he proposed to himself in entering into civil society. But it is absurd to suppose, that he would give up the whole of his property for the sake of preserving it.

2 T. Rutherforth, *Institutes of Natural Law* 48 (1756).

These reservations led William Blackstone to describe the nerve of the public-use limitation and to attack a "purposive" understanding of eminent domain. In his *Commentaries*, Blackstone described private property as "[t]he third absolute right, inherent in every Englishman." 1 William Blackstone, *Commentaries on the Laws of England* 134 (Stanley Katz intro., 1979) (1765). Blackstone's emphasis on individual rights led him to construe the power of eminent domain narrowly:

> So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more

> essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law.

1 *id.* at 135.

Within that framework, Blackstone recognized a place for the power of eminent domain—as long as the property went to the state. He acknowledged that "the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce" in a condemnation. *Id.* But the legislature did so "[n]ot by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification." *Id.* When it did so, *"[t]he public is now considered as an individual*, treating with an individual for an exchange." *Id.* (emphasis added).

Blackstone's understanding of eminent domain left no room for the broad reading of "public usefulness," "purpose," or "advantage." He specifically rejected the idea that "the good of the individual ought to yield to that of the community." He specifically rejected the suggestion that any "public tribunal" could be the judge of what was "expedient" enough to strip a man of his property rights. Blackstone rejected these ideas because he conceived of the "public good" in social-compact terms. In these terms, the proper object of government is not to dole out land to whichever developers will contribute the most to the local economy—it is rather "the protection of every individual's private rights."

Similarly, Blackstone paved the way for the narrow reading of "public use." To contribute to the "public good" as conceived of in social-compact terms, the public needed to benefit from eminent domain as partners benefit when their partnership acquires property and uses it on their behalf. That is why Blackstone regarded "the public" during eminent domain *"as an individual*, treating with an individual for an exchange." 1 Blackstone, *supra*, at 135 (emphasis added). The term "public use" reduces to a term of art Blackstone's substantive requirement that the government take and em-

ploy private property in the same manner "as an individual" would.

The first state public use clauses all reflect these background commitments to social-compact theory. Thus, Pennsylvania's first post-Revolution Constitution declared that "government is, or ought to be, instituted for the common benefit, protection, and security of the people." Penn. Const. of 1776, art. V, *reprinted in* 2 Benjamin Perley Poore, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States* 1541 (1878). As to takings, the constitution proclaimed that "no part of a man's property can be justly taken from him, or applied to *public uses*, without his own consent, or that of his legal representatives." *Id.* art. VIII (emphasis added). Similarly, Virginia's Bill of Rights declared "[t]hat government is, or ought to be, instituted for the common benefit, protection, and security of the people," and specified that "all men . . . cannot be taxed or deprived of their property for public uses, without their own consent, or that of their representatives so elected . . . ." Virginia Bill of Rights of 1776, §§ 3, 6, *reprinted in* 2 Poore, *supra*, at 1908-09. *Accord* Del. Const. of 1792, art. I, § 8, *reprinted in* 1 Poore, *supra*, at 279; N.H. Const. of 1792, Part I, art. 10, *reprinted in* 2 Poore, at 1295.

Some of these provisions also reinforced the narrower understanding by using contrasting terms relating to public use with a broader idea of "public exigencies." For instance, Massachusetts' 1780 Bill of Rights provides that "[w]henever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." Mass. Const. of 1780, Part I, art. X, *reprinted in* 2 Poore, *supra*, at 958. Similarly, Article 2 of the Northwest Ordinance states that "should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same." *An Ordinance for the Government of*

the Territory of the United States Northwest of the River Ohio, Art. 2, 1 Stat. 51, 53 n.a (July 13, 1787, re-enacted Aug. 7, 1789). The Massachusetts Bill of Rights contrasted "public exigencies" with "public uses"; the Northwest Ordinance contrasted the same phrase with "common preservation." Even if "public exigencies" may have impelled the government to condemn, "public uses" or the "common preservation" imposed separate substantive limitations on what governments could do with the properties they took.

