BEFORE THE
GEORGIA PUBLIC SERVICE COMMISSION

Sandersville Railroad Company Hancock County, Georgia **In re: Sandersville Railroad Company's Petition for Approval to Acquire Real Estate by Condemnation**	Docket No.: 45045

PRE-FILED RESPONSIVE EXPERT TESTIMONY OF DONALD J. KOCHAN

on behalf of the Property Owner Respondents

August 25, 2023

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Q: PLEASE STATE YOUR NAME AND ADDRESS.

A: My name is Donald J. Kochan, and my address is George Mason University Antonin Scalia Law School, 3301 Fairfax Drive, Arlington, Virginia 22201.

Q. ON WHOSE BEHALF ARE YOU TESTIFYING IN THIS PROCEEDING?

A. I am testifying on behalf of the Property Owner Respondents.

Q: PLEASE STATE YOUR CURRENT TITLE AND YOUR EXPERIENCE IN ACADEMIA.

A. I am a Professor of Law and Executive Director of the Law & Economics Center (LEC) at George Mason University Antonin Scalia Law School. Previously, I was the Parker S. Kennedy Professor in Law at Chapman University's Dale E. Fowler School of Law from 2004 to 2020. From 2003 to 2004, I was an Olin Fellow at the University of Virginia School of Law. During 2002-2003, I was a Visiting Assistant Professor of Law at George Mason's Scalia Law School. I am also a Nonresident Scholar at the Center for the Constitution at Georgetown University Law Center, where I was a Visiting Scholar in residence during Fall 2018. In 2016, I was a Lone Mountain Fellow at the Property & Environment Research Center (PERC) in Bozeman, Montana.

At George Mason, I am teaching Property Law this semester, a course that I have taught almost every year since 2002 (when I started my academic career). Here, I have also taught Civil Procedure, Institutions of American Law, Environmental Law, and a Survey on Law & Economics; and I co-taught State Constitutional Law, a course exploring state constitutional law across the nation, with The Honorable Jeffrey S. Sutton, Chief Judge of the U.S. Court of Appeals for the Sixth Circuit. During my sixteen years at Chapman University, I taught Property Law; Natural Resources Law & Policy; Administrative Law & Practice; Remedies; Real Estate Transactions; Commercial Leasing; Corporations; Agency & Partnership; Law & Economics; and Federal Courts.

My scholarship focuses on property law with a significant amount of my research

specialization focusing on takings law, particularly public use; administrative law, including land use controls; public lands and natural resources law; and law and economics. My works of scholarship have been cited and/or quoted—one or more times (beyond mere acknowledgements)—in several state and federal court opinions, in more than 50 briefs filed in state and federal courts including the U.S. Supreme Court, in dozens of books, and in more than 500 articles in scholarly journals listed in the Westlaw Journals and Law Reviews (JLR) Database. Further, my property law scholarship has been cited and quoted in the new RESTATEMENT OF THE LAW FOURTH, PROPERTY, in both published sections already approved by the American Law Institute and drafted sections soon to be approved and published (the Restatement is approved and published in stages). And, there are more than 800 citations to my work listed in Google Scholar. See https://scholar.google.com/citations?user=mCi70SkAAAAJ&hl=en.

Within book citations, my scholarly work has been cited and quoted in dozens of treatises and textbooks as well, including multiple of my property law and land use articles cited in one of the most widely used Property textbooks in the country—DUKEMINIER ET AL., PROPERTY (8th ed. 2014, 9th ed. 2018, 10th ed. 2022). A sampling of other textbooks and treatises cited my property work that is relevant to the expertise provided here, including, as a sampling, citations in: GERALD KORNGOLD & SUSAN FRENCH, CASES AND TEXT ON PROPERTY (7th ed. 2019); DANIEL R. MANDELKER, LAND USE LAW (5th ed. 2014); ROTUNDA AND NOWAK'S TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE (5th ed. 2007-2023); GERALD KORNGOLD & PAUL GOLDSTEIN, REAL ESTATE TRANSACTIONS: CASES AND MATERIALS ON LAND TRANSFER, DEVELOPMENT AND FINANCE 493 (6th ed. 2015); FREDERICK CUBBAGE, JAY O'LAUGHLIN, & M. NILS PETERSON, NATURAL RESOURCES POLICY 324 (2016); SAMANTHA HEPBURN, MINING AND ENERGY LAW 241, 276 (2015).

Q: PLEASE STATE YOUR EDUCATIONAL BACKGROUND.

A. I received my J.D. from Cornell Law School, where I was a John M. Olin Scholar in Law and Economics. I received my B.A. from Western Michigan University, *magna cum laude*, with majors in both political science and philosophy, where I studied as the John W. Gill Medallion Scholar and I was honored as the Presidential Scholar in political science, a designation awarded to the top graduate in the political science department.

Q: PLEASE DESCRIBE YOUR LEGAL WORK OUTSIDE OF ACADEMIA.

A. After graduating from law school, I was a law clerk to The Honorable Richard F. Suhrheinrich of the United States Court of Appeals for the Sixth Circuit. Following my clerkship, I was an associate with the firm of Crowell & Moring LLP in Washington, D.C. as an associate in the Natural Resources & Environmental Law Practice Group (including substantial work in mining and timber operations and regulations).

Q: DO YOU HAVE ANY PROFESSIONAL EXPERIENCE RELATING TO PUBLIC UTILITIES AND EMINENT DOMAIN?

A. Yes. While at Crowell & Moring LLP, I worked on several eminent domain matters, including involving multiple disputes specifically regarding the use of condemnation authority by a natural gas pipeline and storage facility operating under a certificate of public convenience and necessity, which included delegated condemnation authority under the Natural Gas Act. I also worked on a major force majeure dispute regarding a coal supply contract with a major coal-fired power plant energy producer where the coal was transported by rail, gaining a deep understanding of energy supply, transportation generally and railroad operations for transporting natural resources to customers specifically, and the economics of supply chains.

