Docket No. 24-386

In The

Supreme Court of the United States

October Term, 2024

KARL FISCHER, 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

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Attorneys for Respondent

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STATEMENT OF THE CASE

Statement of the Facts

In an effort to bolster and encourage economic and social stability for the local community and citizens, the State of New Louisiana ("New Louisiana") passed the Economic Development Plan ("the Plan") as an effort to expand tourism and the job market. R. at 1-2. The Plan, which requires 1,000 acres of land owned by 100 different owners, anticipates 3,470 new jobs, increase in tax revenue, a new luxury ski resort to revitalize and support the surrounding community, and increases to the property values in the surrounding areas. *Id.* To accomplish this well-thought and approved project, it is necessary for New Louisiana to use its eminent domain authority to take depreciated land from the ten property owners who refuse to sell their property to the state. R. at 2-3. New Louisiana statutory law authorizes the State to condemn property for economic development (NL Code § 13:4911), and statutory law only provides a claim for just compensation when sovereign immunity is waived (NL § 13:5109). *Id.*

The properties in question are in an area that has been generational family-owned farms and single-family homes. R. at 2. The soil conditions have made it impossible for these family-owned farms to flourish and produce adequate income, and, as a result, the properties have become neglected, with overgrown plots and have depressed the local market value. *Id.* The other ninety landowners have sold their properties to New Louisiana, however, Karl Fischer, the primary holdout owner, does not want to sell the land because of the sentimental value of the land to him. R. at 3. The other nine holdout owners feel similarly and brought this suit because they believe they have a right to just compensation. *Id.* Since the ten holdout owners refuse to sell their land, New Louisiana initiated eminent domain proceedings, notifying the holdout owners that state law provides no right to compensation. *Id.*

Procedural History

The ten property owners ("Petitioners") brought the underlying suit against New Louisiana, seeking temporary and permanent injunctive relief for a violation of their Fifth and Fourteenth Amendment rights. R. at 3. Petitioners allege the taking is not for a public use, and, thus, New Louisiana does not have the authority to continue moving forward with the Plan. *Id.* In the alternative, Petitioners argue that the Takings Clause provides a remedy for just compensation for any taking that occurs. *Id.* In response to the suit, New Louisiana filed a 12(b)(6) motion to dismiss on two arguments (1) *Kelo v. City of New London* allows for takings for economic development and (2) the Fifth Amendment is not self-executing, and, thus, does not provide a cause of action for property owners when there is no state or federal remedy. *Id.* The United States District Court for the District of New Louisiana granted New Louisiana's motion to dismiss on June 28, 2023 (Case No. 23-CV-149), finding that *Kelo v. City of New London* allows takings for confer an economic benefit, like the Plan approved by New Louisiana. The district court also held that New Louisiana was correct in citing the Tucker Act, 28 U.S.C. § 1491 ("Tucker Act"), and 42 U.S.C. § 1983 ("§ 1983"), showing that it is statutory provisions that provide a cause of action, and that the Fifth Amendment is not self-executing and does not provide a remedy for just compensation where there is no federal or state cause of action. R. at 5, 7-8.

Petitioners argued and submitted on December 8, 2023, to the Thirteenth Circuit Court of Appeals requesting the appellate court to reverse the district court's decision. R. at 9. Upon review, the Thirteenth Circuit found New Louisiana's argument credible and persuasive, ruling the district court correctly determined that Petitioners had no claim for relief because "public use" under *Kelo v. City of New London* "extends to takings for economic development event when no harm is being remediated, and the property is given to another private party." *Id.*

Furthermore, the appellate court held the district court correctly determined that the Fifth Amendment is not self-executing, and, therefore, does not create a right for property owners to bring a claim for relief. *Id.* The majority opinion did not include a review of the stare decisis analysis since the Petitioner did not ask the appellate court to overrule *Kelo v. City of New London*, however, Judges Hayes and Willis analyzed why stare decisis does and does not favor overruling *Kelo v. City of New London*. R. at 11-16. Nonetheless, the Thirteenth Circuit Court of Appeals affirmed the decision by the District Court for the District of New Louisiana, ruling in favor of the State. R. at 11. Petitioners appealed the Thirteenth Circuit's decision, and this Court granted certiorari. R. at 20.

SUMMARY OF THE ARGUMENT

This Court should affirm the judgment of the Thirteenth Circuit Court of Appeals for the following reasons.

