No. 22-913

In the Supreme Court of the United States

RICHARD DEVILLIER, ET AL.,

Petitioners,

v.

STATE OF TEXAS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC., AND MANHATTAN INSTITUTE IN SUPPORT OF PETITIONERS

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Question Presented

May a person whose property is taken without compensation seek redress under the self-executing Takings Clause even if Congress has not codified a cause of action?

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Interest of Amici Curiae[1]

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized for the purpose of litigating matters affecting the public interest in private property rights, individual liberty, and economic freedom. Founded 50 years ago, PLF is the most experienced legal organization of its kind. PLF attorneys have participated as lead counsel in numerous landmark United States Supreme Court cases generally in defense of the right to make reasonable use of property and the corollary right to obtain just compensation when that right is infringed. *See, e.g.*, *Tyler v. Hennepin Cnty.*, 598 U.S. 631 (2023); *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021); *Pakdel v. City and Cnty. of San Francisco*, 141 S.Ct. 2226 (2021); *Knick v. Twp. of Scott*, 139 S.Ct. 2162 (2019); *Murr v. Wisconsin*, 137 S.Ct. 1933 (2017); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). PLF also routinely participates in important property rights cases as amicus curiae. *See, e.g.*, *Horne v. Dep't of Agric.*, 576 U.S. 350 (2015); *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012). Additionally, PLF attorneys have extensive experience with the question here, having recently advocated for the Just Compensation Clause's self-executing nature several times. *See, e.g.*, *Ariyan, Inc. v. Sewerage & Water Bd. of New Orleans*,

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[1] No counsel for any party authored this amicus brief in whole or in part, and no person or entity, other than amici, their members, or counsel, made any monetary contribution to the preparation or submission of this brief.

143 S.Ct. 353 (2022); *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Cooperative de Ahorro y Credito Abraham Rosa*, 143 S.Ct. 774 (2023).

The National Federation of Independent Business Small Business Legal Center, Inc. (NFIB Legal Center), is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

The Manhattan Institute for Policy Research (MI) is a nonpartisan public policy research foundation whose mission is to develop and disseminate ideas that foster greater economic choice and individual responsibility. MI's constitutional studies program aims to preserve the Constitution's original public meaning. To that end, it has historically sponsored scholarship regarding quality-of-life issues, property rights, and economic liberty.

Introduction and Summary of Argument

The courts don't need Congress's permission to enforce the self-executing constitutional right to just compensation. A civil right is self-executing "if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced." *Davis v. Burke*, 179 U.S.

399, 403 (1900). Compensation for a taking is just such a right. The plain text of the Fifth Amendment itself supplies the rule for how the right is protected, and how it is enforced: takings of private property *require* compensation. This Court has said so—many times. *See*, *e.g.*, *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty.*, 482 U.S. 304, 316 n.9 (1987) (the Just Compensation Clause "of its own force furnish[es] a basis for a court to award money damages against the government."); *Knick*, 139 S.Ct. at 2172 (citing *First English* as holding that a "property owner acquires an irrevocable right to just compensation immediately upon a taking").

Congress may enforce the Fourteenth Amendment by creating causes of action and remedies. U.S. Const. amend. XIV, § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."). Because the Fourteenth Amendment's plain text applies to the states *as states*, Congress *could* create a statutory cause of action for deprivations of life, liberty, or property by a state. U.S. Const. amend. XIV, § 1 ("nor shall any *State* deprive any person of … property, without due process of law"). But Congress need not have done so for Richard Devillier to seek compensation from Texas for a taking, because the Fifth Amendment itself specifies the remedy, and the absence of legislation does not prohibit courts from enforcing the self-executing constitutional right to just compensation.

Statutory authorization may be necessary for *other* civil rights claimants to sue, but not Just Compensation claimants, because with one possible exception, no right listed in the Bill of Rights other than the right to Just Compensation is self-executing.