My scholarship has also engaged on railroad issues, including looking at the methods and processes of acquiring railroad easements by eminent domain, deed interpretation of railroad easements, and the limited scope of railroad easements as defined by those deeds and as defined by

the necessity and railroad-purposes limitations in the originally delegated eminent domain authority used to originally acquire the lands necessary. Although this research has influenced several of my scholarly works, it was most heavily employed in my 2016 *Florida State University Law Review* article, *Deeds and the Determinacy Norm: Insights from* Brandt *and Other Cases on an Undesignated, Yet Ever-Present, Interpretive Method*, 43 FLA. ST. U. L. REV. 793 (2016).

Q: ARE YOU INVOLVED IN ANY PROFESSIONAL ACTIVITIES TO CLARIFY AND IMPROVE THE LAW?

A. Yes. I am an elected member of the American Law Institute (ALI), which is the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law. I was appointed by ALI in July 2016 to serve as an Adviser to the *Restatement of the Law Fourth, Property* project. In addition, I am the author of over 50 law review articles and several books, including The Law of Neighbors (Thomson Reuters 2022) which is co-authored with James C. Smith, the John Byrd Martin Chair of Law Emeritus at the University of Georgia School of Law where he has been on the faculty since 1984 (note that Professor Smith and I have authored multiple property law articles together as well), Questions & Answers: Property (Carolina Academic Press, 3rd ed. 2022) (with the late Professor John Copeland Nagle of the University of Notre Dame Law School), and the 8th and 9th editions of Emanuel Law Outlines: Property – Keyed to Dukeminier, Krier, Alexander, Schill & Strahilevitz (Wolters Kluwer, 8th ed. 2018, 9th ed. 2018) (with the late Professor Calvin R. Massey of the University of California Hastings College of Law).

Among my service activities, I was Chair of the Association of American Law Schools' (AALS) Real Estate Transactions Section in 2019 and its Property Law Section in 2017. I am currently Vice-Chair, Committee on Environment & Natural Resources Regulation, ABA Section on Administrative Law & Regulatory Practice, and I have previously served in a variety of other

ABA leadership roles, including as a member of the ABA Real Property, Trust & Estate Law ("RPTE") Diversity and Inclusion Committee (by appointment); as a Contributing Editor to *Keeping Current-Property* in PROBATE & PROPERTY, the bi-monthly magazine of the ABA RPTE Section; ABA RPTE Section Liaison to the Standing Committee on the Law Library of Congress (July 2021-August 2022) (by appointment); Chair for Legal Education and Co-Chair of Trusts & Estates Legal Education Committee for the ABA RPTE Section (Sept. 2017-August 2019) (by appointment). At the Uniform Law Commission ("ULC"), I have served as the ABA Section Advisor for the Study Committee on Adverse Possession (2017-2018).

Q. HAVE ANY OF YOUR SCHOLARLY ACTIVITIES BEEN SPECIFICALLY FOCUSED ON ISSUES SURROUNDING THE MEANING OF "PUBLIC USE"?

A. In *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49 (1998), I documented my very detailed research study of the history and meaning of "public use" and related clauses like "public purposes," their interpretive treatment in the courts, and the susceptibility of the condemnation power to interest group capture in the absence of serious "public use" review. This eminent domain-related article that I authored and that is focused on the "public use" clause has not only received well over 100 citations in other articles and books, it was cited and quoted at length in an amicus brief of Nobel Laureate James Buchanan and noted economist Gordon Tullock in the landmark property rights and eminent domain case of *Kelo v. City of New London*, as well as in five other briefs in *Kelo* and in seven amicus briefs in a similar takings case at the Supreme Court of Michigan in *County of Wayne v. Hathcock* (overturning the infamous *Poletown* decision).

Most recently, my article *The ~~[Takings]~~ Keepings Clause: An Analysis of Framing Effects from Labeling Constitutional Rights*, 45 FLA. ST. U. L. REV. 1021 (2018), analyzes public use and other parts of the Takings Clause and their proper interpretation, particularly in light of the purposes

for which these provisions were inserted into the U.S. Constitution and state constitutions. Significant development of the eminent domain clause as a land use device was conducted in my article *A Framework for Understanding Property Regulation and Land Use Control from a Dynamic Perspective*, 4 MICH. J. ENV'T & ADMIN. L. 303 (2015). And I wrote *Chapter 3: Eminent Domain Law and Reform in Illinois: A Brief Overview*, in An Illinois Constitution for the Twenty-First Century (Joseph E. Tabor ed. 2017) (with introduction by Richard A. Epstein and foreword by George F. Will). Demonstrating that my research and expertise on takings and specifically "public use" dates back more than 25 years, public use and public purposes under state constitutional law was a particular focus of my 1996 monograph REFORMING THE LAW OF TAKINGS IN MICHIGAN, Mackinac Center for Public Policy (Apr. 1996).

I am also particularly proud of the fact that my views on the constitutional protections of property have been received positively from scholars and activists from across the political spectrum. For instance, notable conservative commentator George Will commended my work in his foreword to a book in which I contributed a chapter on takings and public use in the Illinois Constitution;[1] progressive consumer activist Ralph Nader cited and favorably discussed my public use scholarship in a law review article;[2] and former Congressman John Conyers (D-MI) reviewed my work (evaluating the way the property rights clauses in the federal and Michigan constitutions should be interpreted in the area of civil asset forfeiture) and called it a "great public service."[3]

Q: WHAT MATERIALS DID YOU REVIEW TO PREPARE YOUR TESTIMONY?

