No. 24-386

In the Supreme Court of the United States

KARL FISCHER, ET AL.,
PETITIONERS

v.

THE STATE OF NEW LOUISIANA,

RESPONDENT

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

BRIEF FOR RESPONDENT

Team 11

Attorneys for Respondent

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QUESTION PRESENTED

I. Under the Fifth Amendment's Takings Clause, (1) should *Kelo v. New London*, 545 U.S. 469 (2005), be overruled when it is consistent with other cases and has been relied on for almost two decades?

II. Should this Court find that the Takings Clause provides an implied cause of action to be brought against the states under when Congress has legislated short of doing so and state sovereign immunity bars suits directly against the states?

STATEMENT OF CASE AND FACTS

Governor Anne Chase of New Louisiana authorized a development project anticipated to benefit property values in the surrounding areas and pledged fifteen percent of the tax revenue from that project to long-term revitalization of the surrounding communities. R. at 2. To achieve these benefits, New Louisiana needed assistance from its citizens; it needed to acquire 1000 acres of land owned by 100 different owners in three counties. *Id.*

Ninety owners agreed to the price offered. *Id.* The ten that did not brought suit. *Id.* at 2-3.

New Louisiana's Economic Development act gives the governor the power and funds to contract with businesses in order to revitalize the economy by expanding the State's tourism attractions and creating new jobs. *Id.* at 1-2. In accord with this grant from the New Louisiana legislature, the Governor contracted with Pinecrest, Inc. to build a tourist attraction in the state. *Id.* at 2. The project is expected to dramatically increase tax revenue, increase property value, attract wealthy tourists, and provide over three thousand four hundred new jobs. *Id.* Locally owned New Louisiana business, citizens, and property owners are predicted to reap the financial benefits of increased property values, tourism, and an influx of new employees. *Id.* New Louisiana was able to buy the acreage it needed from ninety percent of the owners. *Id.* at 2. Ten holdouts remain. *Id.* The ten holdout owners live on properties that suffer from fertility issues, inhibiting their ability to produce marketable crops. *Id.* Many properties are overgrown and the homes on them are in poor conditions, depressing the value of homes owned by other New Louisiana citizens nearby. *Id.*

Unable to buy the properties it needed for the project to revitalize the economy and remedy the depressed property value in the community, New Louisiana initiated eminent domain proceedings against them on March 13, 2023. *Id.* at 3. New Louisiana law allows for such takings for economic development. NL CODE § 13:4911. R. at 2. New Louisiana has not waived its sovereign immunity. R. at 2. NL CODE § 13:5109 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. R. at 2.

The ten property owners that did not accept the price offered looked outside of their state's lines for relief and brought suit under Federal law against New Louisiana. *Id.* at 2-3. On March 15, 2023, they sued under the Fifth and Fourteenth Amendments, seeking temporary and permanent injunctive relief for violating the Takings Clause, alleging that the taking is not for public use. *Id.* at 3. In the alternative, they requested just compensation for any taking that occurs. *Id.*

Without filing an answer, New Louisiana moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing the *Kelo v. City of New London* allows for takings for economic development and that the Petitioners did not have a cause of action under the Fifth Amendment or any state law. *R.* at 3-4.

The District Court agreed with New Louisiana, twice, holding that takings for economic development are valid and the Fifth Amendment does not provide a cause of action because it is not self-executing. *Id.* at 4, 5, 8.

The Thirteenth Circuit affirmed, also agreeing with New Louisiana on both issues. *Id.* at 10-11. This Court granted certiorari at the request of the ten holdout owners. *Id.* at 20.

SUMMARY OF ARGUMENT

Respondent respectfully requests this Court affirm the ruling of the Thirteenth Circuit and hold that (1) *Kelo v. City of New London* should not be overruled, and (2) the Takings Clause of the Fifth Amendment does not contain an implied cause of action.

When evaluating whether a case should be overturned, there are four factors that the court should consider: (A) the quality of the reasoning, (B) the workability of the rule, (C) the consistency with other related decisions, and (D) the reliance on the decision. When applied to *Kelo v. City of New London*, all the factors lean heavily towards upholding the precedent and adhering to the doctrine of Stare Decisis.