That Congress created a general civil cause of action for "persons" claiming deprivations of "rights, privileges, or immunities secured by the Constitution and laws"—Civil Rights Act of 1871, 42 U.S.C. § 1983—is of no moment here. For example, Congress has never legislatively established a cause of action for just compensation against the *federal* government, and owners whose property is alleged to have been taken seek compensation directly under the Constitution. The Tucker Act does not create a cause of action for compensation or money damages; it only assigns jurisdiction over constitutionally based takings claims to the Court of Federal Claims and the Federal Circuit. *See* 28 U.S.C. § 1491(a)(1) ("The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded … upon the Constitution"). In federal takings, the self-executing Just Compensation Clause recognizes the right and provides the remedy. *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 126 (1974). If the lack of a statutory cause of action does not stand in the way of holding the federal government to the Just Compensation Clause's requirements, it similarly does not stand in the way of the same claim against a state. Our constitutional order cannot countenance neutering a right and remedy expressly recognized by the text of the Constitution, on the grounds that Congress has not acted.

The Fifth Circuit acknowledged Texas' obligation to comply with the Fifth and Fourteenth Amendment's plain requirements. But by divorcing liability from the constitutionally mandated remedy, the court below engaged in a clever, but not compelling, Texas two-step. First, the Fifth Circuit

acknowledged that states cannot effect uncompensated takings. Yet the court concluded that Congress must affirmatively provide a statutory remedy before property owners may pursue compensation claims against a state—even in the state's own courts. Petitioners sued Texas in a Texas court, alleging that the state's deliberate flooding of their land effected a taking requiring compensation under the Fifth and Fourteenth Amendments. Texas eliminated any possible Eleventh Amendment issues that may have been lurking by removing the case to federal court. *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 622–23 (2002); *Embury v. King*, 361 F.3d 562, 566 (9th Cir. 2004) ("Allowing a State to waive immunity to remove a case to federal court, then 'unwaive' it to assert that the federal court could not act, would create a new definition of chutzpah.") (citation omitted). By requiring that Congress first recognize a cause of action for just compensation, the Fifth Circuit ensured that Devillier's federal civil rights cannot be enforced in any court.

This Court should reaffirm that the Just Compensation Clause is self-executing and hold that property owners need not rely on a statutory cause of action where compensation is mandated by the Fifth and Fourteenth Amendments. The Constitution itself provides the cause of action, rendering the need for a statute unnecessary.

Argument

I. The Text of the Fourteenth Amendment Binds "the States"

Until the ratification of the Fourteenth Amendment, the Just Compensation Clause

restricted only the federal government. *Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243 (1833). Property owners seeking compensation for a taking of their property by a state or its instrumentalities were forced to look exclusively to state constitutions for the remedy. *Id.* at 249 ("Had the people of the several states, or any of them … required additional safe-guards to liberty from the apprehended encroachments of their particular governments; the remedy was in their own hands"); *see also Pumpelly v. Green Bay Co.*, 80 U.S. 166, 176–77 (1871) ("This requires a construction of the Constitution of Wisconsin; for though the Constitution of the United States provides that private property shall not be taken for public use without just compensation, it is well settled that this is a limitation on the power of the Federal government, and not on the States."); *Boom Co. v. Patterson*, 98 U.S. 403, 407 (1878) (applying Minnesota's just compensation clause to a compensation claim removed to federal court). The view was that state courts applying state law were adequate to protect fundamental rights against intrusion by the state itself. Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 Utah L. Rev. 1211, 1265. "[M]any prominent jurists regarded the Takings Clause of the U.S. Constitution as essentially a reference to the various notions of compensation, property, and public use in the common law of takings." *Id.* (quoting 2 Joseph Story, *Commentaries on the Constitution of the United States* 547 (Thomas M. Cooley ed., 4th ed., Boston, Little, Brown & Co. 1873) (1833) ("This is an affirmance of a great doctrine established by the common law for the protection of private property.")). *See also TrinCo Inv. Co. v. United States*, 140 Fed.Cl.