A: In addition to caselaw research regarding the seminal takings and "public use" or "public purposes" cases in federal and Georgia law and sources cited in footnotes to this testimony, the

[1] George F. Will, Foreword, AN ILLINOIS CONSTITUTION FOR THE TWENTY-FIRST CENTURY (Joseph E. Tabor ed. 2017).
[2] Ralph Nader & Alan Hirsch, *Making Eminent Domain Humane*, 49 VILL. L. REV. 207, 225-28 (2004).
[3] *See 'Odd Couple' works for common good*, DETROIT NEWS, July 21, 1998.

following is a non-exhaustive list of the materials I reviewed in preparation for this testimony:

- The petition, amended petition, responses, direct testimony, and all other documents entered into the docket in the above captioned petition.
- THE UNITED STATES CONSTITUTION
- THE CONSTITUTION OF THE STATE OF GEORGIA
- GEORGIA CODE TITLE 46. PUBLIC UTILITIES AND PUBLIC TRANSPORTATION § 46-8-120
- NICHOLS ON EMINENT DOMAIN (1950-present)
- SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755).
- THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (2d ed. 1871).
- JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (C.B. Macpherson ed., Hackett Pub. Co. 1980) (1690).
- WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1766).
- JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833).
- SIR FREDERICK POLLOCK AND FREDERICK WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW (2d ed. 1898; reprint ed., Cambridge, 1968).
- JOSEPH WILLIAM SINGER & NESTOR M. DAVIDSON, PROPERTY (6th ed. 2022).
- Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. PA. L. REV. 261 (2019).
- ROBERT MELTZ, CONG. RSCH. SERV., RL97-122, TAKINGS DECISIONS OF THE U.S. SUPREME COURT: A CHRONOLOGY (rev'd July 20, 2015), available at https://fas.org/sgp/crs/misc/97-122.pdf.
- Douglas W. Kmiec, *The Original Understanding of the Takings Clause Is Neither Weak nor*

Obtuse, 88 COLUM. L. REV. 1630 (1988).

- William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995).
- JAMES ELY, THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 26 (1992).

Q: PLEASE SUMMARIZE AND OUTLINE YOUR TESTIMONY.

A. My testimony addresses the historic and linguistic understanding of the term "public use" as that term is used regarding the exercise of eminent domain. History and language confirm that the point of the Takings Clauses in our constitutions is to make forced transfers hard, costly, and rare, not to make them easy, cheap, and common.

Two background observations make this clear. First, eminent domain is an extraordinary coercive power that involuntarily and forcibly wrests property owners of their rights, and thus should be exercised in only the most extraordinary circumstances. Second, the power of eminent domain is rife with the potential for abuse—particularly the sovereign using eminent domain to line its own coffers with the lands of its citizens against their will, or the sovereign using eminent domain to take land from less favored citizens in order to give it to the sovereign's friends.

It is indisputable that these two general observations were near universally shared by the framers of our federal and state constitutions and clearly motivated their decisions to create express limitations on when, how, for what purposes, and with what conditions the eminent domain power may be legitimately exercised. We know this in part because the framers injected Takings Clauses into the federal constitution and into the constitutions of the states, including Georgia. Indeed, the Takings Clauses in the U.S. and Georgia constitutions did not confer a power. Rather, the Takings Clauses limited a power which the framers thought the federal and state governments, like the King and sovereigns before him, would claim to exist. The Clauses are designed to limit and restrict the

state's condemnation power to only express, limited circumstances. That limitation and restriction extends to state agencies (including the Georgia Public Service Commission) and to railroads and utilities to which the state delegates part of its power for limited, specific purposes in furtherance of those entities' public functions only. Of critical importance in each constitution is the power-limiting condition that takings may only occur for a "public use." The "public use" and "public purpose" conditions in these constitutions are the primary focus of this written testimony.

To summarize, the government is always at a disability from exercising eminent domain power to coercively seize the property of an otherwise lawfully possessing private owner for anything other than a public use. The owner has an absolute immunity in that sense and, consequently, can enforce it through injunctive relief. The government (or, as here, entities to which it conditionally delegates its eminent domain authority) simply cannot take property from one person for the principally private use of another. There is little debate on that point from the U.S. Supreme Court, even in cases that interpret the phrase "public use" in a broad sense.[4] The government is also at a disability even for takings for justifiable public use ends unless and until it pays just compensation. Unless and until it does, the property owner retains the immunity. Once the government establishes a public use as the ends for the taking and pays just compensation, however, the parties' positions shift: The government escapes its disability and transforms the owner's immunity into only a right to damages for what is essentially a lawfully authorized sovereign confiscation of the immunity right.

My testimony proceeds in the following manner. First, I highlight the key constitutional provisions in the U.S. and Georgia constitutions relevant to the public use and public purposes determinations before this Commission. Second, I look at the drafting and early interpretational

[4] *See* Kelo v. City of New London, 545 U.S. 469, 480 (2005).

history of these provisions to understand their meaning, including what rights they were meant to protect and what evils they were meant to prevent. Next, I examine the words of these clauses and the linguistic lessons that inform their interpretation. I continue by explaining how the purposes and function of these clauses should inform not only how they are interpreted but how they should be applied to invocations of the extraordinary power of eminent domain. Included in that analysis is the preference for private market transactions in the transfer of property and how the clauses work to reinforce that preference, channeling individuals toward bargaining for property acquisition rather than lobbying for property condemnation. Included in this analysis is the application of interest group theory—another area of my expertise—to better understand why the public use and public purposes provisions were inserted into the federal and state constitutions in the first place. Finally, I explain why railroads or utilities—as mere statutory delegatees of condemnation authority—have even narrower eminent domain power than municipalities, as their authorizing statutes subject them to additional necessity and purpose constraints relating to their very limited roles as railroads or utilities. Finally, having deeply studied these areas of law and having carefully reviewed the docket in this proceeding, I offer my conclusions that the petitioner has not met its burden to prove that there is a public use or public purpose served here, making any grant by the Commission to the railroad company a violation of the U.S. and Georgia constitutions.

