No. 24-386

In the
SUPREME COURT OF THE UNITED STATES

KARL FISHER, ET AL.,

PETITIONERS,

v.

THE STATE OF NEW LOUISIANA

RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR RESPONDENT

TEAM 10
Counsel for the Respondent

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QUESTIONS PRESENTED

1. Since *Kelo v. City of New London* is sound as a matter of law, did not significantly result in negative consequences, and underpins states' reliance interests, should the decision be upheld?

2. When United States Constitutional amendments are generally not self-executing and the Takings Clause has never been determined to directly provide a cause of action, is the Takings Clause self-executing?

STATEMENT OF THE CASE

The New Louisiana state legislature enacted the New Louisiana Economic Development Act with the goal of revitalizing the state's economy. R. at 1. Revitalization efforts under the Act include expansion of the state's tourism industry and the creation of new jobs. R. at 1–2. To further these efforts, the Act equips Governor Anne Chase with the ability to contract with businesses to pursue large-scale development projects that promote economic growth. *Id.* Under this authority, Governor Chase partnered with Pinecrest, Inc. to construct a luxury ski resort. R. at 2. The project is specially designed to attract wealthy tourists, generate substantial tax revenue, and create 3,470 new jobs. *Id.* The project also promises to reinvest 15% of the tax revenue into the surrounding community to support ongoing revitalization efforts. *Id.*

Construction of the Pinecrest resort requires 1,000 acres across three counties, on land owned by 100 different property owners. *Id.* At the state's request, ninety landowners agreed to sell their land in lieu of the promising development. *Id.* The ten others, however, refused to sell. *Id.* These properties, while sentimental and long held, are economically struggling: some farms have been rendered unproductive due to poor soil, and many of the homes require substantial repairs. R. at 2–3. Although the properties are neither dilapidated nor pose a risk or threat to the public, their poor conditions continue to depress local market value. R. at 3. On March 13, 2023, New Louisiana authorized Pinecrest to begin construction on the land already acquired, while initiating eminent domain proceedings to obtain the remaining properties. *Id.*

Two days later, the ten holdout owners filed suit, alleging that the taking violated the Fifth and Fourteenth Amendments. *Id.* Despite the project's purpose of economic revitalization, the owners argued that the taking did not satisfy a public use. R. at 3–4. The owners requested injunctive relief. R. at 2. Alternatively, they requested just compensation, but they failed to plead

a statutorily based cause of action for the relief. R. at 3–4. In response, New Louisiana moved to dismiss both claims under Fed. R. Civ. P. 12(b)(6). R. at 3. The state acknowledged two statutes that supported dismissal: NL Code § 13:4911, which permits takings for economic development, and NL Code § 13:5109, which provides that an executive or statutory waiver of immunity is required for a property owner to obtain just compensation. R. at 2. The district court granted the motion. R. at 4. It held that the taking was valid pursuant to *Kelo v. City of New London*, 545 U.S. 469 (2005), and that the Fifth Amendment's "just compensation" clause is not self-executing. R. at 4–5. On appeal, the Court of Appeals for the Thirteenth Circuit affirmed the district court's ruling. R. at 11–12.

This Court granted the property owners' petition for writ of certiorari to determine (1) whether *Kelo* should be overruled, and (2) whether the Fifth Amendment's Takings Clause is self-executing. R. at 20. Accordingly, Respondent New Louisiana requests this Court to uphold the ruling of the Thirteenth Circuit.

SUMMARY OF THE ARGUMENT

The Court should uphold *Kelo v. City of New London* because no special justification exists to overturn the precedent. While not an "inexorable command," *stare decisis* promotes the predictable and consistent development of legal principles, and it fosters reliance on judicial decisions. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015). Overruling *Kelo* would disrupt this consistency and harm states like New Louisiana, which have relied on its interpretation of "public use" to advance their economic goals.

Kelo is not grievously wrong as a matter of law. The Court's decision aligns with long-established precedent, reaffirming that economic development serves a legitimate public purpose. *Kelo*, 545 U.S. at 484. The ruling also promotes federalism, allowing the states to balance their

own eminent domain powers against individual property rights. Additionally, *Kelo* has not resulted in significant negative consequences, as its rule is workable, clear, and consistent with prior precedent. Overturning *Kelo* would unsettle concrete reliance interests for states that have adopted its broad definition of "public use" to create jobs and drive economic revitalization. Because no substantial grounds exist for overruling it, *Kelo* should remain intact, as it continues to provide a sound and effective framework for states exercising eminent domain.

The Fifth Amendment's Takings Clause does not provide a self-executing cause of action for just compensation because the text and history of the Bill of Rights and a considerable amount of precedent illustrate that the Constitutional amendments provide broad strokes of rights, but they do not provide a cause of action by narrowing into the means for obtaining a remedy. This Court has recently determined that no cause of action exists under the Takings Clause. *Me. Cmty. Health Options v. United States*, 590 U.S. 296, 323 n.12 (2020). *Devillier*, the most recent guidance from this Court on the matter, also declined to add a cause of action under the Fifth Amendment. *Devillier v. Texas*, 601 U.S. 285, 293 (2024).

It is not clear from the record what other state remedies are available, and this Court has also stated that it would be "imprudent" to not look at other remedies before deciding the self-executing question. *Id.* at 286. Alternatively, even if the Court were to find that the Takings Clause is self-executing, Petitioners' claim would still need to be dismissed because of state sovereign immunity under the Eleventh Amendment. No exceptions to that sovereign immunity apply. Finally, constitutional principles such as federalism and the separation of powers suggest that state courts and the legislative branch are more appropriate places to examine the state takings claims. Thus, Petitioners' claims must be dismissed because no cause of action exists under the Takings Clause.

ARGUMENT

I. THE COURT SHOULD UPHOLD *KELO* BECAUSE IT IS LEGALLY CONSISTENT WITH DECADES OF PRECEDENT ALLOWING STATES TO NARROW THEIR PUBLIC USE DOCTRINES BEYOND THE BASELINE OF ECONOMIC BENEFIT.

In deciding whether to uphold precedent, *stare decisis*—to "stand by yesterday's decision"—remains the preferred course. *Kimble*, 576 U.S. at 455 (citations omitted). While not an "inexorable command," the doctrine promotes "the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Id.* at 455 (citations omitted). In addition, it reduces incentives for challenging settled precedent, saving the parties and courts the expense of endless litigation. *Id.* The doctrine is a "foundation stone of the rule of law[,]" and overruling precedent is never a small matter. *Id.* (quotations omitted).