530, 534 (2018) (noting that until 1855 there was no federal judicial forum for trying takings cases.).

But the Civil War laid bare the notion that states could be entrusted with policing their own protection of fundamental civil rights. The Fourteenth Amendment's Due Process Clause overruled *Barron* and held states—*in their capacity as states*—to the same standards as the federal government. *See* U.S. Const. amend. XIV, § 1 ("nor shall *any State* deprive any person of life, liberty, or property, without due process of law") (emphasis added). The Amendment "'fundamentally altered the balance of state and federal power'" by "requir[ing] the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution." *Alden v. Maine*, 527 U.S. 706, 756 (1999) (citation omitted). Its provisions "were intended to be, what they really are, limitations of the power of the States[.]" *Ex parte Virginia*, 100 U.S. 339, 345 (1879). "[A] State cannot disregard the limitations which the Federal Constitution has applied to her power. Her rights do not reach to that extent." *Id.* at 346. The Fourteenth Amendment thus worked a "sea change" enhancing "federal protections for individual rights against state infringements." *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 176 (2023).

Ratification of the Fourteenth Amendment inherently limited state power over individual rights. *Mitchum v. Foster*, 407 U.S. 225, 238–39 (1972) (recognizing the role of the Amendment in elevating "the Federal Government as a guarantor of basic federal rights against state power"); *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 287 (1913) (adopting as the "theory of the Amendment" that "the

Federal judicial power is competent to afford redress for [a] wrong" that violates the Fourteenth Amendment); Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 268 (1998) (noting that a leading proponent of the Amendment stated it was adopted in part to protect "citizens of the United States, whose property, by State legislation, has been wrested from them").

In the very first case "incorporating" a right acknowledged in the Bill of Rights against a state under the Fourteenth Amendment's Due Process Clause—the Just Compensation Clause[2]—this Court recognized that the Fourteenth Amendment limits the states, not just its officials, instrumentalities, and agencies:

> But it must be observed that the prohibitions of the [Fourteenth] amendment refer to *all the instrumentalities of the state*,—to its legislative, executive, and judicial authorities, —and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the state, 'violates the constitutional inhibition' … This must be so, or, as we have often said, the constitutional prohibition has no meaning[.]

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[2] *See Dolan v. City of Tigard*, 512 U.S. 374, 383 (1994); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 122 (1978); *Nollan*, 483 U.S. at 827; *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 560 U.S. 702, 717 (2010). *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 306 n.1 (2002) (The Just Compensation Clause "applies to the States as well as the Federal Government.").

Chicago, B. & Q.R. Co. v. City of Chicago, 166 U.S. 226, 233–34 (1897) (emphasis added). Initially, this Court in *Chicago* established that property rights established the foundation of the Constitution as a whole:

> The requirement that the property shall not be taken for public use without just compensation is but "an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down as a principle of universal law. Indeed, in a free government, almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen."

Id. at 236 (citing 2 Story, Const. § 1790; 1 William Blackstone, *Commentaries* 138, 139 (1765); Thomas M. Cooley, *A Treatise on the Const. Limitations Which Rest upon the Legislative Power of the States of the American Union* *559 (1868); *People v. Platt*, 17 Johns. 195, 215 (N.Y. Sup. Ct. 1819); *Bradshaw v. Rogers*, 20 Johns. 103, 106 (N.Y. Sup. Ct. 1822); *In re Mt. Washington Road Co.*, 35 N.H. 134, 142 (1857); *Parham v. Justices of the Inferior Court of Decatur Cnty.*, 9 Ga. 341, 348 (1851); *Ex parte Martin*, 13 Ark. 198, 206 (1853); *Johnston v. Rankin*, 70 N.C. 550, 555 (1874)). More recently, *McDonald v. City of Chicago*, 561 U.S. 742, 760 (2010), also noted that "in holding that due process prohibits a State from taking private property without just compensation, the Court described the right as 'a principle of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of its

justice.'" (citing *Chicago, B. & Q.R. Co.*, 166 U.S. at 238). In *McDonald*, this Court explained that it "abandoned 'the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights,' stating that it would be 'incongruous' to apply different standards 'depending on whether the claim was asserted in a state or federal court.'" *McDonald*, 561 U.S. at 765 (quoting *Malloy v. Hogan*, 378 U.S. 1, 10–11 (1964)).