First, Petitioners fail to prove that this Court should abandon stare decisis analysis and overrule *Kelo v. City of New London*. Petitioners claim that *Kelo* strays from the historical usage and understanding of the Fifth Amendment Takings Clause by enlarging the definition of "public use" to include economic development plans. Petitioners' argument, however, is faulty because Petitioners fail to prove this definition makes *Kelo* illogical, unworkable, unreliable, and distorts other important areas of the law. This Court is bound by its precedent in which it held that a taking is constitutional so long as the primary purpose is for a public use. This Court properly distinguished the judicial authority from the legislative authority and also held it is within the legislative authority to specifically define what public use means. This hold stems from this Court's reasoning that each town, state, province, etc., requires different and unique takings based upon needs that courts cannot effectively define. Thus, *Kelo* does not stray from prior

precedent and reaffirms those holding, and Petitioners claim of abandoning stare decisis is wrong.

Secondly, even assuming this Court does decide *Kelo v. City of New London* warrants abandoning the principle of stare decisis, Petitioners still fail to prove that public use does not include economic development plans similar to the one at issue in this case. Specifically, Petitioners argue that the current interpretation of public use within the context of the Takings Clause allows the government to take land from one private individual and give the land to another private individual. Petitioners are mistaken in this belief because this Court has made clear that the United States Constitution, with respect to the Fifth Amendment Takings Clause, provides a "floor" of protection and allows states to pass individual legislation to further restrict and limit what takings are constitutional or unconstitutional. Thus, a request for greater protection against a taking for plans similar to the one passed by New Louisiana is better suited in the state legislature, and this Court's historical definition and interpretation of public use is correct within the context of the Fifth Amendment Takings Clause.

Third, the Fifth Amendment Takings Clause is not self-executing by its plain language and this Court has never held it to be self-executing, causing Petitioners to lack an adequate state remedy or a federal remedy to seek just compensation pursuant to NL Codes §§ 13:4911 & 13:5109. This Court's holdings for the past four decades express it cannot create constitutional implied cause of actions. Petitioners seek to overturn the precedent of this Court and ask it to legislate from the bench, however, this Court should not create a cause of action because it risks arrogating the legislative power to do so, granted by the United States Constitution.

Finally, the Tucker Act and § 1983 both waive sovereign immunity and create a cause of action, which are specified in both acts. Petitioners concede neither of these statutes apply in this

case, which leads to the conclusion they have no claim for which relief can be granted under. Case law supports this position and shows this Court's precedent holds that constitutional violations must be brought under statutes like the Tucker Act and § 1983.

In all, this Court should not overrule *Kelo v. City of New London*, nor should this Court find that the Fifth Amendment is self-executing to provide a cause of action for just compensation. Thus, this Court should affirm the decision by the Thirteenth Circuit Court of Appeals.

ARGUMENT

I. *KELO V. CITY OF NEW LONDON* SHOULD NOT BE OVERRULED BECAUSE *KELO'S* HOLDING DOES NOT WARRANT AN ABANDONMENT OF STARE DECISIS.

The principle of stare decisis is valuable in maintaining legal issues and concepts as settled, without concern that decisions and interpretations of the law will constantly change. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 218 (2022); *Loper Bright Enters v. Raimondo*, 144 S. Ct. 2244, 2270 (2024). Nonetheless, the principle of stare decisis is not "an inexorable command," and "is at its weakest when we interpret the Constitution." *Dobbs*, 597 U.S. at 218 (quoting *Agostini v. Felton*, 521 U.S. 203, 235 (1997)). Case law, such as *Dobbs* and *Knick*, provide clarity in the stare decisis analysis by setting forth various factors that must be weighed against each other in determining whether a case should be overturned. *Id.; Knick v. Twp. of Scott*, 588 U.S. 180, 202-203 (2019). Each of these factors examined and analyzed below prove stare decisis should not be abandoned and do not provide a basis for overruling *Kelo v. City of New London*. While *Dobbs* is not necessarily an exhaustive list for stare decisis, it is one of the current decisions which stare decisis was implemented to overrule longstanding precedent. *Id.* Additional factors that have been considered, and that the appellate court in the case relied upon, include consistency with other related decisions. *Knick*, 588 U.S. at 202-206.

Furthermore, Petitioners assert doubt on *Kelo's* definition of public use, however, this is misguided because this Court has emphasized it lacks the authority to define with precision what public use is and relies upon the legislature to do so. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 240-41 (1984). Thus, the assertion by Petitioners that *Kelo* wrongly defines public use is wrong.

In any event, should this Court overrule *Kelo v. City of New London*, this Court is still bound by precedent cases, such as *Midkiff* and *Berman*, both of which hold the same ideal that

the legislature is the appropriate branch vested with the authority to define public use. *Id.*; *Berman v. Parker*, 348 U.S. 26 (1954).