First, the reasoning in Kelo is sound and logical. It is a natural progression of Fifth Amendment Jurisprudence and does not violate the plain meaning of the text. It is also consistent with the history of the eminent domain power. Second, the rule in Kelo is straightforward and clear. It will lead to more consistent decisions by the courts and more predictability in decisions. This rule provides courts with a clear guide for assessing how local governments are exercising the power of eminent domain and whether they are complying with the Takings Clause of the Fifth Amendment. Third, the decision in Kelo, is consistent with other related decisions by this Court. It is not contrary to other decisions and is not an outlier in its reasoning and holding among this Court's Takings Clause jurisprudence. Finally, communities are relying on the decision in Kelo, for their redevelopment plans. Redevelopment projects often take years to plan and cost up to millions of dollars. Overturning this decision would halt these projects and stop local governments from being able to enact their plans to improve their communities and benefit the general public.

Respondent also requests this Court not extend an implied cause of action to the context of the Fifth Amendment's Takings Clause. The Takings Clause presents this Court with a new context

that differs from the three prior implied causes of action; it includes a different constitutional provision and a different category of defendants.

Special factors here counsel this Court's hesitation in crafting a cause of action. Congress has twice legislated short of providing a cause of action for Takings Clause rights against the states. To do so subject the states to suits implicates Federalism and the Eleventh Amendment's limits on the federal judicial power.

Respondent thus respectfully requests this Court to affirm the ruling of the Thirteenth circuit.

ARGUMENT

I. *KELO* SHOULD BE UPHELD BECAUSE IT IS A STRONG PRECEDENT THAT IS CONSISTENT WITH FIFTH AMENDMENT JURISPRUDENCE AND HAS BEEN RELIED ON.

This Court should not overturn *Kelo v. City of New London*, 545 U.S. 469 (2005). The doctrine of *Stare Decisis* is a crucial part of case law. *Dobbs v. Jackson Women's Health Organization,* 597 U.S. 215, 263 (2022). It provides stability and consistency to the general public and it protects the interests of those who relied on case law. *Id.* It enhances the actual and perceived integrity in the judicial process and it restrains judicial hubris. *Id.* at 264. *Stare Decisis* guides the court to make decisions with the wisdom of past generations of justices. *Id.*

It is very difficult to overturn precedent and it should never be done lightly. *Id.* at 263. There are four factors that the court must consider before overturning precedent. *Id.* These factors should be evaluated together, and the presumption should always be to uphold previous case law. *Id.* The four factors are: the quality of the reasoning, the workability of the rule, the consistency with other related decisions, and the reliance on the decision. *Id.*

A. *Kelo* should be upheld because its reasoning is sound and its holding a natural progression of Fifth Amendment jurisprudence.

Kelo should be upheld because its reasoning is logical and prudent. It is well established that the "public use" requirement of the Fifth Amendment includes traditional government functions that serve a legitimate public purpose. *Strickley v. Highland Boy Gold Mining Co.,* 200 U.S. 527, 531 (1906). That public purpose largely depended on the specific facts surrounding the subject of the taking. *Clark v. Nash,* 198 U.S. 361, 369 (1905). The Supreme Court time and time again has held that legislatures should be awarded deference in their determination of what is needed to rejuvenate an area, i.e., what public purposes can justify a taking under the Fifth

Amendment. *Berman v. Parker,* 348 U.S. 26, 32 (1954); *Fallbrook Irrigation District v. Bradley,* 164 U.S. 112, 160 (1896); *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 240 (1984).

Courts should defer to the determinations that legislatures make concerning what is a legitimate governmental function. *Midkiff,* 467 U.S. at 240. In *Midkiff,* an act was passed that would combat concentrated land ownership which resulted in inflated prices and injured the public welfare. *Id.* at 233. The act allowed for the condemnation of certain properties which would allow the government to exercise their eminent domain power and take the land from lessors and grant it in fee simple to the tenants. *Id.* The issue was whether this taking violated the "public use" requirement of the Takings Clause of the Fifth Amendment since the land was given to private parties and would not actually be "used" by the general public. *Id.* at 231–32. The Court held that the "public use" requirement has the same scope as police powers, which means that while the courts have a role to play, it is an extremely narrow role. *Id.* at 235, 240. A court cannot "substitute its judgment for legislature's judgment as to what constitutes public use unless the use be palpably without reasonable foundation." *Id.* at 241. It is clear that a person's property cannot be taken for the benefit of another private person unless there is a justifying public purpose. *Id.* The court reasoned that it is the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause. *Id.* at 244. A taking satisfies the "public use" requirement when it is rationally related to a conceivable public purpose. *Id.* at 241. In *Midkiff*, while the property was given to private parties, the purpose for the taking was to benefit the general public. *Id.*