While *stare decisis* may carry less weight in constitutional decisions, the Court still demands a "special justification" or "strong grounds" to overturn a constitutional ruling. *Ramos v. Louisiana*, 590 U.S. 83, 121 (2020) (Kavanaugh, J., concurring in part). To determine the existence of a "special justification," the Court examines various *stare decisis* factors,[1] but those factors fold broadly into three considerations: (1) whether the prior decision was grievously wrong as a matter of law, (2) whether it caused significant negative jurisprudential or real-world consequences, and (3) whether overruling the prior decision would unduly upset reliance interests. *Id.* at 121–22. (Kavanaugh, J., concurring in part).

All three considerations support upholding *Kelo*. First, the Court's interpretation of the public use doctrine accurately reflects the historical role of private development in advancing

[1] Ramos, 590 U.S. at 121 (Kavanaugh, J. concurring in part) (identifying the *stare decisis* factors used by the Court as: (1) the quality of the reasoning, (2) the precedent's consistency and coherence with previous or subsequent decision, (3) changed law since the prior decision, (4) changed facts since the prior decision, (5) the workability of the precedent, (6) the reliance interests of those who have relied on the precedent, and (7) the age of the precedent).

public economic interests. Second, *Kelo* promotes federalism by allowing states to balance the scope of their eminent domain powers against the property rights of individuals. Finally, overturning *Kelo* would unsettle the concrete reliance interests of states, like New Louisiana, that have relied on the broad construction of the public use doctrine to drive economic development and revitalization efforts. No special justification exists for overturning *Kelo*.

A. *Kelo* Was Not Grievously Wrong as a Matter of Law Because its Reasoning was Sound and it is Legally Consistent With Prior Precedent.

A garden-variety of disagreement does not suffice to overrule—*Kelo*'s precedent must be egregiously wrong as a matter of law. *See Ramos*, 590 U.S. at 122 (Kavanaugh, J. concurring in part). To conduct this inquiry, the Court examines, among other factors, (1) the quality of the precedent's reasoning, and (2) its legal consistency with other decisions. *Id.* A decision's reasoning is sound when it is "ground[ed] in the constitutional text, history, or precedent[.]" *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 220 (2022). A decision a legally consistent when it tracks with related legal decisions and developments. 590 U.S. at 106.

Kelo's rule starts with the Fifth Amendment, which provides that "private property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V. Absent a textual definition of "public use," the question of whether a use is public or private is ultimately left to the judiciary. *Rindge Co. v. Los Angeles Cnty.*, 262 U.S. 700, 706 (1923). Historically, the Court's answer fell three categories: (1) public ownership, as with hospitals, military bases, or roads, (2) use-by-the-public, as with common carriers or public utilities, and (3) exigencies where the takings otherwise satisfy the Constitution. *Kelo v. City of New London*, 545 U.S. 469, 497–98 (2005) (O'Connor, J. dissenting). But in 2005, the Court held that a city's economic development was "a 'public use' within the meaning of the Fifth Amendment" *Id.* at 490.

1. The Court's Reasoning Was Sound Because it was Based in the Principle of State Sovereignty and Recognized the Government's Role in Economic Development

Two rationales underpin *Kelo*'s holding. First, the Court repeated its command that state governments are the appropriate body to determine the state's local needs. *Id.* at 488. It explained, "When the legislature's purpose is legitimate and its means are not irrational, . . . empirical debates over the wisdom of takings . . . are not to be carried out in the federal courts." *Id.* (citing *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 242–43 (1984)). Second, the Court reasoned that "[p]romoting economic development is a traditional and long accepted function of the government." 545 U.S. at 484. Therefore, when a state identifies economic development as the reason a taking, the Court saw "no principled way of distinguishing economic development from the other [recognized] public purposes." *Id.*

In 1787, two years before he drafted the Fifth Amendment, James Madison wrote that the protection of "the faculties of men"—that is, the right of "acquiring property"—should be the primary objective of the government. The Federalist No. 10 (James Madison). A year later, the Court cautioned that the government fails that objective when it "takes property from A[] and gives it to B." *Calder v. Bull*, 3 U.S. 386, 388 (1798). The Court reflected Madison's view, but it omitted context. In The Federalist No. 10, Madison explained that protecting property rights involves managing economic inequality arising from "the diversity in the faculties of men," as this diversity leads to factions that could destabilize society. Implicit in Madison's view is that, by safeguarding property rights, the government may ensure economic prosperity, as "the regulation of these various and interfering interests forms the principal task of modern legislation." *Id.* That is, safeguarding property rights is a means to an economically prosperous end. Considering Madison's view, *Kelo* is consistent with principles that advocate for government's role in promoting economic prosperity.

That the states may deem "economic development" a public use is consistent with the understanding that eminent domain—and, by extension, the states' discretion to define "public use"—was a power historically recognized as belonging to the states. *Kohl v. United States*, 91 U.S. 367, 372 (1875). The Court did not recognize the federal government's eminent domain powers until 1875, when it upheld a taking to construct a post office. *Id.* at 372. Before then, eminent domain was thought to be state-exclusive. *See id.* at 368 ("No one doubts the existence in the State governments of the right of eminent domain."). In *Kohl*, the Court explained, "The right of eminent domain was one of those means well known when the Constitution was adopted, and employed to obtain lands for public uses." *Id.* at 372. Honoring the notion of state sovereignty, the Court added that a state "[need not apply] to the [federal government] to exercise its lawful powers." *Id.* After applying Fifth Amendment's Takings Clause to the states, the Court addressed the states' discretion to define "public use" in *Rindge Co. v. Los Angeles Cnty.*, 262 U.S. 700 (1923). The Court echoed the principles of sovereignty, holding that "[t]he nature of a use, whether public or private . . . is influenced by local conditions." 262 U.S. at 706.

Based on its sound reasoning, *Kelo* was not grievously wrong as a matter of law. The Court's decision rested on two core principles: state sovereignty and the government's role in promoting economic prosperity. The ruling reaffirms the established authority of states to determine "public use" based on local needs and conditions, respecting the balance of federalism.

2. Kelo is Legally Consistent Because it Relied on the Court's Previous Eminent Domain Decisions.

In *Kelo*, the Court deferred to the state's authority to define that purpose, relying principally on *Berman v. Parker*, 348 U.S. 26 (1954) and *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984). *Kelo*, 545 U.S. at 489. In *Berman*, the Court instructed that "when the legislature has spoken, the

public interest has been declared. . . . In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation[.]" 348 U.S. at 32. The Court reaffirmed this in *Midkiff*, holding that "[t]he 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers." 467 U.S. at 240. In *Berman*, the Court added that, if the legislature so concludes, "[t]he public end may be as well or better served through an agency of private enterprise than through a department of government." 348 U.S. at 33–34. Consistent with *Berman* and *Midkiff*, the *Kelo* Court "decline[d] to second-guess the City's determinations as to what lands it needs to acquire in order to effectuate" an economic development project. 545 U.S. at 488–89.