Q: WHAT CONSTITUTIONAL PROVISIONS RESTRICT THE USE OF EMINENT DOMAIN IN THE STATE OF GEORGIA?

A: The U.S. Constitution, Amendment V, states: "Nor shall private property be taken for public use without just compensation."[5] This not only limits the federal government, but it also creates a federal limit on the authority of state governments through the doctrine of incorporation

[5] U.S. CONST. amend. V.

that, by application of the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.[6] Independently, states limit their own state governmental units' authority by including takings clauses in their state constitutions. Article I, Section 3, Paragraph 1 of the Georgia Constitution provides: "Eminent domain. (a) Except as otherwise provided in this Paragraph, private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid."[7]

Q: HAVE YOU STUDIED THE HISTORY OF THE TERM "PUBLIC USE"?

A. Yes. In particular, I have studied the intent of the framers in putting the "public use/purpose" provisions in their respective constitutions.

Q: WHAT ARE YOUR CONCLUSIONS?

A. The framers of the U.S. and Georgia constitutions structured governments of limited powers, with the essential purpose of protecting private property.[8] The framers of the U.S. Constitution, for example, were no doubt inspired by John Locke's contention that "[t]he great and chief end, therefore, of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property. To which in the state of nature there are many things wanting."[9] James Madison acknowledged the same necessity: the state must protect property, and property must be protected from the state. In his essay, *Property*, Madison wrote, "Government is instituted to protect property of every sort … . This being the end of government, that alone is a

[6] Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 239 (1897).

[7] GA. CONST. art. I, § 3, para. 1.

[8] *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 29 (1985); *see also* Robert Brauneis, Eastern Enterprises, Phillips, *Money, and the Limited Role of the Just Compensation Clause in Protecting Property "in its Larger and Juster Meaning"*, 51 ALA. L. REV. 937, 939 (2000) ("We all know that the prevailing view of the founding generation was that, as Gouverneur Morris, echoing Locke and others, put it at the Constitutional Convention, 'property [is] the main object of Society.'" (citing THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 533 (M. Farrand ed. 1911))).

[9] JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 66 (C.B. Macpherson ed., Hackett Pub. Co. 1980) (1690).

just government, which impartially secures to every man, whatever is his own."[10] Thus, "protection" and "preservation," not merely "compensation," must be the focus in constitutional interpretation of what it means to adhere to just governance.

The "public use" language in the Takings Clause is intended to prohibit the power of the government to take property for private uses, without regard to compensation. You never get to the issue of compensation if the government is trying to take property for a private use—the constitutions simply forbid it. The federal government's power of eminent domain was not tested in federal court until 1875.[11] Nonetheless, a variety of litigation in state courts, interpreting similar provisions in their own constitutions and interpreting the federal constitution, began developing definitions of "public use."[12]

Michigan Supreme Court Justice Thomas Cooley's *Treatise on Constitutional Limitations* is especially enlightening because in that work Cooley's purpose was to summarize the doctrine as announced by the courts of all of the states up to 1871.[13] Cooley does not intend to advocate a theory of eminent domain, but rather to observe the dominant threads of interpretation in the courts of the various states all wrestling with finding the meaning of very similarly-worded Takings Clauses.

In his *Treatise* Cooley discusses state jurisprudence on eminent domain, and elaborates that conveyances to private parties, or condemnations designed to principally benefit particular private interests, do not satisfy the public use requirement even if they could indirectly serve the public interest:

> [I]f taken for a purely private purpose, it would be unlawful. Nor could it be of

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[10] James Madison, *Property*, NATIONAL GAZETTE (Mar. 27, 1792), reprinted in 14 THE PAPERS OF JAMES MADISON 266 (Robert Rutland et al. eds., 1983).

[11] *See* Kohl v. United States, 91 U.S. 367 (1875).

[12] *See, e.g.*, People ex rel. Trombley v. Humphrey, 23 Mich. 471 (1871).

[13] *See* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION iii (2d ed. 1871).

> importance that the public would receive incidental benefits, *such as usually spring from the improvement of lands or the establishment of prosperous private enterprises*: the public use implies a possession, occupation, and enjoyment of the land by the public at large, or by public agencies; and a due protection to the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another on vague grounds of public benefit to spring from the more profitable use to which the latter may devote it.[14]

As Cooley recognized, one could almost always make some credible argument that the public will benefit if certain private parties flourish. Indeed, benefits "usually spring" in one way or another from making a private company more prosperous or from shifting resources to a preferred use. For example, a use that is more environmentally protective might be preferred. But because that kind of "preferred use" argument can always be made, such an argument can never be sufficient. That reductive argument would make the "public use" or "public purposes" requirements meaningless.

Cooley further observes that even when a private party could use a property more beneficially than the property's then-residing owners, it would not justify invoking the power of eminent domain:

> [T] here are very many cases in which the property of some individual owners would be likely to be better employed or occupied to the advancement of the public interest in other hands than in their own; but it does not follow from this circumstance alone that they may be rightfully dispossessed.[15]

Thus, early court decisions recognized that the Takings Clause empowered neither the courts nor the legislature to engage in economic planning through eminent domain. Nor would precedent justify

[14] *Id.* at 585-86.
[15] *Id.* at 587.

environmental planning. For example, Cooley added that:

> It may be for the public benefit that all the wild lands of the State be improved and cultivated, all the low lands drained, all the unsightly places beautified, all dilapidated buildings replaced by new; ... but the common law has never sanctioned an appropriation of property based on these considerations alone.