Thus, ratification of the Fourteenth Amendment reduced state power to the extent necessary to ensure that all Americans could seek judicial vindication for violation of constitutional rights. *See, e.g.*, *In re Venoco LLC*, 998 F.3d 94, 110 (3d Cir. 2021) ("State sovereign immunity is a critical feature of the U.S. Constitution, but it is not absolute. When they ratified the Constitution, states waived their sovereign immunity defense in bankruptcy proceedings[.]"). Because the Fifth Amendment explicitly provides for "compensation" and the states consented to the language of the Fifth and Fourteenth Amendments, the states thus consented to a mechanism that is "inherent in the constitutional plan." *PennEast Pipeline Co., LLC v. New Jersey*, 141 S.Ct. 2244, 2262 (2021).

Thus, the incorporated Bill of Rights protections "are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." *Malloy*, 378 U.S. at 10. *Cf. Mapp v. Ohio*, 367 U.S. 643, 655–56 (1961) ("[I]n extending the substantive protections of due process to all constitutionally unreasonable searches—state

or federal—it was logically and constitutionally necessary that the exclusion doctrine … be also insisted upon … To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment."); *Wallace v. Jaffree*, 472 U.S. 38, 49 (1985) (describing as an "elementary proposition of law" that "when the Constitution was amended to prohibit any State from depriving any person of liberty without due process of law, that Amendment imposed the same substantive limitations on the States' power to legislate that the First Amendment had always imposed on the Congress' power.") (footnote omitted); *Benton v. Maryland*, 395 U.S. 784, 795 (1969) ("Once it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice,' the same constitutional standards apply against both the State and Federal Governments.") (citation omitted).

II. Self-Executing Constitutional Rights Do Not Need Legislative Recognition of a Remedy

It is not a necessary prerequisite for Congress to create a cause of action and a judicial remedy when the Constitution itself recognizes the remedy which is thus "self-executing." *See Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 21 (1940) ("[I]f the authorized action ... does constitute a taking of property for which there must be just compensation under the Fifth Amendment, the Government has impliedly promised to pay that compensation and has afforded a remedy for its recovery…."); *Maine Cmty. Health Options v. United States*, 140 S.Ct. 1308, 1328 n.12 ("Although there is no express cause of action under the Takings Clause, aggrieved owners can sue through the Tucker Act under our case law."). Applied here, this means

that although Congress has the power to enforce the Fourteenth Amendment,[3] where (as here) it has not done so and the constitutional right is "self-executing," the absence of legislation does not bar a court from enforcing the right. In short, Devillier does not need Congress' permission to sue Texas—*in Texas' own courts, no less*—to recover just compensation as guaranteed by the Fourteenth Amendment. This Court should hold that property owners have a self-executing federal constitutional right to just compensation when government takes their property, and they may sue to enforce that right against the State of Texas in a Texas court (or in federal court if Texas removes it). Notwithstanding Congressional failure to adopt a statute like section 1983 that creates a just compensation remedy against the states, Texas cannot immunize itself from the minimal requirements of the U.S. Constitution.