The Institute is not aware of any primary source that explains how 1790s-era Americans understood public use limitations better than Supreme Court Justice William Patterson's circuit opinion in the case of *Van Horne's Lessee v. Dorrance*, 2 U.S. (2 Dallas) 304 (C.C.D. Pa. 1795). To be sure, *Van Horne's Lessee* was decided after the ratification of the Fifth Amendment, it was decided under Pennsylvania law, and the narrow grounds for decision focused not on public use but on just compensation. Even so, Justice Patterson's sweeping opinion comprehensively explained the political theory behind public use constitutional guarantees. Thus, even if *Van Horne's Lessee* post-dates the Fifth Amendment by a few years, it is extremely revealing evidence as to the moral "common knowledge" that American jurists shared during the 1790's.

Patterson interpreted guarantees in Pennsylvania's constitution to lock in a commitment to protecting private property rights. He insisted that "[t]he preservation of property . . . is a primary object of the social compact" because "[n]o man would become a member of a community, in which he could not enjoy the fruits of his honest labour and industry." 2 U.S. (2 Dallas) at 310.

For Patterson, social compact theory laid down the principles that both justified and limited the State's power of eminent domain. On one hand, in a government pledged to securing the rights of every citizen, each citizen could in turn be required to sacrifice his property for the good of the

whole. "Every person ought to contribute his proportion for public purposes and public exigencies." *Id.* At the same time, if the government was going to exercise this power, it needed to do so on two conditions—that the owner receive "a recompence in value," and that the taking be "for the good *of the community*." *Id.* (emphasis added).

Patterson then reinforced the same point by explaining that takings guarantees protect owners from government actions "laying a burden upon an individual, which ought to be sustained by the society at large." *Id.* at 310. This Court still echoes Patterson's view, for it still holds that takings guarantees were "designed to bar Government from forcing 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). Under either formulation, the implications for public use are quite clear: A "public use" occurs only when the "society at large" or the "public as a whole" acquires the property taken.

Justice Patterson also confirmed that constitutional takings guarantees were designed to limit a wide-ranging power of eminent domain. He recognized the continental or sovereign conception of eminent domain—he dryly called it "the despotic power." 2 U.S. (2 Dall.) at 311. He conceded that this power "of taking private property, when state necessity requires, exists in every government." *Id.* At the same time, in a republic dedicated to the social compact, this power needed to be circumscribed:

> It is . . . difficult to form a case, in which the necessity can be of such a nature, as to authorise or excuse the seizing of landed property belonging to one citizen, and giving it to another citizen. It is immaterial to the state, in which of its citizens the land is vested; but it is of primary importance, that, when vested, it should be secured, and the proprietor protected in the enjoyment of it.

Id.

In stark contrast, Chapter 132 of Connecticut's statutory code presumes that city officials may and should redistribute land in whatever way is most advantageous for their cities. Patterson insisted, though, that States' main business is to protect and enlarge the rights of their citizens to own and use their land for their own chosen purposes. "It is infinitely wiser and safer to risk some possible mischiefs," he warned, "than to vest in the legislature so unnecessary, dangerous, and enormous a power." *Van Horne's Lessee*, 2 U.S. (2 Dallas) at 312.

III. Government Takes Property for a Public Use Only If the Government Retains Ownership or Assigns Ownership to a Regulated Common Carrier.

As a result, during and after the Founding, the term "public use" clearly signaled that the public controlled the property taken in a corporate sense, and it clearly precluded any general idea of "public usefulness," "purpose," or "advantage." To appreciate how to carry the former meaning into effect, this Court should look to the doctrines developed by American courts early in the nineteenth century. With exceptions in a few lines of doctrine, to be discussed in part IV, courts followed a simple three-part categorization: public ownership, public control of a common carrier, and pure private ownership. If a taking fell into one of the first two categories, it qualified as a public use; otherwise, it was for private use and therefore unconstitutional.

A. The Government Takes Property For a Public Use When It Keeps Ownership of the Property.

Early American courts and commentators uniformly recognized that government takes property for a public use when it retains ownership of the property. In *Wellington, et al., Petitioners*, 16 Pick. 87 (Mass. 1834), for example, Massachusetts Supreme Court Chief Justice Lemuel Shaw upheld

the appropriation by the highway commissioners of land already owned by the public as a military training field. He explained that when the owners of the land granted it to the town of Cambridge in 1769, the town "became owners of the soil with full power, as such owners, to make any use of the property, which owners of land can make." *Id.* at 99. This Court confirmed the same understanding in *Kohl* when it approved of takings "for forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses, *and for other public uses*" (emphasis added). 91 U.S. at 371.