Id.

Further examining Cooley's analysis, it is also clear that a taking primarily to benefit a single entity or a small network of entities—such as here a single customer and its network—would not fit as a "public use" or for "public purposes," even if some secondary users (but still far from a large segment of the public) might also gain benefits from using, or receiving products from users of, the condemned property. That means here that arguments that the rail line ostensibly would provide service to secondary customers is not enough in light of the primary non-public purpose of the taking. Such are the kinds of "vague grounds of public benefit" Cooley finds insufficient to meet the "public use" and "public purposes" threshold, and it cannot be said that these secondary incidental benefits involve the condemned property being moved to the "possession, occupation, and enjoyment of the land by the public at large, or by public agencies" as the clauses demand for a condemnation to pass constitutional muster.

Even if there were incidental benefits to the public, such benefits would not create a record sufficient to establish a public use or prove the existence of a public purpose. For instance, an interest in encouraging certain types of transportation or methods of moving goods would not be a legitimate public use under Cooley's analysis or the framers' understanding of the terms "public use" or "public purpose." Evidence of incidental environmental or incidental economic benefits that could "benefit the public" are not the kinds of facts that meet the threshold to prove that the purpose of the taking was public or that the use of the taken property would be public. As Justice Clarence Thomas

explained in his dissenting opinion in the now infamous *Kelo v. City of New London* case (in a statement not contrary to the language used in the majority opinion), "Tellingly, the phrase 'public use' contrasts with the very different phrase 'General Welfare' used elsewhere in the Constitution … [t]he Framers would have used the same such broader term if they had meant the Public Use Clause to have a similarly sweeping scope."[16] Justice Thomas continued, "The Constitution's text, in short, suggests that the Takings Clause authorizes the taking of property only if the public has a right to employ it, not if the public realizes any conceivable benefit from the taking."[17]

On these points, consider *Missouri Pacific Railway Co. v. Nebraska*.[18] There, the U.S. Supreme Court applied the "public use" test to invalidate what Yale Law School Professor Jonathan Macey calls "a blatant attempt at rent-seeking by the Nebraska legislature."[19] When in-state grain interests attempted to negotiate with the railway company for a plot along the railway's right of way, Missouri Pacific refused.[20] To obtain the property, the grain interests then turned their efforts to the legislature. The legislature and the board of transportation ordered Missouri Pacific to allow the grain interests to build a commercial grain elevator on Missouri Pacific's property.[21] The Court invalidated this coerced private-to-private transfer, calling the action "in essence and effect, a taking of private property … for the private use … ."[22] It continued, stating that "[t]he taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law[.]"[23]

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[16] Kelo v. City of New London, 545 U.S. 469, 509 (2005) (Thomas, J., dissenting).
[17] *Id.* at 510 (2005) (Thomas, J., dissenting).
[18] 164 U.S. 403 (1896).
[19] Jonathan R. Macey, *Public Choice, Public Opinion, and the Fuller Court*, 49 Vand. L. Rev. 373, 388 (1996).
[20] *See Mo. Pac. Ry. Co.*, 164 U.S. at 411.
[21] *Id*. at 411-13.
[22] *Id*. at 417.
[23] *Id*.

Q: DID THE LANGUAGE CHOSEN BY THE FRAMERS OF THE U.S. AND GEORGIA CONSTITUTIONS HAVE SPECIFIC MEANINGS?

A. Yes. A breakdown of the relevant words in the U.S. and Georgia constitutional provisions is instructive. "Nor" is an indication of prohibition and sets the tone that the clause's primary purpose is to serve a power-limiting (rather than power-conferring or power-legitimizing) function; "shall" connotes that the limitations on power that follow are mandatory and the government is obligated to adhere to them; "private property" is the scope of protected interests; "be taken" is the act triggering coverage of the provision and the subject of actions to which the limitations apply; "for public use" or "public purposes" acts as what scholars label with the term of art "property rule," meaning it provides that owners have a right to exclude the government if the taking is for anything other than a public use no matter how much the condemner offers to pay; and "without just compensation" acts as what scholars call a "liability rule," meaning it provides that, if the government has cleared the threshold hurdle of establishing that its exercise of power will be for a public use, then the property owner does not have a right to exclude the government for public use takings so long as the government compensates justly. I will discuss those terms of art again later in my testimony. To round out our terminology, "eminent domain" is the power in question; "condemnation" is the exercise of that power; and "takings" are the effect of the exercise of the power.

Most relevant to this proceeding, the "public use" and "public purposes" limitations use language that plainly indicates that the purpose of these provisions is to limit the government from acting as anything other than a public functionary. Of course, any interpretation that assumes the language of the Takings Clause permits takings for non-public uses would wrongfully presuppose that government could act in non-public functions in the first place.

In using the word "public," the framers excluded takings for private uses from the eminent domain power. Eighteenth-century dictionaries define each word in diametrically opposed ways.

One source defines "public" as that which is "belonging to a state or nation; not private ... general. regarding not private interest, but the good of the community."[24] In such sources, the accepted understanding of the term "public" involves the sphere of those things in which all individuals have a common interest, not those in which certain individuals, especially in exclusion or expense of others, have a specific interest. It is also important to note that the element of possession within the definition assumes that the "use" must remain in the hands of the state.[25]

"Purpose" as used in the Georgia constitution's Takings Clause does not expand the state's power as compared to "public use" as used in the federal constitution. First, the state of Georgia is still bound by the U.S. Constitution's Fifth Amendment and, no matter what its own state constitution allows, could never take private property for anything other than a "public use." Second, "purpose" itself creates very limited conditions under which a taking is legitimate. To identify a public purpose is to identify something that serves the purpose of advancing the interests of the public, not the interests of a private entity. Indeed, in this sense, the two phrases are quite similar. "Public use," has retained the meaning of "employing with a purpose."[26] This requires that the public be the actual exerciser of the use for which property is taken. Taken together, "public" and "use" can be further defined through three tests which distinguish those uses that are public from those that are private. Inherent in the concept of public uses are the standards that they must be inclusive, in which the interest and surplus is divided evenly amongst all those in society; provide a universal right of access to the use; and be derived out of necessity, that is, function in areas that could not be controlled through non-public means.