This Court has long recognized that the existence of a right means there must be a remedy: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury v. Madison*, 5 U.S. 137, 163 (1803). *Marbury* explains that this standard traces to English legal tradition, as Lord Blackstone noted, "it is a general and indisputable

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[3] *See* U.S. Const. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."). Pursuant to this section, Congress may enforce constitutional guarantees, notwithstanding sovereign immunity, by legislating a damages remedy for a state's violation of the Fourteenth Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 448–49, 456 (1976); *Health & Hosp. Corp.*, 599 U.S. at 175.

rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded." *Id.*

The constitutional provision is "self-executing" when it "supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced," as compared with non-self-executing provisions that "merely indicate[] principles, without laying down rules by means of which those principles may be given the force of law." *Davis v. Burke*, 179 U.S. at 403 (citation omitted).[4] Here, the Fifth Amendment explicitly commands payment of just compensation when government takes property for public use. It is the *only* explicit civil remedy provided in the text of the Constitution. This is a "sufficient rule" as evidenced by courts' ability to apply it since the earliest days of the United States. By contrast, other constitutional provisions recognizing fundamental rights do not condition the right on a remedy expressed in the Constitution. For example, if a government abridges First Amendment rights, the text of the Constitution doesn't prescribe

[4] This Court does not always require that Constitution explicitly detail the remedy in order to deem a provision self-executing. For example, *Minn. v. Murphy*, 465 U.S. 420, 434–35 (1984), held that because the Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself," U.S. Const. amend. V, the provision is self-executing if the government threatens to penalize someone if he refuses to speak; the person may rely directly on the Constitution to refuse to answer questions where the answers might incriminate him in future criminal proceedings or to seek exclusion of answers extracted in that circumstance. However, the clause otherwise is generally considered non-self-executing, although the "execution" depends on an individual's affirmative claiming of the privilege rather than a government waiver. *Id.* at 425.

what a court can do about it. *See, e.g.*, *Tanzin v. Tanvir*, 141 S.Ct. 486, 489, 491–92 (2020) (Religious Freedom Restoration Act of 1993 provides private right action seeking damages to redress Federal Government violations of the right to free exercise under the First Amendment).

Because of the foundational nature of the Just Compensation Clause's protection of property rights, "[t]he legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but *it is not due process of law if provision be not made for compensation*." *Chicago, B. & Q.R. Co.*, 166 U.S. at 236 (emphasis added). That is, liability alone cannot fulfill the constitutional mandate—there must be compensation: "the right to compensation was an incident to the exercise of the power of eminent domain; that the one was so inseparably connected with the other that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle." *Id.* at 238 (citing *Sinnickson v. Johnson*, 17 N.J.L. 129, 145 (1839)). After considering other early federal cases in the same vein, this Court concluded, "private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the fourteenth amendment of the constitution of the United States[.]" *Id.* at 241.

When the states were subjected to the Fourteenth Amendment and thus, the incorporated "self-executing" Just Compensation remedy, property owners harmed by a state taking acquired a right to file a claim for compensation, notwithstanding the lack of enabling legislation. *First English*, 482 U.S. at

316 n.9; *see also Esposito v. S.C. Coastal Council*, 939 F.2d 165, 173 n.3 (4th Cir. 1991) (Hall, J., dissenting); Catherine T. Struve, *Turf Struggles: Land, Sovereignty, and Sovereign Immunity*, 37 New Eng. L. Rev. 571, 573–74 (2003) ("[T]he Fifth Amendment's Just Compensation Clause also appears to furnish an exception to the prohibition on damages relief."); Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 Wash. & Lee L. Rev. 493, 519 (2006) ("[T]he straight textual argument seems to require the government to provide money damages [for a taking], notwithstanding otherwise applicable sovereign immunity bars."). The Constitution provides that property owners must be compensated when government takes private property for public use.[5] It does not say "except for states."