The Court first broadened the public use doctrine to account for railroad construction during the Industrial Revolution. In 1872, The Court refused the idea that private ownership prevents land from being of public use. *Olcott v. Fond du Lac Cnty.*, 83 U.S. 678, 697 (1872). In *Olcott*, the Court upheld Wisonsin's use of eminent domain to take land for railroad construction, even though private companies owned and operated the railroads. *Id.* at 698. The Court emphasized, "While, then, it may be true that ownership of property may sometimes bear upon the question of whether the uses of property are public, it is not the test." *Id.* at 697. The Court rationalized that, despite their private ownership, railroads contributed greatly to "the general business, the commercial prosperity, and the pecuniary resources of the inhabitants of cities," and thus "[produced] public good …and [conferred] benefits … upon the persons and property of all the individuals composing the community." *Id.* at 692 (quoting *Hasbrouck v. City of Milwaukee*, 13 Wis. 37, 44 (1860)). Only when the taking is "for the *private use* of another" does it violate the Takings Clause. *Missouri Pac. Ry. Co. v. Nebraska*, 164 U.S. 403,417 (1896) (emphasis added).

The Court later explained that a taking a "for the benefit of [a] private person" must have a "justifying public purpose." *Thompson v. Consol. Gas Utils. Corp.*, 300 U.S. 55, 80 (1937).

Beyond infrastructure, the Court expanded its understanding of "public use" when it upheld a taking for an irrigation system that benefitted the agricultural economy of Illinois. *See Fallbrook Irr. Dist. v. Bradley*, 164 U.S. 112 (1896). In *Fallbrook Irr. Dist.*, the Court reasoned that cultivating large swathes of dry land "would seem to be a public purpose, and a matter of public interest, not confined to the landowners, or even to any one section of the state," as it could generate a thriving agricultural economy. *Id.* at 161. By the time the Court decided *Berman* and *Midkiff*, it had already established that takings that facilitate economic benefits could be considered public uses. This understanding naturally extended to *Kelo*, where the Court explained, "Viewed as a whole, our jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances." 545 U.S. at 482.

The evolution of the public use doctrine supports the Court's recognition that economic growth is a legitimate public purpose. *Kelo* is legally consistent with precedent holding such and is therefore not grievously wrong as a matter of law.

B. *Kelo* Did Not Result in Negative Jurisprudential and Real-World Consequences Because its Rule is Workable and it is Legally Consistent with Prior Precedent.

In considering *Kelo*'s jurisprudential consequences, the Court examines (1) the workability of the rule and (2) its legal consistency with other decisions, among other factors. *See Ramos*, 590 U.S. at 122 (Kavanaugh, J., concurring in part). The Court should also analyze the precedent's "real-world effects on the citizenry." *Id.* The negative consequences must be significant; they may arise when an otherwise workable rule results in diminished protections for individual liberties. *Id.* at 126 (Kavanaugh, J., concurring in part) (referencing *Apodaca v. Oregon*, 406 U.S. 404 (1972))

(contending that the *Apodaca* decision resulted in a legal process that could facilitate wrongful convictions). Absent negative consequences, though, this inquiry does not favor overruling precedent. *See id.*

A rule is workable when "it can be understood and applied in a consistent and predictable manner." *Dobbs,* 597 U.S. at 281. *Kelo*'s rule is workable and clear: (1) local governments are best positioned to define "public use" within their communities, and (2) economic development, as a baseline, qualifies as "public use." 545 U.S. at 489. Central to *Kelo*'s holding is that states may also "impose 'public use' requirements that are stricter than the federal baseline." *Id.* It emphasized that "nothing in [*Kelo*] precludes any State from placing further restrictions on its exercise of the taking power." *Id.* Thus, Court laid a floor for defining "public use" and invited states modify that definition to suit their own views of eminent domain. *Id.* It was predictable and clear, to the extent that many states heeded the invitation to narrow their own definitions of "public use." Ultimately, it served as a positive endorsement of federalist principles.

In the aftermath of *Kelo*, many states sought to restrict their own eminent domain powers. In Ohio, the State Supreme Court held that, under its own constitution, an "economic development by itself is not a sufficient public use to satisfy a taking." *Norwood v. Horney*, 853 N.E.2d 1115, 1141 (Ohio 2006). Similarly, the Supreme Court of Oklahoma interpreted their constitution to "provide private property protection to [its] citizens beyond that which is afforded them by the Fifth Amendment[.]" *Bd. of Cnty. Com'rs of Muskogee Cnty. v. Lowery*, 136 P.3d 639, 651 (Okla. 2006) ("We join other jurisdictions including Arizona, Arkansas, Florida, Illinois, South Carolina, Michigan, and Maine, which have reached similar determinations on state constitutional grounds."). Other states, such as New Jersey and Pennsylvania, adopted modified versions of *Kelo*'s holding, allowing for takings to support economic development only with blighted

properties. *See, e.g.*, *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447, 460 (N.J. 2007); *In re Redevelopment Auth.*, 962 A.2d 1257, 1263 (Pa. Cmmw. 2008). In each case, the states welcomed *Kelo*'s invitation to restrict their eminent domain powers, which reflects the ideas of federalism upon which the Court based its ruling.

The real-world effects on the citizenry are equally positive, as they enhance the political power of individuals to advocate for individual property rights next to the eminent powers of the state. The Court has held that "the property rights protected by the Takings Clause are creatures of state law." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 155 (2021). In *Kelo*, the Court advocated for "affording legislatures broad latitude in determining what public needs justify the use of the takings power." 545 U.S. at 483. Its deferential posture properly instructs that state legislatures are best situated to honor the individual liberties of the citizenry. *See id.* Consequently, this also allows citizens a say in how legislatures invoke their eminent domain powers. For example, should local officials vote to condemn certain properties to the chagrin of the public, the citizenry, through the political process, has power to replace those officials with a vote. *Kelo*'s broad ruling not only respects the sovereignty of states to make their own decisions, but it empowers voters to influence their local officials democratically. In doing so, the citizenry's view on individual property rights may be properly accounted for when the government exercises its eminent domain to support public welfare.