The taking in *Kelo* was similarly justified as the one in *Midkiff*. Just like the court in *Midkiff* held that the taking serves a public purpose, the taking in *Kelo* is justified because of the economic benefit for the community. Economic development is tied with many other legitimate government interests that would justify a taking, and therefore it was logical for the court to extend this to

purely economic takings. The taking in *Kelo,* just like the one in *Midkiff,* is rationally related to a conceivable public purpose: economic development. The development plan in *Kelo* was projected to create more than a thousand jobs which would revitalize the economy and benefit the general public. Additionally, just like the taking in *Midkiff* did not violate the Fifth Amendment because the land was given to a private party, the taking in *Kelo* is similarly proper because as the court held in *Midkiff,* it is the purpose of the taking not the mechanics of the takings that has to pass strict scrutiny under the "public use" clause.

One can argue that it is not logical for the court to equate public use with public purpose. However, it is the Court's job to interpret the Constitution and in the long history of the Takings Clause it was always interpreted broadly as "public purpose." Decades of precedent would have to be unnecessarily overturned in order to have a narrow interpretation of the Public Use Clause. Even if this was erroneous at the beginning, it does not now rise to the level of error that would justify abandoning precedent. Another argument is that purely economic takings are not a justifiable purpose under the Fifth Amendment. However, economic development is no different than other legitimate public purposes that the court has decided could justify a taking. Revitalization of the economy is arguably one of the greatest ways to benefit the general public.

Kelo does not allow for purely private takings. It only allows for takings that would benefit the public. It is not reasonable to distinguish economic development which leads to great prosperity and gain to the public from other uses the public might have for the land. *Kelo's* reasoning is a simple continuation of Fifth Amendment jurisprudence and therefore should not be overturned.

B. The rule in *Kelo* should be upheld because it is flexible, clear, and easy to administer because it does not draw arbitrary lines that are out of date.

Takings Clause jurisprudence before *Kelo* was vague and hard to administer; the holding in *Kelo* ensures that the law is flexible and evolves with the needs of society. When a court is

analyzing the workability of a rule, it should assess how easily the rule can be understood and applied in a consistent and predictable manner. *Dobbs,* 597 U.S. at 280–81. Even before *Kelo,* the court has held that the "use by the public" test is difficult to administer and is impractical. *Bradley,* 164 U.S. at 162. Precedent should not be overturned when the rule it provides is understood and applied in a consistent and predictable manner. *Dobbs,* 597 U.S. at 280–81.

The court in *Bradley* first interpreted the "public use" requirement to extend to a legitimate public purpose. 164 U.S. at 164. The court stated that what is a considered "public use" often and largely depends upon the facts of a particular statute and case. *Id.* at 159-60. The court reasoned that it is not necessary for the public to actually "use" the land taken to satisfy the Public Use Clause. *Id.* at 162. It is also expected that some individuals might benefit from the taking personally and economically, this does not alter the use from a public to a private one. *Id*. Much of the Takings Clause jurisprudence is about the importance of deferring to local governments regarding their expert opinion about what society needs. *Id.* at 160. The clause is intended to help the local governments improve their communities and be able to take lands when it is beneficial for the general public. *Id.*

The rule in *Kelo* simply continued this jurisprudence. *Kelo* applies a test more akin to the "public purpose" test than the narrow "public use" test. This makes it clear for courts to evaluate government takings and whether they are allowed under the Fifth Amendment. The Takings Clause is meant to provide the government with a way to take land when the general public will make better use of it. This does not strictly mean that the general public is actively using the land, economic development, as the case was in *Kelo,* allows the general public to benefit from the land and thus are making better use of it. This is a much clearer and straightforward test that the courts can apply. It will also lead to more predictable decisions.