Relying on *Marbury*, this Court in *Franklin v. Gwinnett Cnty. Pub. Schools*, 503 U.S. 60, 69 (1992), held that when a statute authorizes a private right of action "to enforce a federal right and Congress is silent on the question of remedies, a federal court may order any appropriate relief." The Title IX plaintiffs in that case could recover monetary damages although the statute was silent on that point. *Id.* at 64–65. If *legislation* creating remedy against Fourteenth Amendment-violating states waives sovereign immunity, *id.*; *Fitzpatrick*, 427 U.S. at 456, then a just compensation remedy *embedded directly* in the

[5] The Constitution itself requires payment of just compensation for a taking, as distinguished from other payments, say, for out-of-pocket costs, that may be reimbursed as a matter of legislative grace. *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 6 and n.7 (1984).

Fourteenth Amendment itself must have the same effect. It makes no sense to allow recovery to plaintiffs with self-executing statutory claims that lack a mandated remedy while withholding recovery from plaintiffs with a self-executing constitutional claim that explicitly describes the remedy owed. *See also Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 373–78 (2006) (Bankruptcy Clause provides a constitutionally grounded exception to sovereign immunity); *Allen v. Cooper*, 140 S.Ct. 994, 1003 (2020) ("the Bankruptcy Clause itself did the abrogating" because "the States had already 'agreed in the plan of the Convention not to assert any sovereign immunity defense' in bankruptcy proceedings") (quoting *Katz*, 546 U.S. at 377); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 752 (1999) (Souter, J., concurring in part) ("A State's untoward refusal to provide an adequate remedy to obtain compensation, the *sine qua non* of an inverse condemnation remedy under § 1983, … is not damages for tortious behavior, but just compensation for the value of the property taken."); Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 Nw. U. L. Rev. 144, 199 (1996) ("It is a proposition too plain to be contested that the Just Compensation Clause of the Fifth Amendment is 'repugnant' to sovereign immunity and therefore abrogates the doctrine[.]").

III. The Fifth Circuit Deprives Property Owners of Any Forum for Constitutional Takings Claims

A. The Takings "Catch-22" Resurrected

The Fifth Circuit's approach acknowledges that property owners asserted a federal constitutional

right but held that they have no remedy—*in any court, state or federal*—until Congress first creates one. The effect on property owners within the Circuit is devastating—often depriving them of *any* compensation even for acknowledged takings. For example, Louisiana state courts employ the same distinction between liability for a taking and a claim for just compensation that the Fifth Circuit applied below. That is, although a waiver of sovereign immunity is not necessary to sue Louisiana governments for takings, *Angelle v. State*, 34 So.2d 321, 323 (La. 1948) (state constitution's just compensation clause is "self-executing" and not subject to sovereign immunity), Louisiana governments have not waived immunity from enforcement of resulting judgments. La. Const. art. XII, § 10(C). This leaves property owners without their property and without any way to recover their owed just compensation, a constitutionally deficient and unjust result. *See Ariyan, Inc. v. Sewerage & Water Bd. of New Orleans*, 29 F.4th 226, 232 (5th Cir. 2022) ("[W]e understand the Plaintiffs' frustration. They have succeeded in winning a money judgment. Without any judicial means to recover, they are compelled 'to rely exclusively upon the generosity of the judgment debtor.'") (quoting *Folsom v. City of New Orleans*, 109 U.S. 285, 295 (1883) (Harlan, J., dissenting).

The situation is especially dire in Texas, which extends sovereign immunity not only to the state, but to any private corporation deputized as an "arm of the state" to exercise government functions. In *CPS Energy v. Elec. Reliability Council of Texas*, 671 S.W.3d 605, 628 (Tex. 2023), the Texas Supreme Court held that a private corporation enjoys sovereign