Inclusivity requires that all members of the public have a chance to share in the uses to which

[24] SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755).
[25] *See id*. at 169-71.
[26] Roger Clegg, *Reclaiming the Text of the Takings Clause*, 46 S.C. L. REV. 531, 543 (1995).

the condemned property is put and the public at large is the beneficiary of the uses to which the property is committed after condemnation. Because all citizens are members of the public, they must retain a right of access to—and the public at large must have a potential to benefit from—the uses following condemnation. Furthermore, a sense of necessity must exist in order for an exercise of eminent domain to become legitimate and to justify an extraordinary departure from the default expectation that most desired transfers will be achieved through negotiated, arms-length market transactions rather than by coercion.

Even the judicial rhetoric on the compensation component of the Takings Clause reinforces that the clause exists to ensure that the condemnation power is only exercised for non-private uses. The fundamental tenet of just compensation is to put the property owner in as good a position as he would have been had the injury not occurred.[27] This serves the principal purpose of the just compensation requirement, as described by the U.S. Supreme Court in the seminal case of *Armstrong v. United States*, "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."[28] Alternatively stated, "[j]ust compensation should neither enrich the individual at the expense of the public nor the public at the expense of the individual."[29] These findings by courts not only reveal that funds for takings should come from the treasury; they also speak to the allocations of burdens. The public, as beneficiary of the taking, should bear the burden of paying for the government's action. But where a private party is the main beneficiary of a taking and the public is only an incidental beneficiary, it hardly seems consonant with the fairness principles espoused in these judicial opinions for the public fisc to bear the primary burden of compensation. The principles of necessity and right of public

[27] *See* Armstrong v. United States, 364 U.S. 40, 49 (1960).

[28] *Id*.

[29] Michigan State Highway Comm'n v. Cronenwett, 216 N.W.2d 597, 600 (Mich. Ct. App. 1974) (quoting In re State Highway Comm'r, 229 N.W. 500, 501 (Mich. 1930)).

access to condemned property have long received support in takings jurisprudence.[30]

Where, like here, the condemning authority is a private party such as a railroad or utility company, the same principles apply. It is not correct for a railroad or utility to claim that they can act as a third-party payer of the just compensation award and thus claim there is no real burden on the public from allowing a condemnation when just compensation to be paid. First, any just compensation payments made by a railroad or utility will inure to the detriment of the public because the public will bear the cost of the payment when the railroad and utilities pass on the costs through service or rate increases. It is naive to think that simply because a private party pulls out its wallet to make the initial just compensation payment that they will not be holding out their hand asking for more from their customers to cover the loss. Just because a private or quasi-public entity is paying the bill doesn't mean public consumers don't suffer the cost. The public at large should not bear that burden when it is not offset by public uses and public purposes to which the public at large can obtain value. Instead, when a discrete, small network of private entities benefit but the public pays, the nexus demanded by the Takings Clauses—that is, the nexus between the burden borne by the public and the benefits gained by the public—disappears. Furthermore, to claim that a third party paying the just compensation award makes a "public use" inquiry unnecessary would simply convert the eminent domain power into a pure commodity for sale. Any private-to-private transfer brokered through a state actor using the coercive power of eminent domain where the transferee agreed to pay

[30] Consider this statement from Justice Thomas:

> The takings clause is a prohibition, not a grant of power: The Constitution does not expressly grant the Federal Government the power to take property for any public purpose whatsoever, Instead, the Government may take property only when necessary and proper to the exercise of an expressly numerated power… for a law to be within the Necessary and Proper Clause … it must bear an obvious, simple, and direct relation' to an exercise of Congress' enumerated powers.

Kelo v. City of New London., 545 U.S. 469, 511 (2005) (Thomas, J., dissenting).

the compensation would be legal. That interpretation of the Takings Clauses would, of course, be an absurd one—not to mention it would create a dangerous pay-to-play environment for the private purchase of the sword of the state.

Q. HOW DO THE "PUBLIC USE/PURPOSE" AND "JUST COMPENSATION" COMPONENTS OF TAKINGS CLAUSES WORK TOGETHER?

A. The provisions regarding takings in the Fifth Amendment of the U.S. Constitution or in Article I of the Georgia Constitution should be seen as principally conferring, or recognizing, two distinct rights that help to accomplish a restraint on takings. Those two rights can be analyzed using terminology adopted in the seminal law review article written by now-Senior Circuit Judge of the U.S. Court of Appeals for the Second Circuit Guido Calabresi with his co-author Stanford Law School Professor Douglas Melamed regarding "property rules" and "liability rules."[31]

The first right is a property rule and is housed in the words "public use" (or "public purposes"). These words give individuals the right to exclude the government entirely if a use is for something other than a public one.[32] It is a property rule because it preserves a property owner's right to keep her property (at least against certain kinds of governmental demands) no matter what level of compensation is offered.[33] If a taking is for anything other than a public use or for public purposes, then consent is required and the state may not compel a property owner to surrender her property for compensation, no matter how large.[34] The right to keep is the presumption and the public use and public purposes clauses establish the intentionally high bar for rebutting it.

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[31] Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

[32] For a detailed discussion of the "public use" clause, see Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49 (1998).