Kelo did not result in negative consequences for the real world or the judiciary. It provided a clear framework for states to determine "public use" while allowing them flexibility to impose stricter requirements if desires. States that chose to limit their eminent domain powers demonstrate the ruling's endorsement of federalism and respect for local governance. Furthermore, *Kelo*

empowered citizens by enhancing their ability to influence eminent domain policies through the democratic process.

C. Overruling *Kelo* Would Unduly Upset Concrete Reliance Interests of States That Conduct Takings to Enhance Economic Prosperity.

In the final inquiry, the Court should focus on the legitimate expectations of those who have reasonably relied on the precedent. *Ramos*, 590 U.S. at 122 (Kavanaugh, J. concurring in part). In this context, factors to consider include (1) the variety of reliance interests and (2) age of the precedent, among others. *Id.* Traditional reliance interests arise "where advance planning of great precision is obviously a necessity." *Dobbs*, 597 U.S. at 289 (quotations omitted). Reliance interests become "concrete"—and thus requiring more careful consideration—in cases involving planned activities, such as those involving "property and contract rights." *See id.* (quotations omitted). When the price of upsetting reliance interests is high, the decision should be upheld. *See* 590 U.S. at 129.

The Fifth Amendment's Takings Clause is a "tacit recognition of a preexisting power to take private property for public use." *United States v. Carmack*, 329 U.S. 230, 241 (1946). That is, while property rights are protected, they exist within the scope of the state's eminent domain powers—the two are intertwined. *See id.* When a state takes property to further a development plan, eminent domain is but one step in series of carefully planned activities. The Court observed this in *Kelo*: "The City has *carefully formulated* an economic development plan that it believes will provide appreciable benefits to the community, including … new jobs and increased tax revenue." 545 U.S. at 483 (emphasis added). Thus, the planning nature of a taking, paired with its close ties with property rights, establishes eminent domain as a concrete reliance interest of the states.

Kelo has stood for nearly two decades, and some states, such as New Louisiana and New York, subscribe to its holding that economic development is a constitutionally permissible public use. *E.g.*, *Kaur v. New York State Urb. Dev. Corp.*, 933 N.E.2d 721 (N.Y. 2010). In *Kaur*, New York exercised its eminent domain powers to provide land to Columbia University for an expansion project. *Id.* at 733. The state did so pursuant to a statute that permits takings for "public service or other civic purposes." *Id.* (citing N.Y. Unconsol. Law § 6253(d)). The court found that the taking complied with statutory requirements. 933 N.E.2d at 733. Despite Columbia being a private university, the court reasoned that the project would "provid[e] public benefits to the local community" in the form of upgraded transit infrastructure, a financial commitment to the surrounding areas, stimulated job growth. *Id.* at 734. Planning was vast, and New York expected "14,000 [new hires] for construction at the [p]roject site, … [and] 6,000 permanent employees once the [p]roject [was] completed." *Id.* at 734–35.

Here, like New York, New Louisiana initiated eminent domain proceedings pursuant to state statute. R. at 2. NL Code § 13:4911 permits "takings purely for economic development." *Id.* The project involves the construction of a ski resort that will expand the state's tourism industry, increase tax revenue, and provide 3,470 new jobs. *Id.* The breadth of the project is expected to be vast, requiring 1,000 acres to complete the construction. *Id.* New Louisiana expects the project to significantly benefit the surrounding community, with 15% of the tax revenue generated from the ski resort to be used for revitalization efforts. *Id.* New Louisiana has adopted *Kelo*'s definition of "public use" and relies on its holding to enhance the public welfare of its communities. R. at 3.

Overruling *Kelo* risks upending existing projects and future initiatives that rely on the current "public use" doctrine. It also risks limiting takings to fringe areas that may not otherwise support the state's redevelopment goals. As the lower court observed, "[r]edevelopment projects

take years, require negotiations and planning with multiple parties, and cost millions of dollars." R. at 13. The financial harm cannot be understated. In addition, the ability of states to attract developers hinges on the promise that large-scale projects can move forward. Eminent domain offers a vehicle for states to attract developers while simultaneously promoting public welfare. States—like New York and New Louisiana—rely on *Kelo*'s definition of "public use" to support such projects. Their reliance interests are concrete. Overruling *Kelo* would destabilize these interests and limit the states' capacity to fully account for the public's benefit when exercising takings for public use.

II. THIS COURT SHOULD AFFIRM THE THIRTEENTH CIRCUIT'S DISMISSAL BECAUSE NO JUST COMPENSATION CAUSE OF ACTION EXISTS DIRECTLY UNDER THE FIFTH AMENDMENT AS IT IS NOT SELF-EXECUTING.

The Court has looked at the overlap of the nature of the Takings Clause combined with available state claims for just compensation, but never before has there been a situation such as this where the claim has been brought solely under the Fifth Amendment. The heart of the matter, which both parties recognize, is that the Fifth Amendment substantively grants the right to just compensation when the government takes property, yet the correct procedural vehicle for seeking such compensation is not readily apparent. The state of New Louisiana asks this Court to continue to recognize the Takings Clause as a constitutional right, but not as a cause of action, as has been the case since its inception.

Since no cause of action exists within the case the Petitioners have brought forth by using only the text of the Fifth Amendment, the Petitioners' claims must be dismissed. First, the plain text of the Takings Clause, the history behind the Bill of Rights, and this Court's considerable hesitancy to add causes of action beyond narrow situations (e.g., *Bivens* claims) should lead this Court to once again decide that a cause of action arising directly under the Takings Clause is not

appropriate. Second, and alternatively, even if this Court is led to the conclusion that the Fifth Amendment is self-executing, the Thirteenth Circuit's decision to dismiss must be affirmed because the Eleventh Amendment protects the State from being sued in federal court. Finally, policy concerns of federalism and separation of powers are central to this case and should be given due consideration.

The Fifth Amendment Takings Clause states, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. A property owner acquires that right to just compensation immediately upon a taking through the Fifth Amendment. *Knick v. Twp. of Scott*, 588 U.S. 180, 192 (2019). However, "Constitutional rights do not typically come with a built-in cause of action to allow for private enforcement in courts." *Devillier,* 601 U.S. at 291 (citing *Egbert v. Boule*, 596 U.S. 482, 490–91 (2022)). Constitutional rights are invoked in two main instances: (1) defensively in cases which arise under other sources of law, or (2) offensively when brought under an independent cause of action designed specifically for that purpose (e.g., § 1983 claims). 601 U.S. at 291.

A. No Claim for Just Compensation is Available Directly Under the Takings Clause Because it Establishes a Right but not a Remedy.