Thus, this Court should affirm the Thirteenth Circuit Court of Appeals decision and hold that (1) *Kelo v. City of New London* withstands the stare decisis analysis, and (2) the Takings Clause of the Fifth Amendment permits courts to determine whether the taking is for a public use, not to define precisely what public use constitutes.

A. *Kelo v. City of New London* provides an adequate definition for "public use" pursuant to the U.S. Constitution Fifth Amendment Takings Clause, and the stare decisis standard confirms this.

". . .[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. This right, vitally important to our country, has been the subject of litigation for over a century. Presently, whether *Kelo* should be overturned hinges on the stare decisis application, and this Court does not lightly overturn its precedents to avoid confusion in the law as well as decreased confidence in the judiciary. *Knick*, 588 U.S. at 202; *Dobbs*, 596 U.S. at 218. With respect to the Takings Clause, Respondent does not contest this Court's precedent that an unconstitutional taking occurs when a government takes private property and gives it to another private party with no public purpose. *Kelo*, 545 U.S. at 477. Additionally, Respondent does not contest this Court's precedent that "this 'Court long ago rejected any literal requirement that condemned property be put into use for the general public.'" *Kelo*, 545 U.S. at 478 (quoting *Midkiff*, 467 U.S. at 244). Thus, when reviewing why this Court should not overrule *Kelo*, it is important to note these uncontested holdings. None of the factors the considered for overruling prior precedent—e.g., the quality of reasoning, the workability of the rule, its effects on other areas of the law, and reliance interests—result in a favorable decision to reconsider and overturn *Kelo*.

1. *Kelo*'s Quality of Reasoning Follows Precedent.

Kelo logically follows what this Court's precedent has held regarding a taking for public use. When looking at our Nation's birth, the Fifth Amendment was included as part of the United States Constitution, however, it was not until 1897 that this provision was incorporated as a restraint against the individual states. *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226 (1897). Since then, the definition of public use, contextualized within the meaning the Takings Clause, has evolved to include a broad understanding. *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112 (1896). Initially, this Court's jurisprudence found that a taking could not occur unless there was a literal public use by the property. *Id.* This stringent requirement, however, changed during the 19th century along with this Court's jurisprudence—shifting to hold that a permissible taking includes for the purpose of the public welfare of a state. *Strickley v. Highland Boy Gold Co.*, 200 U.S. 527, 531-32 (1906).

In *Strickley*, it was held that there is nothing in the United States Constitution requiring courts to interfere with the state legislative power to deem the taking of a private owner for the public welfare as unconstitutional. *Id.* In *Strickley*, the taking was not specific to a particular public use but for the general public welfare, and the state of Utah allowed a taking of private property for a right of way for an aerial bucket. *Id.* at 529. Most notably, the Court stated, "there might be exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation which under other circumstances would be left wholly to voluntary consent." *Id.* at 531. Thus, the recognition that takings for public welfare, even if the usage is not necessarily a literal public use, has been embedded in this Court's precedent and *Kelo* follows this longstanding principle.

In the modern era of precedent, the same logical deductions are made—that the judiciary's role is to "determine whether the power is being exercised for a public purpose is an extremely narrow one." *Berman*, 348 U.S. at 32. The *Berman* court was tasked with determining whether a constitutional taking includes an act passed by a state legislature for redevelopment and beautification projects in which the property is given to a private party for the purposes of public welfare. *Id*. at 28-29. The Court stressed, "[w]e cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects." *Id.* at 34. In a unanimous opinion, *Midkiff* adhered to *Berman's* holding and found that once a court determined a taking, where the means are through a private party, is for a legitimate public purpose, the judiciary role ends. *Midkiff*, 467 U.S. at 241. Thus, precedent authorizes a constitutional taking through an economic development plan, where property is given to a private party as long as it has an underlying has public purpose.

Petitioners argue that *Kelo* strays from these key cases and causes conflict with the historical understanding of public use. The City of New London in *Kelo* designed an economic development plan, like the ones in *Berman* and *Midkiff*, to promote rehabilitation of the city and long-term economic growth. *Kelo*, 545 U.S. at 472-475. In reviewing whether the city could take the private property of individuals and give it to another private party, Pfizer, this Court in *Kelo* relied primarily on *Midkiff's* holding and determined the economic plan was a permissible taking because the purpose was for a public use. *Id.* at 482. This Court exhibited its proper use of authority in *Kelo* by relying upon precedent and deeming that it could only say whether the economic development plan had a public purpose. *Id.* Furthermore, the Court maintained its position that its role is extremely narrow by refraining from legislating from the bench and determining whether an economic development plan was good or bad for the local community.