Petitioner argues that the test in *Kelo* is unworkable because it ignores the intended limit on the government's power. However, without *Kelo,* the test becomes vague and inapplicable. It is not clear which government functions are "important" enough to justify a taking and which are not. This is clearly not a question for the judiciary but one for the legislature which is exactly what *Kelo* holds. *Kelo* emphasizes the importance of giving legislature the proper deference so that they can decide what is best for their communities. Certain government functions might justify a taking in one jurisdiction but not another which is why the judicial branch should, and does under *Kelo,* have a narrow role in deciding what is "public use." Additionally, the test in *Kelo* is not actually a new one. Decisions prior to *Kelo,* had already held unequivocally, that a strict "public use" requirement is not proper and that as long as the taking serves a public purpose, it should be upheld. The only thing that *Kelo* added to this jurisprudence, is that the holding made it clear that economic benefit *is* a legitimate public purpose.

Distinguishing purely economic benefit from other legitimate public purposes is illogical and difficult for courts to administer. It would also be hard to predict how a court would decide on any given case. Economic development is never in a vacuum, any project that helps the economy will also have other benefits for the community. The rule in *Kelo,* which does not distinguish economic development from other government interests, is easy to administer, consistent and leads to predictability.

C. *Kelo* should be upheld because its holding and reasoning are not outliers but are consistent with Fifth Amendment jurisprudence.

Kelo should not be overturned because its holding stems from previous decisions and is a natural progression of the law. Before *Kelo* was established, the Court had held that it is proper under the Fifth Amendment for the government to take non-blighted land in order to benefit the community as a whole. *Berman,* 348 U.S. at 33. It was also established that this taken land can be

given to private entities so long as it is done for the purpose of benefiting the general public. *Midkiff,* 467 U.S. at 241. Lastly, it had been established that this benefit could be economic. *Berman,* 348 U.S. at 33.

In *Berman,* the court upheld a state statute that allowed the government to take non-blighted property. *Id*. A redevelopment project under the statute required the taking of many properties. *Id.* at 31. Most properties were substandard housing or "slums;" however, one of them was a department store. *Id*. The storeowner argued that taking property for the purpose of ridding the area of "slums" is a legitimate "public use" under the Fifth Amendment, but the taking of his land was for the purpose of developing a "better, balanced, and more attractive community" and that is not a legitimate "public use." *Id.* The court disagreed and allowed the taking holding that any attempt to define the reach of police power is fruitless because each case "must turn on its own fact." *Id.* at 32. The court reasoned that the state is responsible for its citizens' "public health, safety, morality, peace and quiet, law and order," and more. *Id.* The concept of public welfare is broad and inclusive, and the values it represents are "spiritual as well as physical, aesthetic as well as monetary." *Id.* at 33. Courts should award legislatures the deference they deserve as it is their job to ameliorate and refine their communities. *Id.*

The holding in *Kelo* is not inconsistent with *Berman* simply because it allows for the taking of non-blighted land. The main point of *Berman* was to allow legislatures to evaluate and determine the needs of their communities. The legislatures in *Berman* constructed an act that allowed for the taking of blighted lands, meanwhile the legislatures in *Kelo approved* a development plan that would revitalize the economy and produce hundreds of jobs. This does not make the two cases inconsistent; it highlights the exact reason why the Court has held that it is crucial for local lawmakers to be making these decisions and not the court itself.

One could argue that *Kelo* goes against *Knick v. Township of Scott,* 588 U.S. 180 (2019). However, these two cases are not addressing the same issue under the Fifth Amendment. *Kelo* is focused on the "public use" requirement of the Takings Clause, and its definition and scope, while *Knick* addressed the "just compensation" phrase in the Takings Clause. Additionally, this factor alone would not be dispositive as all the other *stare decisis* factors collectively support upholding *Kelo.*

The Fifth Amendment does not require that a taking only be done to prevent public harm. The only requirement is that it is for public use. The court has repeatedly interpreted public use broadly and has deferred to legislatures' judgment on what should be considered public use. The decision in *Kelo* was no different. *Kelo's* holding and reasoning are consistent with related decisions and therefore should not be overturned.

D. *Kelo* should be upheld because many communities and developers have relied on its holding for their redevelopment plans.

Kelo should be upheld because it has been relied on by legislatures and developers. Precedent should not be overturned when it can be established that it has been relied on by interested parties. This is essential because it is crucial that people are able to rely on precedent and case law as much as they rely on statutes. Precedent *is* law and people should not lose time, money, effort, or stability because they relied on good law.