B. The Government Takes Property for a Public Use When It Subjects a Private Recipient to Common Carrier Regulation.

Early courts recognized limited circumstances in which governments could take private property and turn it over to private owners—transfers to common carriers with a duty of access to the public. The public's right of access ensures that the public "uses" the property even though a private delegate happens to own the property.

This exception is best explained in *Beekman v. Saratoga & Schenectady R.R.*, 3 Paige Ch. 45 (N.Y. Ch. 1831). In *Beekman*, Chancellor Williams upheld the use of eminent domain for the construction of a private railroad. As a beneficiary of a state taking, and as an entity providing a service normally provided by the government, the railroad owed the public a duty of non-discrimination, and it was subject to utility rate regulation:

> The public have an interest in the use of the road, and the owners of the franchise are liable to respond in damages, if they refuse to transport an individual or his property upon such road, without any reasonable excuse, upon being paid the usual rate of fare. The legislature may regulate the franchise and limit the amount of the tolls….

Id. at 75. Other cases applied this common-carrier public right of access to distinguish between roads taken for public and private uses. *See* John Lewis, *A Treatise on the Law of Eminent Domain* § 158 (1st ed. 1888) (citing cases).

C. The Government Takes Property for a Private Use When It Transfers Property to a Private Owner Without Common Carrier Duties.

By contrast, when the government redistributed private property from one private owner to another without establishing common carrier duties, it violated public use principles. Justice Chase, in the case of *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), regarded "a law that takes property from A. and gives it to B" as offensive in principle as an *ex post facto* law or a law altering contracts. *Id.* at 388. This motif quickly became a poster child for the worst sort of constitutional violation. In 1829, Justice Story wrote for this Court:

> We know of no case, in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state in the union. On the contrary, it has been constantly resisted as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced.

Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 658 (1829). Such a law, Story explained, was pernicious for "subverting the great principles of republican liberty, and the social compact." *Id.* at 647.

Thus, long after the ratification of the Public Use Clause, courts routinely rejected—in extremely strong language—the proposition that legislatures could redistribute land between private parties. *See, e.g.*, *Den ex. dem. Robinson v. Barfield*, 6 N.C. 391, 421 (N.C. 1818) ("[N]ecessity can never demand that the lands of A. shall be taken and given to B."); *Arrowsmith v. Burlingim*, 1 F. Cas. 1187, 1189 (C.C.D. Ill.

1848) ("Can legislatures in this enlightened age, with written constitutions to restrain them, take from one and give to another his property with or without compensation? It is only necessary to state the proposition in its nakedness to meet refutation"); *Jordan v. Woodward*, 40 Me. 317, 323 (1855) ("The private property of one citizen cannot be taken and given to another citizen, for private uses."); *Nesbitt v. Trumbo*, 39 Ill. 110, 114 (1866) ("private property cannot be constitutionally condemned and appropriated by the legislature to private uses").

In short, for most of America's history, courts consistently warned that the power to redistribute property from one private party to another "would be utterly destructive of individual right, and break down all the distinctions between *meum et tuum*, and annihilate them forever, at the pleasure of the state." *Buckingham v. Smith*, 10 Ohio 288, 297 (1840).

D. Sound Doctrine Keeps Separate the Issues of "Public Use" and "Public Purpose."

These early state precedents are also revealing because courts kept the question whether the government takes for an acceptable public purpose entirely separate from the question whether it takes for a public use. The public-purpose inquiry presented a political question committed entirely to the legislature. Public use, by contrast, presented a pure question of law, without any standards of review or deference. Thus, when New York equity Chancellor Walworth "den[ied] to the legislative power the right thus to take private property for the mere purpose of transferring to another," he admitted "that [the legislature] are the sole judges . . . as to the exercising the right of *eminent domain* for the purposes of making public improvements." *Varick v. Smith*, 5 Paige Ch. Rep. 136, 159-60 (N.Y. Chn. 1835). In his influential *Commentaries*, Chancellor Kent explained that while "it undoubtedly must rest in the wisdom of the legislature to determine when public uses require the assumption of private property," still

"if they should take it for a purpose not of a public nature . . . the law would be unconstitutional and void." 2 James Kent, *Commentaries on American Law* 276 (1st ed. 1827). *See also Tyler v. Beacher*, 44 Vt. 648, 651 (1871); *Loughbridge v. Harris*, 42 Ga. 500, 504-05 (1871); *Harris v. Thompson*, 9 Barb. 350, 362 (N.Y. Supr. Ct. 1850); Lewis, *supra*, § 158.