Id. Therefore, *Kelo* did not stray from its binding precedent, and, instead, it follows the same logical argument and restraints as this Court determined years before.

2. *Kelo*'s Rule is Understandable and Applied in a Consistent and Predictable Manner.

Kelo provides a rule that is understood and applied in a consistent and predictable manner. The Takings Clause does not permit the taking of "one person's property [for] the benefit of another private person without a justifying public purpose, even though compensation to be paid." *Midkiff*, 467 U.S. at 243. Nonetheless, this Court has held that it is a constitutional taking when it is rationally related to a conceivable public purpose. *Id.* The Court will not, however, overstep and substitute its determination for public use "unless the use be palpably without reasonable foundation," meaning that courts cannot interfere with a legislature's proper plan unless it is abundantly clear that there is not a public purpose underlying. *Id.* at 241(quoting *United States v. Gettysburg Electric R. Co.*, 160 U.S. 668, 680 (1896)). This flexible rule evolved from early takings case law, whereby this Court followed a strict interpretation of the Takings Clause. *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 113 (1896). Thus, this Court historically changed its direction and interpretation of the Takings Clause to provide an easier, more executable rule for the meaning of public use.

Kelo's holding, "there is, moreover, no principled way of distinguishing economic development from the other public purposes we have recognized," aligns with prior case law. *Kelo*, 545 U.S. at 484. *Kelo* affirmed prior holdings by this Court and held that a permissible taking includes a taking whereby private parties are used as the means to achieve the public purpose and usage required by the Takings Clause. *Id.*

As Judge Hayes correctly discussed in the Thirteenth Circuit's opinion, *Kelo* provides a flexible and straightforward rule that allows local governments to best serve the surrounding

communities. R. at 12; *Kelo*, 545 U.S. at 469. The Court historically changed its precedent from a strict interpretation of the Takings Clause and broadened it to avoid an overly restrictive universal test. *Fallbrook Irrigation Dist.*, 164 U.S. at 158-64. Additionally, *Kelo* has proved workable when reviewing lower-level court cases, such as *Protect Our Parks Inc.* and *MHC Fin. L.P.*, have followed *Kelo's* rule that economic development plans that result in an eminent domain taking are constitutional so long as the underlying purpose of the plan is for the public. *Protect Our Parks, Inc. v. Chicago Park Dist.*, 971 F.3d 722, 737 (2020); *MHC Fin. L.P.* v. *City of San Rafael*, 714 F.3d 1118, 1129 (2013).

3. *Kelo* is Consistent with Other Related Decisions and Does Not Distort Other Areas of the Law.

In the context of the impact *Kelo* had on other areas of law, *Kelo* does not distort the meaning of due process. For the reasons described *supra* in analyzing the first two stare decisis factors, the same argument applies here. Justice Alito briefly mentioned distortion of other areas of the law when determining the decision to overrule longstanding precedent *Roe v. Wade*, and he stated this factor caused the court to overrule *Roe* because it "ha[s] led to the distortion of many important but unrelated legal doctrines, and that effect provides further support for overruling those decisions." *Dobbs*, 597 U.S. at 286; *Roe v. Wade*, 410 U.S. 113 (1973). Although Justice Alito did not give much insight to an in-depth analysis of this factor, it is inferred from the general reading of *Dobbs* that *Roe* created a conflict with issues of federalism, health care, and other similarly situated areas of the law. *Dobbs*, 597 U.S. at 247-51. The same is not applicable to *Kelo* because *Kelo* follows its direct line of preceding cases that interpret the Takings Clause broadly.

Judge Willis indicated in his partial dissent from the Thirteenth Circuit that *Kelo* goes beyond the due process threshold and limitations placed by previous case law. R. at 16. His

reasoning for this opinion stems from an erroneous reading of *Knick*. *Id.* His opinion relies upon the notion that *Knick* "adhered to a clear facial meaning of the Takings Clause." *Id.* This is wrong because *Knick*, as Judge Hayes correctly identified, does not conflict with *Kelo*. R. at 13. *Knick* only addressed the right to just compensation and overturned *Williamson*. *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). *Knick*, 588 U.S. 180. *Knick* did not discuss whether the taking was for a public use, and, thus, does not conflict with *Kelo*. *Id.* Furthermore, *Kelo*, relies on precedent in which "public use" has included economic development planning and specifically stated that takings from a private party to give to another private party for a "public purpose" are constitutional.

4. *Kelo* Provides Reliance on its Decision for Nearly Two Decades.