United States constitutional amendments generally do not provide causes of action. 596 U.S. at 490–91. "[T]he finding that 'a damages remedy is implied by a provision that makes no reference to that remedy may upset the careful balance of interests struck by the lawmakers,' particularly where there is no clear manifestation of congressional intent to do so[.]" *Smith v. Kentucky*, 36 F.4th 671, 674–75 (6th Cir. 2022) (quoting *Hernandez v. Mesa*, 589 U.S. 93, 101 (2020)). The Court is "increasingly skeptical of implied damages actions for constitutional violations and has substantially narrowed the circumstances under which such an action would be viable." 3 Jennifer Mason McAward et. al., *Civil Rights Actions,* § 14.01 (2024). "'[W]e have long

held that § 1983 provides the exclusive remedy for constitutional violations' for rights protected by the Fourteenth Amendment where Congress has not otherwise provided a cause of action." *Smith,* 36 F.4th at 675.

1. The text and the history of the Takings Clause indicate that the actual language of the Clause was meant to provide a condition on the government's right to takings, not to provide a cause of action.

"We're all textualist now." Elena Kagan, The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes, at 8:28 (Nov. 17, 2015), http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation. "Textualism" is defined as "[t]he doctrine that the words of a governing text are of paramount concern and that what they fairly convey in their context is what the text means." Textualism Definition, *Black's Law Dictionary* (12th ed. 2024), *available at* Westlaw. With that in mind, "just compensation" is "[u]nder the Fifth Amendment, a payment by the government for property it has taken under eminent domain[.]" Just Compensation Definition, *Black's Law Dictionary* (12th ed. 2024), *available at* Westlaw. "Consideration of the compensation question must begin with direct reference to the language of the Fifth Amendment[.] . . . As its language indicates, and as the Court has frequently noted, this provision does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *First English Evangelical Lutheran Church v. Cnty. of L.A*., 482 U.S. 304, 314 (1987).

No plain language in the amendment gives guidance to where and how just compensation is due, just that it is due. This substantive right stems from the Fifth Amendment, but the text itself does not indicate to the public what the means are for such compensation. Furthermore, there is no language suggesting those means are granted directly in the Fifth Amendment itself. This Court recently recognized that the Fifth Amendment does not directly provide the case of action. "After all, the Constitution did not 'expressly create . . . a right of action,' when it mandated 'just

compensation' for Government takings of private property for public use[.] . . . Although there is no express cause of action under the Takings Clause, aggrieved owners can sue through the Tucker Act under our case law." *Me. Cmty. Health Options v. United States*, 590 U.S. at 323 n.12. "[N]or shall private property be taken for public use without just compensation" contrasts with provisions for just compensation found under state constitutions which designate the means for receiving such compensation. For example, California's Constitution provides a detailed cause of action.

> Private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.

CA Const. art. 1 § 19. This state procedural mechanism fits directly into the scheme the Framers intended by allowing state claims and keeping the U.S. Constitution amendments broad.

The plain language of the Fifth Amendment's Taking Clause does not support a direct cause of action, nor does the original purpose and history of the Takings Clause and the Bill of Rights in general. Alexander Hamilton declared, "[T]he Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS." The Federalist NO. 84 (Alexander Hamilton). Notably, the Bill of Rights is a Bill of Rights, not a Bill of Remedies.

Though "[t]here is no surviving history of debate of the Congress or the state legislatures about what the clause meant," of all the clauses in the Bill of Rights, the Takings Clause was the only one not requested by a state. William Michael Treanor, *Review: Supreme Neglect of Text and History*, 107 MICH. L. REV. 1059, 1065 (2009). The Takings Clause exists because Madison drafted it in his Bill of Rights proposal. *Id.* The original meaning and intention of the Takings Clause are noted in two areas: (1) the prevention of military confiscations and (2) compensation if the government abolished slavery. Michael B. Rappaport, *Originalism and Regulatory Takings: Why*

the Fifth Amendment May Not Protect Against Regulatory Takings, but the Fourteenth Amendment, May, 45 San Diego L. Rev. 729, 737 (2008). Here, those two purposes do not apply. Thus, when considering the plain text of the Takings Clause as well as the minimal known history behind its creation, the Fifth Amendment does not provide a self-executing cause of action.

2. Recent precedents from this Court show that implying additional causes of action directly under the Constitution is ill-advised.

In *Egbert v. Boule*, after a bed-and-breakfast owner brought a cause of action under the Fourth Amendment, the Court held that Congress is better positioned to decide whether to provide a damages remedy under the U.S. Constitution. *Egbert*, 596 U.S. at 492. A bed-and-breakfast owner worked as a confidential informant with Border Patrol to identify "unlawful cross-border activity." *Id.* at 487. On one occasion, a Border Patrol officer observed the informant's vehicle and became suspicious of the passenger's immigration status. The situation escalated when the officer followed the vehicle into the driveway and threw the informant into the vehicle and then to the ground. The informant brought excessive use of force and unlawful retaliation claims under the Fourth and First Amendments respectively.

However, the Court declined to imply additional causes of action arising directly under the Constitution. *Id.* at 491. The Court reasoned that if even a single reason exists to defer such creation to Congress, then the court is required to refrain from creating such remedies. *Id.* "Put another way, 'the most important question is who should decide whether to provide for a damages remedy, Congress or the courts?'" *Id.* at 491–92 (citing *Hernandez*, 589 U.S. at 95). This Court cautioned, "If there is a rational reason to think that the answer is 'Congress'—as it will be in most every case . . . —no *Bivens* action may lie." *Id.* at 492. The Court emphasized the history of cases holding that *Bivens* remedies may not be added if Congress has already provided an alternative remedial structure. *Id.* at 493.

> If there are alternative remedial structures in place, "that alone," like any special factor, is reason enough to "limit the power of the Judiciary to infer a new *Bivens* cause of action." . . . Importantly, the relevant question is not whether a *Bivens* action would "disrup[t]" a remedial scheme . . . or whether the court "should provide for a wrong that would otherwise go unredressed[.]" . . . Nor does it matter that "existing remedies do not provide complete relief. *Id.* (internal citations omitted)

Egbert stated the most recent guidance from this Court about adding causes of action directly under the Constitution. It has been about 45 years since the Court was inclined to do so, and the additions were under very narrow circumstances. *Id.* at 486. Similar to the Petitioner in *Egbert*, the Petitioners here have limited options for remedies, but this Court has spoken: even if existing remedies do not provide complete relief, the Court is limited in the scope of its power to be adding causes of action. In the present case, the Court has no reason not to apply the same rationale from *Egbert* that if Congress has already provided an alternative remedial structure, new claims should not be added. Congress created § 1983 claims and the Tucker Act for these purposes. R. at 8. "These two statutes reflect that (1) Congress recognized that another source of law must provide the right to seek just compensation because the Fifth Amendment does not include an implied cause of action, and (2) the statutes did not imply waive sovereign immunity but provided a cause of action for damages." *Id.* The State of New Louisiana recognizes of course that those statutes do not apply in this instance, but the rationale follows that Congress is both capable and interested in providing a remedial structure.