This distinction makes perfect sense if one recalls that public use ideas developed as a limitation on eminent domain separate from the eminent domain power itself. Legally, courts had few if any standards to second-guess whether a taking would promote sound public policy, but they had a simple and rule-bound test to execute the corporate understanding of "public use." Substantively, since eminent domain was an attribute of state sovereignty, it made sense for courts to leave alone the decision whether eminent domain would promote a public purpose. But the public use question was totally different. *That* was a limitation created to stop American legislatures from assuming the worst tendencies of European despots. European kings might take their subjects' property whenever they happened to think it convenient. But republican representatives needed to be reminded that they could only condemn their constituents' property to pursue projects from which *all* of their constituents would benefit.

As a result, in most lines of precedent over the nineteenth century, state courts thought it was anathema to conflate the questions of public purpose and public use. As a New York judge explained in *Bloodgood v. Mohawk & Hudson R.R.*, 18 Wend. 9, 60 (N.Y. 1837) (opinion of Tracy, Sen.):

> When we depart from the natural import of the term "public use," and substitute for the simple idea of a public possession and occupation, that of public utility, public interest, common benefit, general advantage or convenience, or that still more indefinite term public improvement, is there any limitation which can be set to the exertion of legislative will in the appropriation of private property[?]

IV. The Public Use Clause Does Not Permit Condemnations Simply Because the Government Finds It Useful or Advantageous to Redistribute Private Property.

A. Why This and Other Courts Mistakenly Conflated "Public Use" with "Public Purpose"

Modern law, however, has mistakenly ignored the requirement that the public actually use, own, or control the property it takes. Instead, the law now comes near to treating the term "public use" as synonymous with "public usefulness," "purpose," or "advantage." This unfortunate shift has doctrinal roots in mill-act cases and other nineteenth-century cases. *See* Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 Ore. L. Rev. 203, 204-25 (1978). But the main reason for the shift was theoretical—the rise of Progressive political theory and Legal Realist legal theory at the beginning of the twentieth century. As Progressive historian Charles Merriam explained, by 1924 individual property rights no longer barred the way to statist Progressive government: "The question is now one of expediency rather than of principle." Charles Merriam, *A History of American Political Theories* 322 (1924).

Broad *obiter dicta* in this Court's decision in *Berman v. Parker* brought Merriam's notion of "expediency" into this Court's public use doctrine. 348 U.S. 25 (1954). *Berman* upheld a law that allowed local authorities to condemn "blighted" land. *See id.* at 28-29. In his opinion for the Court, Legal Realist Justice William O. Douglas treated the blight laws as exercises of the police power. Douglas treated the questions of public use and of police power both as questions about "the public interest," which he defined as "essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition." *Id.* at 32. Douglas went out of his way to encourage local governments to redistribute property: "The public end may be as well or

better served through an agency of private enterprise than through a department of government." *Id.* at 33-34.

B. The Plain and Original Meaning of "Public Use" Must Not Be Conflated with the Police Power or with Any Open-Ended Notion of Public Purpose.

While *Berman*'s specific findings about blight are not at issue in this case, the case's broader statements about eminent domain have misguided state and federal courts for more than half a century. This Court's most recent pronouncement on public use, *Hawaii Housing Authority v. Midkiff*, cited *Berman* to say that "[t]he 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers." 467 U.S. 229, 240 (1984). To uphold the law under challenge, which cited so-called "oligopoly" concerns to redistribute land from owners to their tenants, *Midkiff* drew from *Berman* that governments may redistribute property from one private owner to another whenever "the exercise of the eminent domain power is rationally related to a conceivable public purpose." *Id.* at 241. Similarly, in the case below, the Connecticut Supreme Court followed the trend of many state courts and hailed *Berman* as a metaphor for a "broad, purposive view of eminent domain." 843 A.2d at 525.

This "public purpose" view, however, is antithetical to the Constitution. It squashes into one flat and statist utilitarian calculus several constitutional powers that are substantively distinct. To begin with, as Part II explained, *Berman*'s understanding confuses a notion of sovereign advantage with the plain and original meaning of "public use." The Framers were well aware of the broad view of "public purpose." They learned it when they learned about the foundations of eminent domain in the treatises of Grotius, Puffendorf, and Vattel. The Framers would not have instituted public use guarantees if they had not wanted to *limit* that monarchical conception of eminent domain.