Overturning *Kelo* would result in stunting economic growth. Bradley, 164 U.S. at 161; Berman 348 U.S. 26, 33-35 (1954). *Kelo* allows for the taking of property in order to effectuate legitimate government functions like economic development of the area. *Midkiff,* 467 U.S. at 241. Not only is *Kelo* relied on, but it is also consistent with a century of Fifth Amendment cases that similarly define "public use" broadly. This means that if the court decides to start interpreting the clause narrowly, it would have to not only overturn *Kelo,* but almost every other Takings Clause

decision. These are all decisions that have been and are currently being relied on by local governments and land developers.

II. THIS COURT SHOULD DECLINE TO FIND AN IMPLIED CAUSE OF ACTION UNDER THE TAKINGS CLAUSE.

This Court should decline to find that the Takings Clause of the Fifth Amendment includes a self-executing cause of action for the remedy of Just Compensation.

The Takings Clause provides, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The Fifth Amendment has been incorporated against the states. *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 239 (1897).

"Constitutional rights do not typically come with a built-in cause of action to allow for private enforcement in courts." *DeViller v. Texas*, 601 U.S. 285, 291 (2024) (citing *Egbert v. Boule*, 596 U.S. 482, 490-91 (2022)). "Instead, constitutional rights are generally invoked defensively in cases arising under other sources of law, or asserted offensively pursuant to an independent cause of action designed for that purpose." *Id.*

The ability of a plaintiff to proactively avail oneself of a federal forum through constitutional cause of action for damages is "what has come to be called an implied cause of action." *Ziglar v. Abbasi*, 582 U.S. 120, 131 (2017); *see Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001). Recognizing an implied cause of action from a constitutional right is a "disfavored judicial activity." *Egbert*, 596 U.S. at 491 (quoting *Ziglar*, 582 U.S. at 135). "Absent utmost deference" to Congress's expertise in creating causes of action, Courts risk "arrogat[ing] legislative power." *Id.* at 491 (quoting *Hernandez v. Mesa*, 589 U.S. 93, 100 (2020)).

This Court's "precedents do not cleanly answer the question whether a plaintiff has a cause of action arising directly under the Takings Clause." *DeVillier*, 601 U.S. at 291-92. This Court has never "directly confronted" whether the Takings Clause provides a cause of action, only that the

remedy is "self-executing . . . with respect to compensation." *Knick v. Twp. of Scott,* 588 U.S. 180, 192 (2019) (quoting *First Engl. Evangelical Lutheran Church of Glendale v. Los Angeles*, 482 U.S. 304, 315 (1987)); *see* Transcript of Oral Argument at 19, *DeVillier v. Texas*, 601 U.S. 285 (2024) (No. 22-913) (identifying right, remedy, and cause of action as "three different things"); *see also First Engl. Evangelical Lutheran Church of Glendale*, 482 U.S. at 316 n.9; Transcript of Oral Argument at 16, *DeVillier v. Texas*, 601 U.S. 285 (2024) (No. 22-913) ("I think that footnote's pretty difficult to decipher.").

In evaluating whether to find an implied cause of action associated with a Constitutional right, this Court prescribes a two-step test. *Egbert*, 596 U.S. at 492 (citing *Hernandez v. Mesa*, 589 U.S. 93, 101-02 (2020)). First, does the case request to extend a cause of action to a "new context?" *Id.* (quoting *Hernandez v.* Mesa, 589 U.S. 93, 102 (2020)). If it does, then at the second step this Court asks if any "special factors" counsel hesitation. *Id*. (quoting *Ziglar*, 582 U.S. at 136). Even a single special factor is "alone" enough to not extend an implied cause of action to a new context. *Id.* at 493.

This case provides a new context, different from the three times this Court has previously implied a cause of action for a constitutional right. The history of legislative line-drawing with respect to the takings clause right and Federalism constitute special factors that counsel against finding an implied cause of action.

A. This case presents a new context.

This case presents a new context because it differs from the three times this Court has found an implied cause of action. The first step in evaluating whether to provide an implied cause of action under the Constitution is whether the claim arises in a "new context." *Egbert*, 596 U.S. at 492 (quoting *Hernandez v. Mesa*, 589 U.S. 93, 102 (2020)). A context is new if it is "different in a

meaningful way" from the three previous cases where the Court found an implied cause of action. *Hernandez v. Mesa*, 589 U.S. 93, 102 (2020) (citing *Ziglar*, 582 U.S. at 139). A new category of defendants or a different constitutional right at issue constitutes a new context. *See Ziglar*, 582 U.S. at 120; *Hernandez*, 589 U.S. at 102 (quoting *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001)).