With respect to other caselaw and decisions, precedent should not be overruled when it will "upend concrete" reliance interests. *Dobbs*, 597 U.S. at 287. If *Kelo* is overruled, then development and redevelopment of communities, like New Louisiana, will be negatively impacted. Additionally, *Kelo* has been relied upon for various state constitutional amendments that have restricted eminent domain power, which has resulted in an unexpected, positive restraint on eminent domain power. *See* Stephen F. Broadus IV, *Ten Years After: Kelo v. City of New London And The Not So Probable Consequences*, 34 Miss. C.L. Rev. 323 (2015). This Court previously denied the opportunity to review and overrule *Kelo*, See *e.g.*, indicating an approval of reliance on *Kelo*. *Eychaner v. City of Chicago*, 141 S. Ct. 2422 (2021) *cert. denied*.

Kelo specifically encouraged states to review their constitutions and provide the level of protection each individual state deemed necessary, rather than the court forcing a standard among each state with unique needs, and states have done so. *Kelo*, 545 U.S. at 489. For example, the use of eminent domain in Detroit, Michigan, has faced adversity due to Michigan

Supreme Court's decision that barred eminent domain usage for economic development purposes. John Gallagher, *Limits on Detroit's use of eminent domain made Jeep deal much harder to do*, Detroit Free Press (May 22, 2019, 6:00AM), https://www.freep.com/story/money/business/john-gallagher/2019/05/22/detroit-eminent-domain-fca-moroun-land-swap/3695388002. Although Detroit desperately needed and continues to benefit from economic development, Michigan has relied upon *Kelo*'s holding and restricted eminent domain power. New Louisiana could do the same, however, it has not. Thus, if this Court rules in favor of Petitioners' request, this Court will be upending decades of stability for state development plans and state constitutional restrictions that have improved social and economic life depending on the unique needs of each community. Here, while Respondent is sympathetic to Petitioners and the sentimental value that the land holds for them, Respondent maintains the position that the Plan enacted by New Louisiana will have long-lasting benefits that Petitioners will benefit from. R. at 2-3. By stimulating economic growth, Petitioners will reap the tax benefits, tourism benefits, and appreciation in land value, which is why Respondent enacted the Plan to begin with. R. at 3.

B. Should this Court overrule *Kelo v. City of New London*, "public use" within the context of the Takings Clause allows economic development plans like the one New Louisiana passed.

A permissible taking includes economic development plans like the State of New Louisiana's. Although Respondent addressed why *Kelo* should not over overruled, it is important to address the second component of the issue at hand—"what constitutes a permissible taking for a 'public use'"? R. at 20. If stare decisis is abandoned and *Kelo* is overruled, *Berman* and *Midkiff* are binding on this Court.

Berman permitted the District of Columbia to take the appellants' building and land solely for the purposes of eliminating and prevent slum and "blighted" areas. *Berman*, 348 U.S. at 28-36. There, the legislature passed the District of Columbia Redevelopment Act of 1945, which described the affected area as "injurious to the public health, safety, morals, and welfare." *Id.* The appellants in this case urged this Court to find that the taking of their land and property was unconstitutional within the meaning of the Fifth Amendment's Takings Clause, however, this Court firmly held (1) it is not the main guardian of the public needs, served by social legislation, the legislature is, (2) public welfare is so broad that it includes spiritual, physical, aesthetic, and monetary desires and needs, and (3) public use within the context of the Takings Clause includes reallocating land and property to a private redeveloper if that is the plan adopted by a legislature. *Id.*

Moreover, *Midkiff* reaffirmed *Berman's* holding when the court determined the Land Reform Act of 1967 passed by the Hawaii Legislature constituted a permissible taking for public use, rationalizing that the means for attaining the object can be through a private enterprise as long as the legislature establishes a public purpose. *Midkiff*, 467 U.S. at 240-41. *Midkiff* continued the ideology that the takings clause is meant to be broad "unless the use be palpably without reasonable foundation." *Id.* (quoting *Gettysburg Electric R. Co.*, 160 U.S. at 680).

In sum, both *Berman* and *Midkiff* provide a broad definition of what public use is. In fact, *Midkiff* goes even further to say that the state government need only a public purpose when exercising eminent domain power. *Id.* at 34. These holdings cast doubt on Petitioner's argument that public use must be narrowly defined and must require land to be use for the public. State legislatures need to prove only that the exercise of eminent domain power is for a public use,

which could be beautification, economic development, or condemnation, and this use of power may be accomplished by giving the land or property to a private enterprise for a public purpose.