Justice Douglas broke with the Framers' understanding, however, for reasons shared by most Progressives and Legal Realists: He assumed that modern democratic majorities would not be as tyrannical as kings—at least, not when they were supervised by expert planners trained by the Progressives and Legal Realists. "[W]hen the legislature has spoken," he insisted, "the public interest is well-nigh conclusive." *Berman*, 348 U.S. at 32. When the legislature's "authorized agencies" implement the legislature's edict, "there is nothing in the Fifth Amendment that stands in the way." *Id.* at 33. But as Justice Patterson warned in *Van Horne's Lessee*, public use guarantees codified a much more pessimistic understanding of democracy and government:

> The constitution is the origin and measure of legislative authority. It says to legislators, thus far ye shall go and not further. Not a particle of it should be shaken; not a pebble of it should be removed. Innovation is dangerous. One incroachment leads to another; precedent gives birth to precedent . . . . Where is the security, where is the inviolability of property, if the legislature, by a private act, affecting particular persons only, can take land from one citizen, who acquired it legally, and vest it in another?

2 U.S. (2 Dall.) at 311-12.

Justice Douglas then compounded his error in *Berman* by confusing both public purpose and public use with a third, distinct concept—the police power, or the power to "regulate." Here Justice Douglas read a huge anachronism into the Constitution. He assumed that the police power could promote a wide range of "purposes neither abstractly nor historically capable of complete definition." *Berman*, 348 U.S. at 32. Douglas, like other Legal Realists, assumed that legislators could write "regulations" to promote virtually any conception of the public interest that any local combination of voters and experts happened to choose.

This view has no support in the Constitution's original meaning. In the Framers' view, majorities and experts do not create citizens' rights. To the contrary—individuals are entitled to their inalienable rights as soon as they are created, and majorities and experts act tyrannically unless they use their power to secure those inalienable rights. "Regulations" are therefore positive laws that mark off, protect, and encourage people to exercise the substance of their inalienable rights. *See* Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 Yale L.J. 907, 944-60 (1992)).

This natural law understanding of "regulation" deeply penetrates the Constitution's design. In Randy E. Barnett's restatement, whenever the Constitution uses the term "regulate," the term means something close to the definition "to make regular"—or "to recognize, protect, and encourage." *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 139 (2001); *see also* John Adams Wettergreen, *Capitalism, Socialism, and Constitutionalism*, in To Secure the Blessings of Liberty: First Principles of the Constitution 244, 254-58 (Sarah Baumgartner Thurow ed., 1988); Claeys, *supra*, at 1553-54.

No surprise, then, that Douglas's view of the police power has no support in the plain meaning of the Constitution. As a textual matter, the police power has nothing to do with the Public Use Clause; it is the flip side of the Takings Clause: "Nor shall private property be taken." U.S. Const. amend. V. Like many other Bill of Rights guarantees, the idea of a "taking" quietly excludes police "regulation." For example, the Second Amendment protects the people from "infringements" of the right to bear arms even as it speaks of a "well regulated militia." U.S. Const. amend. II. The contrast makes no sense unless "infringements" tacitly exclude sound "regulations"—laws that codify the natural right to bear arms, encourage its free exercise, and prevent abuses of the right. "Infringements" are positive laws that restrain the

right to bear arms for purposes not related to these specific ends. What is explicit in the Second Amendment is implicit in many other terms of art throughout the Bill of Rights, including "abridging" free speech and having property "taken." U.S. Const. amends. I, V; *see also* Barnett, *supra*, at 141-42; Claeys, *Natural Property Rights*, *supra*, at 1664-65; Hamburger, *supra*, at 948-53.

If one understands the Constitution as the Framers did, Justice Douglas's opinion in *Berman* totally confounded the law of takings. It merges into one inquiry what are really three separate issues: "public purpose," "police regulation," and "public use." First, the question whether a condemnation promotes a public purpose is irrelevant to takings law. This question is relevant to whether the condemnation is necessary under the Necessary and Proper Clause or under a state constitution, but it has no place in Fifth Amendment analysis. *See supra* parts II.B, III.D. Second, the question whether a condemnation is a police regulation is then relevant to whether the condemnation is a taking at all, not whether it is a taking for public use. A law may condemn property on the ground of "regulating" it if, under principles of intermediate scrutiny, the condemnation either directly prevents a real threat to the public or secures affected owners an average reciprocity of advantage. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *see also* Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 107-45, 195-215 (1985); Claeys, *supra*, at 1570-1604, 1618-26.