immunity when authorizing legislation "'evinces clear legislative intent'" to vest it with the "'nature, purposes, and powers' of an 'arm of the State government'" and because doing so satisfies the "political, pecuniary, and pragmatic policies underlying our immunity doctrines." *Id.* (footnotes omitted). The dissenting opinion noted that although "'immunity is inherent to sovereignty, unfairness is inherent to immunity,' especially when it is extended to what is not inherently sovereign: purely private entities." *Id.* at 653 (Boyd and Devine, joined by Lehrmann and Busby, JJ., dissenting) (footnote and citations omitted). *See also Hall v. McRaven*, 508 S.W.3d 232, 243 (Tex. 2017) (sovereign immunity from suit "allows the 'improvident actions' of the government to go unredressed,") (citation omitted); *Brown & Gay Eng'g, Inc. v. Olivares*, 461 S.W.3d 117, 121–22 (Tex. 2015) (sovereign immunity "places the burden of shouldering" the "costs and consequences" of those actions "on injured individuals," rather than the entity that caused those consequences) (citation omitted).

The property owners in this case exercised their choice of forum to pursue their constitutional takings claims against Texas in state court. *Texas* removed the case to federal court, and the Fifth Circuit refused to consider the merits, holding there is no enabling statute and states cannot be sued under section 1983. Consequently, in the Fifth Circuit, where can a property owner properly raise takings claims against the state? If the owner sues the state in federal court seeking just compensation, the state will invoke Eleventh Amendment immunity to get it dismissed. And if the owner sues in state court, as the Petitioners did here, the state defendant can simply remove the

case to federal court and poof! It disappears. *Cf. Biden v. Nebraska*, 143 S.Ct. 2355, 2371 (2023) (rejecting government's "sleight of hand" to cancel student loans). This Court should have little patience with courts that deprive property owners of *any* forum to pursue their constitutional claims.

B. The Constitution Elevates Judicial Protection of Property Rights Over Government Gamesmanship

Governments compound the constitutional error of taking property without just compensation by engaging in legal tactics designed to thwart property owners' attempts to vindicate their constitutional rights. *See* Laura D. Beaton & Matthew D. Zinn, Knick v. Township of Scott*: A Source of New Uncertainty for State and Local Governments in Regulatory Takings Challenges to Land Use Regulation*, 47 Fordham Urb. L.J. 623, 625 (2020) (urging local governments to make use of "several tools" "to try to force claims, in whole or in part, back into state courts"); *Arrigoni Enters., LLC v. Town of Durham*, 136 S.Ct. 1409, 1409 (2016) (Thomas and Kennedy, JJ., dissenting from denial of certiorari) (procedural bar from federal court "inspired gamesmanship"); *Lapides*, 535 U.S. at 621 (decrying state's manipulation of legal doctrine "to achieve unfair tactical advantages"). In this circumstance, a property owner's only recourse in 49 states is to sue for inverse condemnation. *Knick*, 139 S.Ct. at 2168; *First English*, 482 U.S. at 316 ("the entire doctrine of inverse condemnation is predicated on the proposition

that a taking may occur without such formal proceedings.").[6]

Our nation was founded on the idea that the government has no power to confiscate private property for public use without compensating the owner. This Court should treat inverse condemnation claims as the mirror image equivalents to eminent domain actions, such that any state's action in taking property authorizes litigation in any court. *See City of Northglenn v. Grynberg*, 846 P.2d 175, 178 (Colo. 1993) ("Because an inverse condemnation action is based on the 'takings' clause of our constitution, it is to be tried as if it were an eminent domain proceeding."). The fact that governmental agencies prefer not to pay cannot fairly limit this constitutional protection. *See* David A. Thomas, *Finding More Pieces for the Takings Puzzle: How Correcting History Can Clarify Doctrine*, 75 U. Colo. L. Rev. 497, 546 (2004) ("Predictions of doom for governmental entities required to carry greater compensation burdens do not ameliorate the unconstitutionality, illegality, and moral perfidy of wrongful deprivations of private property by irresistible public power.").

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[6] In Ohio, property owners must seek a writ of mandamus compelling the government to initiate condemnation proceedings. *Knick*, 139 S.Ct. at 2168, n.1.

Conclusion

The decision below should be reversed.

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Respectfully submitted,

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