Additionally, to ease Petitioners' concerns with eminent domain power, over forty states have passed legislation which restricts and limits eminent domain power. Stephen F. Broadus IV, *Ten Years After: Kelo v. City of New London And The Not So Probable Consequences*, 34 Miss. C.L. Rev. 323 (2015). Concerns for the usage of eminent domain through the Takings Clause affected individuals prior to *Kelo*—and state courts were upholding the use of eminent domain for economic development. See *eg.*, *Prince George's Cnty v. Collington Crossroads, Inc.*, 339 A.2d 278 (Md. 1975); *City of Shreveport v. Chanse Gas Corp.*, 794 So. 2d 962 (La. Ct. App. 2001); *Town of Vidalia v. Unopened Succession of Ruffin*, 663 So. 2d 315 (La. Ct. App. 1995); *Board of Comm'rs v. Mo. Pac. R.R. Co.*, 625 Co. 2d 1070 (1993). Thus, *Kelo* did not shock or change an already existing standard among the states.

For all the foregoing reasons, Respondent respectfully request this Court affirm the decision by the lower courts and hold that (1) *Kelo* is not overrule, and (2) public use includes economic development plans that have an underlying public purpose, even if the means to achieve that purpose is by using the eminent domain power and giving property to a private enterprise to carry out that purpose.

II. THE FIFTH AMENDMENT IS NOT SELF-EXECUTING, AND, THEREFORE, DOES NOT CREAT A CAUSE OF ACTION AGAINST A STATE FOR JUST COMPENSATION WHEN THERE ARE NO AVAILABLE FEDERAL OR STATE STATUTORY PROVISIONS ENACTED.

The Fifth Amendment acts as a restraint on the federal government, and, through incorporation, against state governments. U.S. Const. amend. V; U.S. Const. amend. XIV. This restraint provides that property may not be taken without just compensation, however, neither amendment's plain language provides a vehicle for bringing a right of action for a takings claim. *Id.* Petitioners ask this Court to legislate from the bench and create a cause of action which deviates from the current precedent prohibiting courts from doing so. *Egbert v. Boule,* 596 U.S. 482, 486 (2022). While this Court has recognized specific and narrow causes of actions under the constitution, this Court has declined on the same token to remain silent regarding whether the Fifth Amendment Takings Clause provides a cause of action. *Egbert*, 596 U.S. at 491. If the Takings Clause were self-executing, then it would be "effective immediately without the need of intervening court action, ancillary legislation, or other type of implementing action." *See Self-executing*, Black's Law Dictionary (6th Ed. 1990). This, however, is not the case with the Takings Clause because the Court has not held that a private individual may bring a takings claim against a *state* government. *Knick*, 588 U.S. at 180 (allowed a claim for takings where a *local* government was found to violate the Fifth Amendment).

For Petitioners to properly bring a claim against the State of New Louisiana, they must have an underlying statutory provision that provides a damages remedy enacted by Congress. *Hernandez v Mesa*, 589 U.S. 93, 100 (2020). The Tucker Act provides causes of actions to hear contractual and takings claims against the federal government, however, it does not create a substantive claim, nor does it apply to state governments. 28 U.S.C. § 1346(a)(2), 28 U.S.C. § 1491. Whereas § 1983 provides a right for individuals to sue (1) state government employees and

(2) others acting "under color of state law" for civil rights actions. 42 U.S.C. § 1983. *Bivens* extended this cause of action to local governments, not state governments. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

For the reasons explained below, the Takings Clause is (1) not self-executing and does not provide a right of action for Petitioners' claim, (2) this Court is prohibited from creating its own implied cause of action, and (3) Petitioners do not have an applicable state or federal remedy to bring a takings claim

A. The plain language of the Fifth Amendment Takings Clause does not provide a cause of action for just compensation.

The Takings Clause of the Fifth Amendment prohibits the taking of private property by the federal government without just compensation, and, incorporated through the Fourteenth Amendment, by state governments. U.S. Const. amend. V; U.S. Const. amend. XIV; *Chicago, B. & Q. R. Co.*, 166 U.S. at 226. A reading of the plain language of the Takings Clause reveals there is not an explicitly stated cause of action for an individual to bring a claim for just compensation: ". . . nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. Without language expressing a right of action, individuals are barred from bringing claims directly under the Fifth Amendment against state governments. *Azul-Pacifico Inc. v City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992) (holding "no cause of action directly under the United States Constitution" for individuals to sue for a taking).