Finally, if the condemnation does not pass muster intermediate-scrutiny principles of police "regulation," it restrains property rights more than necessary to regulate and is therefore a taking. The Public Use Clause then controls. Such a condemnation must pass muster, if at all, under the principles about public ownership and common carriers set forth in parts II and III above. Neither the Takings Clause nor the Public Use Clause is an escape hatch to encourage govern-

ments to redistribute their constituents' lands whenever officials happen to find it expedient to do so.

C. The Original Meaning of the Fifth Amendment Can Resolve the Most Vexing Public Use Cases.

The best way to appreciate these principles in action is to consider how they apply to constitutional challenges to mill acts. Now, not all courts and cases handled the mill acts correctly, as the court below confirmed when it cited *Olmstead v. Camp*, 33 Conn. 532 (1866), for its "deferential approach to legislative declarations of public use." *Kelo*, 843 A.2d at 523. At the same time, these erroneous cases are not as numerous and uniform as is commonly supposed. Many courts did approach these cases correctly, respecting the principled distinctions between public purpose, police regulation, and eminent domain. The better-reasoned mill act cases confirm that many courts appreciated and conscientiously applied the original and narrow meaning of "public use" even to mill dams. They also illustrate how sound doctrine can decide even the hardest public use cases.

First, most cases kept questions about public purpose and sovereignty out of takings analysis. As one court recognized, "the eminent domain of the Sovereign Power, extends to the taking of private property." *Crenshaw v. Slate River Co.*, 27 Va. (6 Rand.) 245, 264 (1828). *See also Harding v. Goodlett*, 3 Yerg. 33, 42 (Tenn. 1832) (citing Vattel).

Second, courts knew how to apply sound public use principles to mill acts that condemned property under the eminent domain power and not the police power. Many courts conscientiously held the condemnations to the literal meaning of "public use." Since mill acts did not keep mills and mill dams in public hands, to survive public use challenge these acts needed to convert the private dams and mills into common carriers. Otherwise, courts declared the condemnations unconstitutional takings for private use. *See, e.g.*, *Blair v. Cuming County*, 111 U.S. 363, 371-73 (1884); *Tyler*, 44

Vt. at 652-56; *Loughbridge*, 42 Ga. at 503-05; *Harding*, 3 Yerg. at 43-44; *Crenshaw*, 27 Va. at 264-65.

Third, however, when legislatures followed a police "regulation" model instead of an eminent domain model, this Court and others knew how to switch from the public use principles explained in parts II and III to the regime of intermediate scrutiny that comes with regulatory takings analysis. The great economic benefits generated by mills did not justify regulation by themselves. Nor could it be said that mill acts controlled any recognizable nuisance or other harm. Riparians did not "injure" anyone merely by refusing to sell out to the owner who wanted to build a dam and mill.

However, mill acts could be written to "regulate" to secure the affected riparians an "average reciprocity of advantage." *Pennsylvania Coal Co.*, 260 U.S. at 415. That is because mill acts resolved an extraordinary problem associated with riparian rights. When it comes to dry land, states may hardly ever use "regulation" to condemn or occupy land without taking it. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Riparian land is different because riparian rights are correlative—less exclusive and more interdependent than the rights associated with dry land. This fact has been appreciated in American law since colonial times. While Blackstone described property as a "sole and despotic dominion," he recognized that "some few things . . . must still unavoidably remain in common; being such wherein nothing but an usufructuary property is capable of being had"—specifically including "the elements of light, air, and water." 2 Blackstone, *supra*, at 2, 14.

Because riparian rights remain "in common" in an important sense, they create a need and justification to "regulate" disputes much as equitable principles of partition regulate the break-ups of tenancies in common. Rather than be forced to continue cooperating with each other, the owners of joint property often find it more convenient to cash out their joint interests and partition their co-tenancy into individually-

owned properties. Sound partition laws may "regulate" these cash-outs even though they seem to redistribute private property. To count as regulations, however, such laws need to respect the principles of equity that guide partitions. To secure owners an average reciprocity of advantage—to make sure that joint owners do not suffer a net loss of rights in the transfer from joint to individual property—partitions must pay ousted owners compensation proportional to the rights they lose. *See* Epstein, *supra*, at 170-75.