After *Egbert*, the Court remained hesitant to find a cause of action under the Takings Clause. In *Devillier*, after Texas took actions which flooded homeowners' properties, the homeowners brought an inverse condemnation action directly under the Fifth Amendment as well as the Texas Constitution, but this Court held that the Petitioners should proceed solely under the

state cause of action and refrained from speaking to the nature of the Takings Clause. *Devillier,* 601 U.S. at 293.

In a unanimous opinion, the Court determined that Texas law provided the procedural vehicle for bringing the takings claims. This Court reasoned, "It would be imprudent to decide that [self-executing] question without first establishing the premise in the question presented that no other cause of action exists to vindicate the property owner's rights under the Takings Clause." *Id.* at 286. The Petitioners argued that the Takings Clause was an exception to the general rules that constitutional provisions are either invoked defensively or offensively under another statute like § 1983 for that specific purpose. *Id.* at 291. The Court was not persuaded. *Devillier* thoroughly analyzed that all cases cited by Petitioners do not directly confront a cause of action provided by the Takings Clause because the cases proceeded either under state causes of action or under equitable claims. *Id.* at 291–92. This Court suggested that the deciding factor for whether the Fifth Amendment is self-executing or not will depend on the nature of the relief sought. *Id.* at 292 n. 2. "[T]he mere fact that the Takings Clause provided the substantive rule of decision for the equitable claims in those cases does not establish that it creates a cause of action for damages, a remedy that is legal, not equitable, in nature." *Id.* at 292.

As this is the most recent guidance from this Court, the State stresses that this case holds much weight when deciding the self-executing question. *Devillier* brings up two important points relevant to the present case. First, the Court should examine if there is an alternative remedy available in state law. The lower courts stated somewhat conclusively that no state law cause of action exists. R. at 2. However, it is unclear why that is the case. It is known that the State did not waive immunity in state court, but it is unknown if a remedy exists (1) under the New Louisiana Constitution like in many other states, (2) under a New Louisiana statute, (3) under the State's

presumed Administrative Procedures Act or an alternate administrative remedy, or (4) under injunctive or equitable relief found in a state suit to create a pathway to a remedy.

Other case law suggests that every state, or nearly every other state, in the United States has a procedural vehicle for bringing a state cause of action for just compensation, so the State urges this Court to consider the same possibility here. *Devillier v. Texas*, 63 F.4th 416, 424 (5th Cir. 2023). (noting that "a procedural vehicle exists in every state's law to enforce takings claims"). The Fifth Circuit made clear that states are obligated to, and do, provide pathways for just compensation. *Id.* at 419. "We should not 'assume the States will refuse to honor the Constitution,' including the Takings Clause, because 'States and their officers are [also] bound by obligations imposed by the Constitution.'" *Id.* (quoting *Alden v. Maine*, 527 U.S. 706, 755 (1999)).

Looking at an example from another state, the state of Louisiana's just compensation process is decidedly not at issue here, but it provides a relevant insight into how the court looks at centuries of precedent. In *Ariyan, Inc. v. Sewerage & Water Bd. of New Orleans*, the court sympathized with the Plaintiffs' frustrations that a remedy was not easily available, but it noted that there were "centuries of precedent" establishing that a state's failure to timely pay a state court judgment did not violate any federal constitutional right. With no underlying constitutional right at issue, Plaintiffs' § 1983 claim was "legally baseless." *Ariyan, Inc. v. Sewerage & Water Bd. of New Orleans*, 29 F.4th 226, 229 (5th Cir. 2022).

The compiled laws and statutes of New Louisiana are not available to the State at this time, but if there is a way to resolve this under a state law, this case easily parallels *Devillier* and the answer would be simple to remand the case to state court. One other interesting possibility to explore is natural equity. New Louisiana's laws might be grounded in natural equity like North Carolina's laws. *See Department of Transp. v. M.M. Fowler, Inc*., 637 S.E.2d 885, 888–889 (N.C.

2006) (observing that although the state constitution had no takings clause requiring just compensation, the principle was so grounded in natural equity that it had never been found to not be part of the state's laws.)

Second, *Devillier* guidance states that the Court should examine the nature of the relief sought. Here, the Petitioners are seeking just compensation, which is a remedy in monetary damages, not equitable relief. Similar to the Petitioners in *Devillier*, the Petitioners here cited a line of equitable cases without bringing citation to other sources of law. R. at 7. The court only grants equitable relief in circumstances where money is not appropriate. So, since takings claims are for money, equitable relief is not applicable here. This further indicates that the Takings Clause is not self-executing.

3. First English *and* Knick *did not establish causes of action directly under the Fifth Amendment.*

In *First English*, after a county adopted an interim ordinance to control flooding that amounted to a temporary taking of a property owner's land, the owner brought an inverse condemnation action against the county. The Court held that the just compensation clause requires governments to pay for temporary regulatory takings. "We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." 482 U.S. at 321. The Court's reasoning focused on the question of temporary regulatory takings, but the opinion did contain language, by citing a previous dissent, about the right to receive compensation and the duty to pay being grounded in the Constitution itself. The Court emphasized that the Court has frequently reiterated that compensation is required by the Constitution.

The State does not object to this substantive right. The State agrees with the Court in *First English* insofar as the right for a plaintiff to receive a remedy is grounded in the Fifth Amendment. However, the State suggests it is a bit of an illogical leap to connect Point A (a taking) with Point C (just compensation) without the necessary procedural vehicle B (the cause of action). If, assuming arguendo, *First English* meant for just compensation claims to be procedurally resolved directly under the Fifth Amendment, then it is, at best, suspicious why cases like *Devillier* and *Knick* did not proceed on or further elaborate on those direct claims. Understandably, the Court has been reticent to suggest such a procedure that it not grounded within the text and history of the Constitution.