This Court implied a Constitutional cause of action for the first time under the Fourth Amendment against federal agents in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397 (1971). The Court found a second *Bivens* claim arising under the Due Process clause of the Fifth Amendment in the context of a sex-discrimination suit against a former Congressman. *Davis v. Passman*, 442 U.S. 228, 246-49 (1979). The third and last time this Court extended *Bivens* was to a claim under the Eighth Amendment's Cruel and Unusual Punishments Clause against a federal prison officials. *Carlson v. Green*, 446 U.S. 14, 19-20 (1980). This Court has not found another implied cause of action under the Constitution for over four decades. *Egbert*, 596 U.S. at 486.

The only other time this Court has been directly asked to confront whether the Takings Clause provides a cause of action, this Court decided the case on other grounds instead of addressing the Constitutional question. *See Devillier*, 601 U.S. at 292-93. The petitioners in *DeVillier* brought suit directly under the Fifth Amendment's Takings Clause against the state of Texas. *Id.* at 287. The Court reasoned that, while "a property owner acquires an irrevocable right to just compensation immediately upon a taking," *id. at 291* (quoting *Knick*, 588 U.S. at 192), this Court's precedents "do not directly confront" or "cleanly answer the question whether a plaintiff has a cause of action arising directly under the Takings Clause." *Id.* at 291-92. This Court again did not confront the question, because Texas agreed at oral argument to allow the plaintiffs in the

case to amend their complaint and add a state law cause of action. *Id.* at 293 (citing Transcript of Oral Argument at 41, 61, 64, *DeVillier v. Texas*, 601 U.S. 285 (2024) (No. 22-913)). The Court then remanded the case with instructions to allow for the claims to proceed under the state law procedural vehicle rather than directly under the Takings Clause. *Id.*

Petitioners have asked this Court to confront the question it avoided earlier this year in *DeVillier* and find an implied cause of action under the Takings Clause. This Court has only ever allowed constitutional implied causes of action against federal officers. It has never found an implied cause of action to be applied against the states or another sovereign a sovereign itself. Petitioner asks this Court to extend *Bivens* to a new context, and Respondent asks this Court to decline that request.

B. Congressional history regarding the Takings Clause and Federalism concerns are factors that counsel hesitation.

Congressional legislative context and sovereign state defendants provide sufficient special factors to counsel against this Court finding an implied cause of action under the Takings Clause.

At the second step, an implied cause of action "will not be available if there are special factors counseling hesitation." *Ziglar*, 582 U.S. at 136 (quoting *Carlson*, 446 U.S. at 18); *Egbert*, 596 U.S. at 492. If a single special factor counseling hesitation exists, "that alone" is sufficient to "limit the power of the Judiciary to infer a new *Bivens* cause of action." *Egbert*, 596 U.S. at 493 (2022) (quoting *Ziglar*, 582 U.S. at 137). "[N]o court could forecast every factor that might 'counsel hesitation.'" *Egbert*, 596 U.S. at 493 (quoting *Ziglar*, 583 U.S. at 174-75 (2017) (Breyer, J., dissenting)).

Here, this Court should not imply a cause of action under the Takings Clause because (i) Congress has drawn legislative boundaries around who can be sued and how they can be sued for

Takings Clause violations and (ii) the Court has never implied a cause of action against sovereign state defendants.

i. Congress has twice drawn the line short of providing a procedural vehicle for Takings Clause claims directly against the states.

This Court should not find an implied cause of action more expansive than the lines Congress has already drawn for vindication of the Takings Clause right.

This Court does not find an implied cause of action when Congress has legislatively provided an analogous cause of action with narrower boundaries. *Hernandez*, 589 U.S. at 109-112; *Egbert*, 596 U.S. at 497-98, 501. Absence of relief is not enough to expand the causes of action available beyond what Congress prescribed. *Egbert*, 596 U.S. at 501.