Historically, the Fifth Amendment has not been self-executing, requiring statutes to create the procedural basis to bring a constitutional violation of the Takings Clause to a federal court. Until statutes were enacted, no federal claims could be brought under the Takings Clause. *Barron v. Baltimore*, 32 U.S. 243, 250-251 (1833). This Court during its early years had explicitly stated that the Fifth Amendment "is intended solely as a limitation on the exercise of power" and had

the framers truly intended to give a constitutional cause of action, "they would have declared this purpose in plan and intelligible language." *Id*. at 250. Adding to language that is unambiguous creates a "construction [that] is inadmissible, unless the words require it." *Marbury v. Madison*, 5 U.S. 137, 174 (1803). The framers did not declare a cause of action for just compensation under the Takings Clause, and so it must be reasonably inferred that it was intentionally left out. The plain language of the statute speaks for itself – there is no cause of action for just compensation under the Takings Clause, and this Court should not insert language into the Fifth Amendment that the framers' intentionally opted out of including.

B. The Judiciary is prohibited from creating implied causes of actions when Congress has not enacted one through a statute.

The power of checks and balances are crucial to this analysis because Petitioners are asking this Court to do something it is prohibited to do, which is create an implied cause of action that does not exist. Petitioners argue that *Knick* is the controlling case because it provides that a private property owner may bring suit against a local government for a Takings Clause claim. R. at 5-8; *Knick,* 588 U.S. at 194. The holding, however, is based upon the fact that there is a procedural cause of action under § 1983, which is inapplicable to this case. *Id.* The claimant in *Knick* properly brought a § 1983 claim, which allows a Takings Clause when a local government violates constitutional provisions. The Court overruled *Williamson* so that plaintiffs could sue under § 1983 when an injury occurred, not to allow a cause of action under the Taking Clause. *Id.* In contrast with Petitioners case here, *Knick* is distinguishable on the grounds that (1) New Louisiana is a state government and not a local government, and (2) § 1983 is inapplicable to Petitioners claim. R. at 2, 10. Therefore, *Knick* holds no precedent for this current case because it is distinguishable factually and procedurally.

Petitioners are correct in that this Court has created implied causes of action previously, however, the last time this Court held for an implied cause of action in the constitution was in *Bivens* for a Fourth Amendment claim, where this Court created extremely narrow claims under the U.S. Constitution. *Bivens*, 403 U.S. at 389. Petitioners seek to extend this to the current issue, however, as recently as 2022, this Court stated if *Bivens* were to be decided today, it "would decline to discover any implied causes of action in the Constitution," undercutting the Petitioners argument. *Egbert*, 596 U.S. at 502.

Without an express cause of action, Petitioners seek to have this Court create an implied cause of action which would upset historical precedent and would be inconsistent with the trends of this Court. This Court expressly states through over four decades of decision, declining "11 times to imply a similar cause of action for other alleged constitutional violations," that the constitution does not create a cause of action. *Egbert*, 596 U.S. at 486. This Court should maintain its position and refrain from creating constitutional causes of actions, upsetting this Court's precedent and the consistency of holdings for forty years.

Furthermore, this Court declined to answer whether the Fifth Amendment Takings Clause is self-executing in a recent decision, in which this was the first case where this Court analyzed a claim for just compensation under the Takings Clause. *DeVillier v. Texas*, 601 U.S. 285, 288 (2024). Instead, the Court reasoned there was a state remedy for a takings claim, and, thus, the adequate state remedy did not require the Court to intervene. *Id.* at 292. Therefore, it can be inferred that this Court's silence on the issue indicates an approval of the holding that the Fifth Amendment is not self-executing.

Additionally, Petitioners request goes beyond simply creating a cause of action, and Petitioners seek to have this Court authorize the spending of federal money. The Appropriations

Clause is key in illustrating the framers' intent to not include a self-executing Takings Clause, and the Appropriations Clause states, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. For the government to be able to spend money "the payment of money from the Treasury must be authorized by a statute," making an implied cause of action that enables spending of federal money outside the scope of the Judiciary. *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990). Congress has always had the sole ability to have money taken or drawn and "not a dollar of it can be used in the payment of anything not this previously sanctioned," which Congress has not done for claims under the Takings Clause. *Reeside v. Walker*, 52 U.S. 272, 291 (1851). Without a federal statue or appropriation that allows for the spending of money on Fifth Amendment claims for just compensation, any Judicial remedy would be unenforceable and thus void as a matter of law.

If Congress chose to create a cause of action for a Fifth Amendment Takings Clause violation, it would have done so with unambiguous and plain language. Instead, Congress has opted out of creating a cause of action, so Petitioners have none. This applies to New Louisiana, as it can create an avenue for remedy that addresses just compensation, however, New Louisiana code specifies, "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." NL Code § 13:5109. Thus, the procedural and jurisdictional basis for just compensation for Petitioners require a waiver of sovereign or executive immunity, which New Louisiana has not done. Without any jurisdictional basis, Petitioners cannot bring suit against New Louisiana in federal court.