In *Knick*, after a township passed an ordinance that all cemeteries were to be kept public during daylight hours, a farm owner, whose land contained a small graveyard, brought suit under § 1983 alleging that the ordinance violated the Fifth Amendment. *Knick v. Twp. of Scott*, 588 U.S. 180, 196 (2019). In its holding, the Court overruled *Williamson County* which held that property owners must seek just compensation under state law before bringing a § 1983 claim. As a 5-4 opinion, this was not a landslide holding. The Court established an important clarification about the Tucker Act. "A claim for just compensation brought under the Tucker Act is not a prerequisite to a Fifth Amendment takings claim—it *is* a Fifth Amendment takings claim." *Id.*

Just like *First English* dealt with timing, so too did *Knick*. In *First English*, the Court clarified that temporary takings are still takings, and in *Knick*, the Court overruled *Williamson County* by stating that plaintiffs did not have to go through state remedies if they wanted to bring claims through § 1983, as they did previously. Neither case established any new cause of action under the Fifth Amendment. Neither case dealt with a state agency. Neither case dealt with a physical taking. These cases are quite distinguishable from the facts and legal issues in the present

case. However, what remains clear is that the text and history of the Constitution as well as the significant case law history on the matter do not establish a self-executing cause of action under the Fifth Amendment.

B. Alternatively, even if the Fifth Amendment is Considered Self-executing, the State is Protected under the Eleventh Amendment from being Sued in Federal Court Because of Longstanding Sovereign Immunity Protections.

The Eleventh Amendment states, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI In other words, the "Eleventh Amendment bars suits against a state or its agencies in federal court[.]" *Brent v. Wayne Cnty. Dep't of Hum. Servs*., 901 F.3d 656, 681 (6th Cir. 2018). This Supreme Court has interpreted this amendment in two important ways since the amendment was ratified. First, and dispositive here, the Eleventh Amendment immunity applies in cases where citizens have sued their own state. *Hans v. Louisiana*, 134 U.S. 1, 18–19 (1890). Second, the Eleventh Amendment is applicable to state officials sued in their official capacity. *Kentucky v. Graham*, 473 U.S. 159, 169 (1985). "But even if the Court does find a direct cause of action, the second obstacle—Eleventh Amendment sovereign immunity—disposes of Gerlach's [takings] claim." *Gerlach v. Rokita*, 95 F.4th 493, 498 (7th Cir. 2024)

The history of the Eleventh Amendment shows that it was added specifically to avoid constitutional entanglements like the present case. Upon gaining independence, states not only considered themselves fully sovereign nations, but the states also inherited "all the rights and powers of sovereign states." *Franchise Tax Bd. of Cal. V. Hyatt*, 587 U.S. 230, 237–38 (2019). "[A]s the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the

States enjoyed before the ratification of the Constitution, and which they retain today[.]" 527 U.S. at 713. Alexander Hamilton explained, "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union." The Federalist NO. 81 (Alexander Hamilton).

After the states ratified Article III, Section Two, the extent of such a decision was first put to the test in *Chisholm v. Georgia*, 2 U.S. 419 (1793). The Supreme Court held that the states consented to federal jurisdiction over civil suits brought by private citizens against the States. *Id.* at 420. The states immediately raged against this decision. Within months, Congress proposed and passed the Eleventh Amendment; the states subsequently ratified it. *Franchise Tax Bd. of Cal. V. Hyatt*, 587 U.S. at 243. The scope of sovereign immunity later expanded when the Court held that states could not be sued by their own citizens in federal court. *Hans v. Louisiana*, 134 U.S. at 15.

Eleventh Amendment state immunity is not limitless, however. Three exceptions exist. First, the *Ex parte Young* doctrine permits plaintiffs to seek prospective injunctive relief. Second, there are instances where Congress has expressly abrogated the states' sovereign immunity. Third, a state may waive immunity by consenting to the suit.

1. The Ex parte Young *doctrine does not apply because the petitioners are seeking retroactive damages, not prospective injunctive relief.*

The *Ex parte Young* Doctrine allows a private party to seek prospective injunctive relief against state officials, acting in their official capacity, before those officials violate a plaintiff's federal constitutional rights. *Ex parte Young* "does not extend to retroactive relief or claims for money damages." *Boler v. Earley*, 865 F.3d 391, 412 (6th Cir. 2017). In the present case, the Petitioners are not seeking prospective nor injunctive relief. They are seeking retroactive compensatory damages. Thus, the *Ex parte Young* exception does not apply.

2. The Fifth Amendment Amendment's Taking Clause is not an exception to the Eleventh Amendment and was not expressly abrogated by Congress.

After Michigan's Governor and other state health officials instituted orders limiting a roller-skating rink's property use early in the Covid-19 pandemic, the rink brought suit alleging an unconstitutional taking, but the court held that the defendants were entitled to Eleventh Amendment Immunity. *Skatemore, Inc. v. Whitmer*, 40 F.4th 727, 729 (6th Cir. 2022). The Plaintiffs argued that the Fifth Amendment is an exception to the Eleventh Amendment relying on a blanket statement from *Knick*. *Id.* The Plaintiffs also referenced *Ladd*, a case where the Plaintiffs brought the same argument, but in *Ladd*, the Sixth Circuit rejected that argument and explicitly held that "the Fifth Amendment's Taking Clause does not abrogate sovereign immunity." *Ladd v. Marchbanks*, 971 F.3d 574, 579 (6th Cir. 2020). Dispositively, the *Skatemore* court reasoned that *Knick* involved a case against a municipality, and municipalities are not afforded the same protection as states under Eleventh Amendment immunity. Thus, since Congress did not expressly abrogate the states' sovereign immunity as applied to the Fifth Amendment, this exception does not apply.

3. The State of New Louisiana did not waive its immunity by ratifying the Fifth and Fourteenth Amendments.

Like the Sixth Circuit, the Fifth Circuit also recognized that "[n]othing in *Knick* alters . . . bedrock principles of sovereign immunity law." *Bay Point Props., Inc v. Miss Transp. Comm'n*, 937 F.3d 454, 456 (5th Cir. 2019). Circuit courts have held that the Eleventh Amendment bars takings claims against states in federal court, so long as a remedy is available in state courts. *Hutto v. S.C. Ret. Sys*., 773 F.3d 536, 552 (4th Cir. 2014). Significantly, as discussed above, the record does not suggest that there are no pathways to seek remedies for these claims in the state of New Louisiana. While it is true that the State has not waived immunity for the project, that does not

mean there is no remedy in the state of New Louisiana. NL Code § 13:49109 provides that a "statutory or executive waiver of sovereign immunity is required for a property owner to obtain just compensation from the State for a taking."