[33] On the role of the "right to keep," *see generally* Donald J. Kochan, The [Takings] Keepings Clause: An Analysis of Framing Effects from Labeling Constitutional Rights, 45 FLA. ST. U. L. REV. 1021 (2018).

[34] Richard A. Epstein, *A Clear View of the Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2112-13 (1997) (describing the traditional view of the public use clause as a restraint on government power fashioned as a

The second right within the Takings Clauses is a liability rule and is housed in the words "just compensation" (or "just and adequate compensation"). These words guarantee that individuals who are made to sacrifice their rights for a public use are made as whole as possible. Just compensation, however, only becomes relevant once the government clears the first property rule threshold hurdle of establishing that the taking is for a public use. The government must admit that, but for its actions, the owner would have the right to keep the property, and that the owner is therefore entitled to the value of the property as compensation for the taking. If a taking is for a proper end, then the owner cannot prevent the taking, but she can demand payment. The public as a whole bears the burden by compensating an owner who has lost her right to keep, so that she is not required to alone sacrifice her rights to serve the public need.

Q. WHAT IS THE ULTIMATE PURPOSE OF THE "PUBLIC USE/PURPOSE" AND "JUST COMPENSATION" COMPONENTS OF TAKINGS CLAUSES?

A. The ultimate purpose of the "public use/purposes" component of Takings Clauses is to make condemnation rare and steer most transfers into market negotiations. Put another way, the limitations created by the Takings Clauses reveal a preference for negotiated bargaining rather than forced transfers.

Negotiated bargaining should be encouraged. Take, for example, the flaws in the "just compensation" analysis. Just compensation awards often fail to make individual property owners truly whole, because just compensation is based on fair market value, and fair market value does not account for individualized value. The problem arises because, in transfers that are coerced through eminent domain, property owners lose their right to refuse to sell.

property rule, so that "where the taking is not for a public use (whatever its precise content) then the individual property owner is once again protected by a property right, so that what can be taken can only be taken with consent . . .").

The right to refuse a sale is critical because it empowers an owner to demand the price that makes her whole. That price is her "reserve price," and it may very well be higher than the fair market value. For instance, she may be extraordinarily comfortable in her property, or may have made highly personal improvements to it. Or the property may have been in her family for generations. Buyers may not want to pay for those things because they do not value them. But the owner values them and normally would not sell unless that value could be reflected in the price. Because she values the property far more than the average person might value it, her reserve price will be much higher than fair market value. When she has a right to keep her property by refusing a sale, she retains her individualized value in her property: if someone wants to buy it, they'll have to meet her reserve price. But when she loses her right to keep her property—such as when a transfer is coerced through eminent domain—she loses her individualized value. To retain the individualized value in any transaction transferring her property, an owner must be able to set the price for the property in a manner that includes her own subjective value of the property.

The "public use/purpose" components of Takings Clauses and their respective injunctions especially protect a property owner's higher reserve price, because they prevent non-consensual transfers from one private party at the demand of another private party who just happens to convince the sovereign to do his bidding. If the "public use/purpose" clause is weak, however, and only just compensation (fair market value) is required, you will get more and more situations where owners are forced out of land they highly value. That property owner who has a personal value in land which has been in her family for generations will not only be dispossessed against her will; she will go undercompensated at that dispossession. The "public use" component is the only protection for their right to refuse to sell - a right that helps them retain that personal value in the land. When the public use component is weak, that right to refuse to sell becomes empty.

Q. DO THESE "PUBLIC USE/PURPOSE" AND "JUST COMPENSATION"

COMPONENTS SERVE ANY OTHER PURPOSES?

A. Yes. The channeling of private land transfers into private market negotiations is also a guard against the evils of special interest capture of coercive governmental authority. If condemnation is easier and cheaper than negotiating for property, then there will be incentives to use the liberty-reducing condemnation process to effect land transfers rather than the liberty-enhancing market transaction.

Special-interest capture of the condemnation power for private uses exemplifies what is known as "public choice theory" or "the interest-group model of legislation." In property disputes, private negotiations are often more costly than convincing the state to condemn. If a private party can get access to the condemnation power—either through a delegation like the railroads have received or by lobbying a municipality—it can obtain land in the "market for legislation" for far less than it would have to pay in the open market. Known by law and economics scholars as "rent seeking," we witness special interests seeking the savings from the cheaper of these two alternatives. If an owner refuses to sell or demands a price higher than the interested buyer is willing to pay, the market provides no means by which the interested buyer can force the owner off the land. However, that is not the case when takings for private use are allowed. In this way, the "public use/purpose" provisions work to disincentivize rent seeking and prevent the state from becoming merely an agent of coercion, with the private interested buyer as its principal.

Q: DO YOU HAVE ANY OPINIONS REGARDING THE USE OF EMINENT DOMAIN BY PRIVATE RAILROADS AND OTHER PRIVATE COMPANIES?

A. Yes. The legitimate scope of "public use" is even narrower when eminent domain is exercised by railroads and utilities. Quasi-public actors like railroads and utility companies are not sovereigns with the power of eminent domain. Their authority derives from the state or federal

government that delegates that power to them.[35] Thus, that the state should condition the exercise of that power is perfectly consistent with the nature of the power; and that is what authorizing statutes do.[36] Alternatively stated, the greater power to delegate eminent domain includes the lesser power to condition that delegation. The primary limitation in such delegations is that any condemnation by a quasi-public actor pursuant to a delegation must have a direct nexus with the limited public purposes anticipated by the delegation. For instance, a railroad may condemn only to serve the purposes of providing public rail service or commerce by rail for the benefit of the full public. This is the proper conclusion, regardless of how broad the language in a delegation statute seems, because there is an implied limitation that the railroad may condemn only for legitimate railroad purposes.

