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 OF THE RESPONDENT

TEAM 23

Counsel for Respondent

QUESTIONS PRESENTED

I. The Takings Clause of the Fifth Amendment permits takings for "public use." Public use jurisprudence has remained steady for over 100 years including private takings and those benefiting a single person. In response, state legislatures react to further define permissible takings.

Was the State's economic development taking constitutional as "public use" under the Takings Clause of the Fifth Amendment's historical understanding and application?

II. State takings are commonly adjudicated through causes of actions adopted in state constitutions, federal statues, or state statutes. The Takings Clause has never been held to fill a statutory void when the State's sovereign immunity has not been waived.

Does the Takings Clause of the Fifth Amendment's meaning and application expand when there is no state or federal statutory cause of action available for a taking?

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STATEMENT OF THE CASE

Statement of Facts

In tandem, the New Louisiana executive and legislative branches developed a plan to improve their state through economic development. R. at 1-2. First, the New Louisiana Legislature passed the Economic Development Act. *Id.* In order to "revitalize the economy[,]" the Economic Development Act sought to join the State of New Louisiana and private industry. *Id.* The State, through the executive branch, received appropriated funds and contracting power. *Id.* at 2. In turn, private businesses would be tasked with expanding tourist attractions and creating new jobs. *Id.* Residents of New Louisiana would not only benefit from an increased job market, but local communities would receive fifteen percent of the tax revenue from the project. *Id.* The newly available tax revenue would be utilized to "ensure long-lasting benefits." *Id.*

Through her legislatively granted powers, Governor Anne Chase began a partnership with Pinecrest, Inc. (hereinafter referred to as "Pinecrest") with the goal to revitalize an area outside the state capital. *Id.* The area in question is comprised of farms and single-family homes which were poorly valued due to soil conditions, overgrowth on lots, and the need for substantial improvements. *Id.* at 2-3. The project, a luxury ski-resort, anticipated 3,740 new jobs and would increase the market value of surrounding property. *Id.* at 2.

To create the thousands of jobs and improve the local economy, the project required 1,000 acres of land. *Id.* The project would span over three New Louisiana counties. *Id.* The land, needed to accomplish the economic development, is owned by 100 landowners. Ninety landowners voluntarily sold their land to New Louisiana, advancing the project. *Id.* Ten landowners, including the named Petitioner, have instead chosen to bring suit, halting the economic development. *Id.* at 3. The remaining landowners, who comprise ten percent of all landowners, are also farmers and

residents of single-family homes. *Id.* at 2. The remaining homes and farms are also in poor condition, but not yet dilapidated nor do they currently pose a health or safety risk to the public. *Id.* at 2-3. The Complaint made reference to the minority demographics of the remaining landowners but does not contend the project's location is related to Petitioners' demographics. *Id.* at 2. The average income of the area is $50,000. *Id.* The remaining landowners alleged that their resistance to sell is due to their desire to retain their family's land and not sell below, what they alleged in their Complaint, market value. *Id.* at 3. The record, taken from the Complaint, is bare as to whether the project's offers were below or at market value. *Id.* at 2-5. Petitioners' Complaint acknowledged the depressed market value due to the properties' required maintenance, poor soil conditions, and lack of marketable crop production. *Id.* at 2. However, Petitioners rely on their properties' sentimental value. *Id.* at 3.

After obtaining ninety percent of the land through voluntary sales, Pinecrest began construction and development on the purchased land. *Id.* As for the remaining land, New Louisiana initiated eminent domain on the last ten percent needed to complete the project. *Id.* Under NL Code § 13:4911, the State of New Louisiana allows takings for purely economic development. *Id.* at 2. Petitioners acknowledged that no statute provides the right to seek just compensation. *Id.* at 6. New Louisiana has not waived its sovereign immunity, generally or in specific relation to this project. *Id.* at 2. Under NL Code § 13:5109, "a statutory or executive waiver of sovereign immunity is required for a property owner to obtain just compensation from the State for a taking." *Id.*

Procedural History

This case was originally brought before the United States District Court for the District of New Louisiana. *Id.* Petitioners brought suit against New Louisiana alleging a Takings Clause

violation claiming the taking was not for public use. *Id.* at 3. Petitioners sought temporary and permanent injunctive relief, or in the alternative, just compensation for the taking. *Id.*

New Louisiana motioned to dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted. *Id.* at 10. Upon review and analysis of the Petitioners' Complaint, on June 28, 2023, the district court dismissed Petitioners' claim to enjoin the taking but granted Petitioners' motion under Federal Rule of Civil Procedure 62(d) to stay the proceeding pending appeal. *Id.* at 5. The district court further dismissed Petitioners' claim to just compensation with prejudice. *Id.* at 8.