The circuit courts have held that because of state sovereign immunity the Fifth Amendment does not require federal courts to hear takings claims, but it does require states to guarantee a remedy to hear takings claims in their own state courts. *DLX, Inc. v. Kentucky*, 381 F.3d 511, 527 (6th Cir. 2004); *Jachetta v. United States*, 653 F.3d 898, 909 (9th Cir. 2011); *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 956 (9th Cir. 2008); *Hutto v. S.C. Ret. Sys*., 773 F.3d 536, 552 (4th Cir. 2014); *Williams v. Utah Dep't of Corr.,* 928 F.3d 1209, 1213 (10th Cir. 2019); *Frein v. Pa. State Police*, 47 F.4th 247, 257 (3d Cir. 2022). The circuits concur that the "constitutionally enforced remedy against the States in state courts can comfortably co-exist with the Eleventh Amendment immunity of the States from similar actions in federal court." *Seven Up Pete Venture*, 523 F.3d at 955. In sum, no exception to New Louisiana's sovereign immunity applies and New Louisiana is protected from being sued in federal court from this alleged cause of action.

C. Constitutional Policy Principles of Federalism and Separation of Powers Suggest that No Cause of Action Exists Directly Under the Takings Clause Because Takings Claims Best Belong in State Court.

The Court disfavors the creations of federal common law causes of action because of federalism and separation of powers concerns. Anthony J. Bellia Jr. & Bradford R. Clark, *The Original Source of the Cause of Action in Federal Courts: The Example of the Alien Tort Statute*, 101 Va. L. Rev. 609, 686 (2015). When the Bill of Rights was ratified, it made clear that "[t]he powers not delegated to the United States by the Constitution . . . are reserved to the States respectively[.]" U.S. CONST. amend. X. Principles of federalism and concerns of an overreaching government indicate that "[t]he Framers thus ensured that powers which 'in the ordinary course of

affairs, concern the lives, liberties, and properties of the people' were held by governments more local and more accountable than a distant federal bureaucracy." *Natl. Fedn. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012) (quoting The Federalist NO. 45 (James Madison)).

"State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *New York v. United States,* 505 U.S. 144, 181 (1992) The Framers thus ensured that powers which "in the ordinary course of affairs, concern the lives, liberties, and properties of the people" were held by governments more local and more accountable than a distant federal bureaucracy. The Federalist NO. 45 (James Madison). The independent power of the states also serves as a check on the power of the federal government: "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Bond v. United States,* 564 U.S. 211, 222, 131 (2011).

The dissent in *Knick* recognized how deciding that the Fifth amendment is self-executing in creating a cause of action would impact foundational principles of federalism. "It will inevitably turn even well-meaning government officials into lawbreakers. And it will subvert important principles of judicial federalism." 588 U.S. at 218. Further, the dissent expressed concerns over federal courts deciding property questions better suited for states to answer. *Id.* at 219.

Emphasizing the separation of powers doctrine, the Court has not implied additional causes of action under the Constitution and has stressed that Congress is better situated to do so.

> Now long past "the heady days in which this Court assumed common-law powers to create causes of action," we have come "to appreciate more fully the tension between" judicially created causes of action and "the Constitution's separation of legislative and judicial power[.]" . . . At bottom, creating a cause of action is a legislative endeavor. Courts engaged in that unenviable task must evaluate a "range of policy considerations . . . at least as broad as the range . . . a legislature would consider." . . . Those factors include "economic and governmental concerns," "administrative costs," and the "impact on governmental operations

> systemwide." . . . Unsurprisingly, Congress is "far more competent than the Judiciary" to weigh such policy considerations. . . . And the Judiciary's authority to do so at all is, at best, uncertain.

596 U.S. at 491. "Weighing the costs and benefits of new laws is the bread and butter of legislative committees. It has no place in federal courts charged with deciding cases and controversies under existing law." *Id.* at 503 (Gorsuch, J., concurring). The State would not dream of asking the Court to legislate from the bench. Here, if a new cause of action is needed, Congress or the state legislature must act.

"Leroy Hassell 'saw things that never were and asked why not.' When he looked at Virginia's courts, Leroy Hassell tended to see things through the eyes of its most vulnerable litigants and he acted to make the system work better for them." Hon. Harry L. Carrico, *In Memoriam: The Honorable Leroy Rountree Hassell, Sr.*, 46 U. RICH. L. REV. 1, 8 (2011). In the spirit of the late Justice Hassell, the State does not end this brief at what cannot be done, but rather goes further to suggest what can be done with the tools available at this time.

There is no doubt that the Fifth Amendment provides a substantive right to just compensation. Procedurally, Congress is better suited to create a statutory scheme, like in the case of § 1983, to provide a cause of action. The Petitioners can pursue an administrative route in New Louisiana, whether that is to bring a suit under the state Administrative Procedures Act or to seek a declaratory ruling. The Petitioners can also consider a due process claim or equitable relief to enforce the federal right in a state remedy. If absolutely none of these options provides a pathway forward, then another alternative would be for New Louisiana to create a state cause of action, if one does not already exist, and then agree to waive immunity in state court for takings claims for just compensation. For example, the Petitioners could go to the Secretary of State to ask the New Louisiana Attorney General's office to petition the state Supreme Court to issue an advisory

opinion on the constitutionality of state takings laws. From there, the state constitution can be amended to provide for such claims. *See*, e.g., Fla. Stat. § 16.061.

Here, a new cause of action arising under the Fifth Amendment might be a more direct remedy and the easiest path, but this Court was not created to decide based on ease. To decide for the Petitioners by adding a cause of action is contradictory to the most recent guidance from this Court in *Egbert* as well as the doctrine of the separation of powers. The Petitioners are likely facing a more difficult path by recognizing no cause of action exists in this case they have brought and that the better path forward is to sue for a constitutional path to a remedy in state court. While the State is sympathetic to the Petitioners' predicament, the harder way out, by going through the appropriate procedural mechanisms which do not arise directly under the Fifth Amendment, will do greater justice for all future takings claims. The legal weeds will be brushed aside, and a path forward will be clear.

CONCLUSION

For the foregoing reasons, this Court should affirm the Thirteenth Circuit's ruling. First, *Kelo v. City of New London* remains sound precedent and should not be overturned. *Stare decisis* supports legal stability, and there is no special justification for abandoning *Kelo*'s definition of "public use."

Second, the Fifth Amendment's Takings Clause does not provide a self-executing cause of action for just compensation. While it grants property owners a right to compensation, it does not establish an independent remedy. Allowing direct claims under the Takings Clause would bypass established procedures, and no exceptions apply here. Even if the Clause were self-executing, state immunity under the Eleventh Amendment bars the claim. Accordingly, this Court should uphold *Kelo* and affirm the Thirteenth Circuit's dismissal of Petitioners' claims.

Respectfully submitted this 21st of October, 2024.

Respectfully submitted,

/s/ Team 10

_____

Team 10
Counsel for Respondent