This Court "[l]ook[s] to analogous statutes for guidance on the appropriate boundaries of judge-made causes of action." *Hernandez*, 589 U.S. at 109 (quoting *Jesner v. Arab Bank, PLC*, 584 U.S. 241, 265 (2018)). "It would be 'anomalous to impute . . . a judicially implied cause of action beyond the bounds [Congress has] delineated for [a] comparable express caus[e] of action.'*" Id*. at 109 (quoting *Blue Chip Stamps v Manor Drug Stores*, 421 U.S. 723, 736 (1975)). "[C]ourts cannot second guess the calibration by superimposing a *Bivens* remedy." *Egbert*, 596 U.S. at 498. This Court "defer[s] to 'Congressional inaction. . . .'" *Id.* at 501 (quoting *Schweiker v. Chiliky*. 487 U.S. 412, 421 (1988)). "[S]ilence is telling . . . ." *Ziglar*, 582 U.S. at 143.

Congress has waived the federal government's sovereign immunity and provided a procedural vehicle for citizens to vindicate their takings claims against the federal government in the Tucker Act. 28 U.S.C. 1491; *U.S. v. Causby*, 328 U.S. 256, 1068-69 (1946); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1020 (1984); *Maine Community Health Options v. United States*, 590 U.S. 296, 322 (2020).

Congress has provided a statutory vehicle in 42 U.S. Code 1983 to vindicate Constitutional rights against state officials and stopped short of providing that vehicle directly against the states. *See* 42 U.S.C. 1983; *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989); *see also Hernandez*, 589 U.S. at 109.

Congress can and has effectively abrogated state sovereign immunity in the past under its enforcement power from section five of the Fourteenth Amendment. U.S. CONST. Amend. XIV, § 5; *see, e.g.*, *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 726, 740 (2003); *U.S. v. Georgia*, 546 U.S. 151, 157-159 (2006) ("[N]o one doubts that § 5 grants Congress the power to 'enforce . . . the provisions' of the Amendment by creating private remedies against the States for *actual* violations of those provisions."); *Coleman v. Court of Appeals of Maryland*, 566 U.S. 30, 35 (2012).

Congress has drawn the line. Plaintiffs can sue the Federal government to vindicate their Takings Clause right. Plaintiffs can sue state officials to vindicate their constitutional rights, including the one under the Takings Clause. Congress has twice stopped short of abrogating state sovereign immunity and providing a procedural vehicle for plaintiffs to vindicate their Takings Clause right in suits directly against the states. This Court should decline to redraw that line.

ii. This Court has never found an implied cause of action against the sovereign states and Federalism counsels against doing so.

This Court should not find an implied cause of action because the involvement of the sovereign states as defendants is a special factor that counsels hesitation.

This Court has never implied a constitutional cause of action that abrogates sovereign immunity. *Cf. Bivens*, 403 U.S. at 397; *Davis*, 442 U.S. at 246-49; *Carlson*, 446 U.S. at 19-20. The involvement of another sovereign counsels hesitation against holding that an implied cause of action exists. *See Hernandez*, 589 U.S. at 103-09; *Egbert*, 596 U.S. at 493-96; *DeVillier*, 601 U.S.

at 292. When considering extending *Bivens* to a new context, this Court considers not just the case at bar but the whole class of new defendants against which the claim will be brought. *Egbert*, 596 U.S. at 496.

"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; *see also Hans v. Lousiana*, 134 U.S. 1, 18 (1890).

State sovereign immunity may be waived by states, abrogated by Congress, or avoided through the *Ex Parte Young* exception by seeking prospective injunctive relief against a state official. *See Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 619 (2002); U.S. CONST. Amend. XIV, § 5; *Ex Parte Young*, 209 U.S. 123, 1549-60 (1908); *see also Edelman v. Jordan*, 415 U.S. 651, 666-67 (1974). The filing of a motion to dismiss does not constitute waiver of sovereign immunity. *See, e.g.*, *Kerchen v. Univ. of Mich.*, 100 F. 4th 751, 762 (2024).

This Court should hesitate to imply a cause of action that will be brought against the sovereign states. Here, New Louisiana has not waived immunity by merely filing a motion to dismiss, Congress has not abrogated immunity, and the Petitioners brought suit directly against the state, not a state official.

Were this Court to imply a cause of action under the Takings Clause, every case brought against a state would have to confront sovereign immunity. This Court should decline to imply a cause of action that would consistently conflict with the Eleventh Amendment's limitation on Judicial Power.

CONCLUSION

Respondent requests this Court to affirm the ruling of the Thirteenth Circuit and neither overrule *Kelo v. City of New London*, nor find that the Takings clause contains an implied cause of action.

/s/_____
Team 11
Counsel for Respondent