This Court upheld a New Hampshire mill act on this joint-property partition model in *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9 (1885). The challenged law instructed dam-builders to pay the owners ousted not only damages but also an extra fifty percent of damages. *See id.* at 10-11 & n.1. This Court approved of the act as "regulating the manner in which the rights of proprietors of lands adjacent to a stream may be asserted and enjoyed." *Id.* at 21. The Court specifically analogized to "equitable compensation" in partition proceedings. *See id.*; *see also Fiske v. Framingham Mfg. Co.*, 29 Mass. (12 Pick.) 68, 70-72 (1832). The act passed muster for two reasons: First, it was fair to presume the owners gained some advantage from exchanging water rights that they could not enjoy exclusively for money that they could enjoy exclusively. Next, and even more important, the law ensured that ousted owners were paid a reasonable approximation of "equitable compensation"—one and a half times the value of their land. (Of course, neither claim could be made about the condemnations at issue here).

D. *Berman* Should Be Limited to Make Clear That the Public Use Clause Is Not Interchangeable with the Police Power or Any Public Purpose.

Needless to say, *Berman*, *Midkiff*, and similar state cases have caused the law to drift far from the original understanding of the Public Use Clause. The Court should therefore

question the passages in these cases that conflate public use, public purpose, and the police power.

At the same time, the Institute understands that *stare decisis* principles may counsel against repudiating *Berman* and *Midkiff* entirely. But the Court need not overrule *Berman* or *Midkiff* to hold for petitioners. There are at least three ways to limit the extreme aspects of these cases. First, neither case is anywhere as extreme as this case. Neither allows a state to pretend that it is merely "regulating" land when it redistributes land from one private owner to another for mere economic advantage. *Berman* had at least some connection to a ground for exercising the police power, namely controlling local crime and disorder. *See* 346 U.S. at 32. Similarly, *Midkiff* had at least some connection to antitrust problems in local land markets. *See* 467 U.S. at 241-42. Section 8-193 of Connecticut's statutory code, however, highlights a new trend, "municipal development" laws that give local governments free license to redistribute land without statutory guidance. Such laws exceed even the extremely deferential rational basis principles of *Berman* and *Midkiff*.

Second, in other cases that have tested the police power, this Court has asked whether the so-called regulation under challenge enforces limitations that "background principles of the State's law of property and nuisance already place upon land ownership." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992). As *Head* suggested, 113 U.S. at 22-26, there may be background principles for rearranging riparian rights under equitable principles of partition, and perhaps *Berman* and *Midkiff* identify other such principles. No such principles, however, allow dry land to be redistributed to businesses for mere local economic advantage.

Finally, this Court could harmonize its public-use case law with its exactions case law. When a State or municipality tries to evade takings requirements by "exacting" land under the guise of the police power, this Court requires the government to show that there is a factually-demonstrable

need for the exaction and that the exaction is roughly proportional to the need. *See Dolan v. City of Tigard*, 512 U.S. 374 (1994). This Court could apply the same intermediate-scrutiny principles when governments try to evade public-use requirements under the guise of the police power. *See* Nicole Stelle Garnett, *The Public Use Question as a Takings Problem*, 71 Geo. Wash. L. Rev. 934 (2003). Most so-called "municipal development" condemnations cannot pass muster under this standard.

V. The City of New London Unconstitutionally Took Kelo's Private Property for Developers' Private Uses.

The condemnations of Kelo's and the other petitioners' property were therefore unconstitutional. Judged as an exercise of eminent domain, New London's takings violated the original meaning of the Public Use Clause. New London did not keep the condemned lots under public ownership. Nor did the city impose any common carrier duties of access or rate regulation on those developers. New London simply took the property of A and transferred it to B—a classic violation of the Public Use Clause.

Nor can New London cite the police power as a backdoor justification for these private takings. New London's actions go beyond any precedent this Court has cited to justify property redistribution under the police power. Kelo and the other petitioners were not "harming" their neighbors in any meaningful sense of the word. Pure and simple, the city is redistributing the petitioners' lots to developers to generate perceived secondary local economic benefits. Judged under any standard, that transfer is not a police regulation but a taking. Judged as a taking, the transfer is for private use and runs afoul of the original meaning of the Public Use Clause.

CONCLUSION

The Claremont Institute respectfully requests that the judgment of the Supreme Court of Connecticut be reversed.

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