The Thirteenth Circuit correctly affirmed the district court's holding in its opinion, R. at 6-8, 10-11. Thus, this Court must refrain from judicial legislating and affirm the Thirteenth

Circuit's holding that the Fifth Amendment is not self-executing, and, therefore, no right of action exists for Petitioners.

C. Petitioners properly concedes neither the 28 U.S.C. § 1491 nor 42 U.S.C. § 1983 are applicable, leaving them without an adequate state or federal remedy for just compensation.

The Tucker Act created a cause of action for various claims against the federal government when there is a federal contract breach or when a federal agent violates the Takings Clause. 28 U.S.C. § 1491. The act gives federal jurisdiction to claims to "render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress." 28 U.S.C. § 1491(a)(1). The Tucker Act also grants the district courts power to "afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief." 28 U.S.C.§ 1491(b)(2). These two sections expressly create a cause of action which give individuals who allege a constitutional violation through one of these claims the ability to seek relief. *Id*.

This Court has previously ruled that the language of the Tucker Act creates the existence of a cause of action. *United States v. Mitchell*, 463 U.S. 206, 218 (1983) ("there is simply no question that the Tucker Act provides the United States' consent to suit for claims founded upon statutes or regulations that create substantive rights to money damages"). Petitioners "claiming that the United States has taken his property can seek just compensation under the Tucker Act" when "the claim is founded upon the constitution." *Ruckelsaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984); *United States v. Causby*, 328 U.S. 256, 267 (1946).

Knick specifically lays this conclusion out, laying out that the "Tucker Act is not a prerequisite to a Fifth Amendment takings claim – it is a Fifth Amendment Takings claim." *Knick*, 588 U.S. at 196. This language used by this Court is evident and can lead to no other

conclusion than the Tucker Act creates the cause of action for a takings clause claim, not the Fifth Amendment. Similar language is used by this Court eighty years ago, finding "suits against the Government are authorized by the Tucker Act … as claims 'founded upon the Constitution.'" *United States v. Dickinson*, 331 U.S. 745, 748 (1947). This language again emphasizes that the Constitution grants the substantive basis of a claim, but a federal statute must authorize a person to be able to bring a suit against the government for a takings clause claim.

Similarly, § 1983 in its express language explicitly states it is creating a cause of action, allowing claims against constitutional violations. It states that any person acting under the color of law "shall be liable to the party injured in an action at law." 42 U.S.C. § 1983. This creates an enforceable cause of action that Petitioners seek to have this Court ignore. Additionally, courts have routinely held in its express language that a plaintiff "may bring a takings claim under § 1983," expressing that the act gives rise to the cause of action for which one may enforce a constitutional right. *Knick*, 588 U.S at 206; see also *Health & Hosp. Corp. v. Talevski*, 599 U.S. 166, 172 (2023) ("§ 1983 can presumptively be used to enforce unambiguously conferred federal individual rights"); *Ellis v. Univ. of Kan. Med. Ctr*., 163 F.3d 1186, 1197 (10th Cir. 1998) ("1983 [ ] did not create any substantive rights, but merely enforce existing constitutional and federal statutory rights" (internal citations omitted)); *Albright v. Oliver*, 510 U.S. 266, 271 (1994) ("Section 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred'" (quoting *Baker v. McCollan*, 443 U.S. 137, 144 (1979)). This Courts persistence in holding that § 1983 creates a cause of action is evident through cases over the past fifty years and, therefore, § 1983 creates a cause of action in its language and its application by the court.

Without a federal statute, Petitioners fail to state a cause of action, and this Court must affirm the lower court's decision. Petitioners do not have an adequate federal remedy, nor do they an adequate state remedy as NL Code § 13:5109 states a claim for just compensation requires a waiver of sovereign immunity. R. at 2. Here, New Louisiana did not waive sovereign immunity, leaving Petitioners without a claim. *Id.*

In summation, the plain language and reading of the Fifth Amendment Takings Clause does not expressly create a right of action for just compensation in which private individuals may sue state governments. Therefore, without a right of action, this Court is left with precedent which has not given a private cause of action against state governments, and this Court is prohibited from legislating from the bench. Finally, Petitioner is without a cause of action because the Fifth Amendment is not self-executing and there are no adequate state or federal avenues for a claim of just compensation.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court affirm the decision by the Thirteenth Circuit Court of Appeals.

By: /s/ Team 2
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