Petitioners appealed to the Thirteenth Circuit Court of Appeals. *Id.* at 9. The Thirteenth Circuit reviewed Petitioners' claims de novo and affirmed. *Id.* at 10. The Thirteenth Circuit held that (1) this Court's precedent was clear that "public use" extended to takings for economic development, (2) the Fifth Amendment only provides a right to just compensation if a right to sue is otherwise provided in law, (3) no other law to sue existed, and (4) New Louisiana had not waived its sovereign immunity. *Id.* at 11. Upon affirming the dismissal, the Thirteenth Circuit granted Petitioners' motion under Federal Rules of Appellate Procedure 41(d)(1), a stay pending a petition for writ of certiorari. *Id.* at 11 n.4.

Petitioners filed a Petition for Writ of Certiorari and this Court granted Certiorari on August 17, 2024. *Id.* at 20.

SUMMARY OF THE ARGUMENT

I. Petitioners' inclusion of immaterial emotional facts should not allure this Court to a hold on sympathy, instead the answer to this question of law is firmly cemented in the Constitution, this Court's well-reasoned precedent, and the nation's fundamental principles.

This Court's well-reasoned decision of *Kelo* and substantial state legislative reaction displayed the nation's functioning republic. Over a century ago, this Court rejected its narrow "use by the public" test and recognized the Fifth Amendment's correct interpretation. This expanded interpretation allowed states and localities to utilize eminent domain not only for post offices and schools, but essential advancements including railroads, electricity, and economic development.

In the landmark case of *Kelo v. City of New London,* this Court culminated its Fifth Amendment precedent in a comprehensive opinion. However, long before *Kelo*, this Court recognized that the judiciary's role in determining public purpose was extremely narrow, the legislature should be granted deference in determining public use, and private takings that benefit the greater welfare of the public are constitutional. Petitioners' argument that the taking is inconsistent with the Fifth Amendment's historical understanding has been long rejected. Upholding *Kelo* and its foundational precedent is sound under *Dobbs v. Jackson Women's Health Org.*'s stare decisis test.

Although Petitioners' Complaint framed the taking as one benefiting the few, it is uncontested the project will advance the needs of many through its public use and benefit. Below, Petitioners make no claim that the cooperative efforts between New Louisiana's executive branch, legislature, and business community were shortsighted. The plan in question, taken as alleged in Petitioners' Complaint, displays thoughtful consideration as to creating thousands of jobs, returning tax revenues to the local community, and improving the economic potential for all New Louisiana residents.

The lower courts correctly determined that Petitioners have not met their burden as they failed to state a claim for which relief can be granted. This Court should affirm on the first issue, while deciding the second issue to settle the matter.

II. Petitioners' claim is without a cause of action and fails against the State of New Louisiana's sovereign immunity. Neither Congress nor New Louisiana have waived the state's sovereign immunity for takings claims under the Fifth Amendment. This Court has long recognized the existence of a right does not require the judicial or legislative creation of a cause of action to seek redress.

In cases where the Takings Clause served as the sole authority, claims were for equitable relief. Here, in Petitioners' alternative argument, seeks just compensation as a legal remedy. This Court has not held the Taking Clause to be self-executing for legal relief. This Court is not the appropriate branch for the creation of a legal cause of action. Under the principles of federalism and judicial restraint, this role has remained in the hands of the legislature. In the rare instances, such as *Bivens* claims, where this Court did create a cause of action, it later recognized its overreach. *Hernandez v. Mesa*, 589 U.S. 93, 99 (2020). Here, the Court should defer to the legislature and not utilize federal common law to create a new cause of action.

The doctrine of sovereign immunity strongly disfavors Petitioners' claims. James Madison's constitutional debate grounds this policy that was later adopted in the Eleventh Amendment. Permitting Petitioners to haul New Louisiana into federal court would not only be unprecedented, but also a dramatic departure from this Court's jurisprudence going centuries back.

Therefore, because New Louisiana nor Congress have enacted a cause of action, Petitioners' claims are without a procedural path. Further, even if this Court were to expand the Fifth Amendment to include a new cause of action under federal common law, deeply engrained principles such as state sovereign immunity and federalism strongly disfavor that expansion.

ARGUMENT

Petitioners appeal Respondent's (hereinafter "New Louisiana") motion to dismiss for failure to state a claim upon which relief could be granted, a constitutional question of law. The standard of review for questions of law is de novo. *Philips v. Pitt Cnty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009). As the non-moving party, allegations in Petitioners' Complaint are accepted as true and construed "in the light most favorable to the" Petitioners. *Id.*

I. NEW LOUISIANA'S TAKING IS CONSTITUTIONAL BECAUSE IT IS FOR "PUBLIC USE" WHICH IS WITHIN NEW LOUISIANA'S EMINENT DOMAIN POWER UNDER THE CONSTITUTION AND *KELO V. CITY OF NEW LONDON*.

Fifth Amendment private takings are not a new concept. Historically deemed constitutional for "public use[,]" the federal government carried out and administered private takings. *Kohl v. United States*, 91 U.S. 367, 373 (1875). The Takings Clause was incorporated against states through the Fourteenth Amendment Due Process Clause. *Chic. Burlington Quincy Ry. v. Chicago*, 166 U.S. 226, 239 (1897). Since then, this Court's "public use" interpretations have increased its scope in takings cases. *Berman v. Parker*, 348 U.S. 26, 35 (1954). This Court reasoned that the constitutional taking of property of an entire area for redevelopment as opposed to piece by piece can occur to eliminate "slums" or merely areas that "may produce slums[.]" *Id.* Additionally, this Court clarified that "public use" does not necessarily mean "use by the public" when it determined a private taking that allowed an individual access to water constituted a public use. *Clark v. Nash*, 198 U.S. 361, 369-70 (1905).