For example, even if the statutory language granting eminent domain authority to a railroad is seemingly broad, no one could seriously say that the railroad can exercise eminent domain to build a post office—something which would probably be a legitimate exercise of eminent domain and satisfy public use if done by a municipality with general condemnation powers. Similarly, the railroad cannot condemn land even to benefit the railroad if it is not for the public railroad purposes that permitted the delegation to be considered constitutional in the first place. For example, a railroad cannot condemn property pursuant to its delegated authority so that the railroad president can build his private home, and just as clearly a railroad company cannot condemn land to lay railroad tracks intended to benefit a discrete set of private interests rather than serving common carrier-based public

[35] Consider congressional grants of eminent domain power to quasi-public actors. "Quasi-public actors" includes a number of private enterprises, usually due to their status as a common carrier, that have been delegated the power of eminent domain. *See*, *e.g.*, Natural Gas Act §7(h), 15 U.S.C. §717f(h) (granting natural gas companies the power of eminent domain). See also Dupree v. Texas E. Corp., 639 F. Supp. 463 (M.D. La. 1986) (recognizing that gas companies operating pursuant to section 7(h) legitimately hold eminent domain power).

[36] *See*, *e.g.*, Lim v. Michigan Dep't of Transp., 423 N.W.2d 343 (Mich. Ct. App. 1988) (no public or private agency may condemn without authorization in law); Montana Talc Co. v. Cyprus Mines Corp., 748 P.2d 444 (Mont. 1987) (delegated eminent domain power must be derived from, and is limited by, legislative grant); In re Swidzinski, 579 A.2d 1352 (Pa. Commw. Ct. 1990) (body to which eminent domain power is delegated has no authority beyond that legislatively granted).

purposes that motivated the legislature to delegate the state's eminent domain authority to the railroad in the first place. Both examples would indistinguishably be takings for private use. In these statutory contexts, the delegatee is limited to condemning only for the specialized purposes motivating the statute.

Q. IN LIGHT OF YOUR EXPERTISE ON "PUBLIC USE" AND "PUBLIC PURPOSES," AND HAVING REVIEWED THE PETITION AND THE DIRECT TESTIMONY OF THE RAILROAD COMPANY AND ASSOCIATED WITNESSES IN THIS PROCEEDING, WHAT IS YOUR OPINION ON WHETHER OR NOT THE PROPOSED HANSON SPUR IS A PUBLIC USE OR PUBLIC PURPOSE?

A. Examining the history, linguistics, and purposes of the public use and public purposes provisions, as well as the cases interpreting these clauses, the Hanson Spur has not met the "public use" or "public purpose" threshold for constitutionality for specifically these reasons:

1. A condemnation that chiefly serves the interests of one company and its network of contractors is not a "public use" or in service of "public purposes." It is the type of private-to-private transfer that should occur if and only if accomplished by a private market transaction—the field where almost all transfers of property for the benefit of private parties must occur. The Takings Clauses, and particularly the "public use" and "public purposes" sections, are designed to ensure that most land transfers continue to take place as voluntary transactions in the marketplace by barring the use of eminent domain for the principal benefit of a single company or a company and its network of individuals with which it contracts. Indeed, the "public use" and "public purposes" provisions underscore that the presumptive field for land transfers is the private market, with coercive powers of condemnation reserved for the few cases where forced acquisition can be justified because it is necessary for public use and public purposes. There is a high bar to overcome the presumptive preference for market transactions when private interests are involved.

2. This is not a taking of necessity from private property owners to serve truly public interests and the public as a whole. Rather, this is a naked wealth transfer. This kind of private benefit outcome is precisely the kind of private-to-private coerced transfer, facilitated by the state to the advantage of a favored interest, that the Takings Clauses were designed to prevent.

3. This is unlike even the most liberal interpretations of the "public use" and "public purposes" provisions where there may be a primary winner who is private but there are multitudes of other private and public individuals or entities—i.e., the "public at large"—that benefit from the condemnation as well. The alleged direct benefits presented in the direct testimony all flow to a single private company and its network of contractors.

4. The alleged indirect benefits are too common to be sufficient to establish necessity and justify the use of extraordinary power. As stated above, any taking from one private individual X to give to another private individual Y could be purported to bring benefits to the public simply because Y has a better business model or is managed by a better businessperson than X. Or, it could be purported that it is better that we have more Y businesses than X businesses because Y businesses will leave less of an environmental footprint or will be able to employ more people and the like, for example. Such spillover effects are never sufficient to establish a public use or a public purpose, because spillover benefits could be claimed in almost any coerced transfer, thereby rendering "public use" and "public purposes" language nugatory. One rule of constitutional and statutory interpretation is that you should give every word effect, and you should reject interpretations or applications of a rule that render parts of the constitution or a statute meaningless. To avoid that, under these facts, the claimed indirect benefits must be considered too common and indirect to be the kinds of evidence needed to establish a public use or public purpose.

5. This Commission should be especially sensitive to its role in determining whether there is or is not a public use or public purpose here. It cannot presume that the courts will correct

any errors it makes. This is especially true because precedents establish that the courts will be deferential to this Commission's determination of whether this condemnation factually satisfies the public use and public purposes provisions. The Commission holds great power over the ultimate resolution of this issue, and with that should take its responsibility to answer the public use and public purpose questions with the appropriate seriousness that such power demands.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A: Yes. However, should additional facts become available during this proceeding that affect any of my conclusions, I will supplement my testimony as appropriate.

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of August, 2023, a copy of the foregoing *Pre-Filed Responsive Expert Testimony of Donald J. Kochan* has been served via electronic mail and U.S. First-Class Mail on the following pursuant to GA. COMP. R. & REGS. 515-16-16-.02; 515-2-1-.04(4)(b), (3):

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