The district court's order to dismiss should be affirmed because the historical and textual meaning of "public use" does not follow a narrow interpretation and instead generally follows a more comprehensive interpretation. Under New Louisiana law, state takings for purely economic development are permitted. NL Code § 13:4911. Similarly, New Louisiana law gives the governor

authority to fortify the economy. Notably, the Takings Clause states "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend V.

While the Constitution makes no mention of plain language textualism, it could be a permissible starting point for constitutional analysis; however, it cannot bar other methods of interpretation. Stephen M. Durden, *Animal Farm Jurisprudence: Hiding Personal Predilections Behind the "Plain Language" of the Takings Clause*, 25 PACE ENVTL. L. REV. 355, 389 (2008); *see also Commonwealth v. Herrick*, 6 Cush. 465, 468 (Mass. 1850) (describing that to "take" in the context of governmental takings was misunderstood since plain meaning varies person to person). When differences arise in the interpretation of "public use" it is unproductive to seek answers in plain language textualism to determine which "plain meaning" is the accurate "plain meaning." Durden, *supra,* at 389.

The landmark case of *Kelo v. City of New London* determined that the taking of private property is constitutional under the Fifth Amendment if it is "rationally related to a conceivable public purpose." *Kelo v. City of New London*, 545 U.S. 469, 490 (2005); *see also Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (asserting this Court has invalidated a taking when no public purpose could be justified but has always sustained the practice of eminent domain power when "rationally related"). Further, this Court ruled that takings do not require "reasonable certainty" that the planned public benefits will come to fruition as federal courts are not the place for such discourse. *Kelo*, 545 U.S. at 487-88.

The applicability of the Fourteenth Amendment to cases regarding the expropriation of private property have been heard by this Court. *Cincinnati v. Vester*, 281 U.S. 439, 447 (1930). The judiciary is tasked with determining what qualifies as "public use" within the bounds of the Constitution. *Id.* While this power is vested in the judiciary, "determining whether that power is

being exercised for a public purpose is an *extremely narrow* one." *Berman*, 348 U.S. at 102 (emphasis added). When a case involves a state action, higher federal courts narrow their power and defer to local authorities, including both legislative and judicial, when determining "public use[.]" *Green v. Frazier*, 253 U.S. 233, 242 (1920). Legislatures and trial courts are the proper venues for fact finding when determining the merit of a taking. *Id.*; *see also Hairston v. Danville & W. R. Co.*, 208 U.S. 598 (1908) (deferring to the judgment of the state court which held the taking of private property constitutional for a private railway company's use that would benefit the public generally because the subject "so closely concerns the welfare of their people[]").

States are further empowered as *Kelo* empathized that "nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power." *Kelo*, 545 U.S. at 489. Such state action would be familiar as many states prior to *Kelo* already enforced a more rigid "public use" requirement, some of which are more inflexible than federal restrictions. *Id.* Prior to *Kelo*, several states had more narrow "public use" requirements included in their state constitutions or codified statutes. *Id.*; s*ee also* Taylor Haines, Note, *"Public Use" or Public Abuse? A New Test for Public Use in Light of Kelo*, 44 SEATTLE U. L. REV. 149, 151-52 (2020) (arguing that states contribute original and creative limitations on takings and are well-positioned to continue to adapt at the state-level when new challenges arise). Three years post *Kelo*, *forty-three states* either amended their constitutions or enacted legislation, explicitly prohibiting economic development from being classified as public use. Haines, *supra,* at 159-60. At the time, *Kelo* caused more state defensive actions than any other decision by this Court. *Id.*

The long-standing doctrine of *stare decisis* calls for adhering to precedent as it represents a fundamental principle stemming from common-law adjudication. *Ute Indian Tribe v. Utah*, 935 F. Supp. 1473, 1506 (D. Utah 1996). While this Court may vacate its prior decisions, affirming

prior correctly decided opinions maintains confidence in the judiciary. *Agostini v. Felton*, 521 U.S. 203, 235 (1997); *see also Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989); *see also* The Federalist No. 78, at 490 (Alexander Hamilton) (H. Lodge ed., 1888). Many courts have concluded that generally, it is "more important that the applicable rule of law be settled than that it be settled right." *Agostini*, 521 U.S. at 235 (quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).

However, since the doctrine is not an inexorable command, in certain and limited cases, special instances allow for its departure. *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992). In *Casey*, this Court prescribed four factors, known as the *Stare Decisis* Balancing test, to analyze whether to overrule precedent. *Id.* at 855. In *Dobbs*, this Court used a similar five factor balancing test to overrule precedent in certain circumstances; notably, the context is not limited to abortion. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 268 (2022). First, the Court is to inquire into the nature of the prior Court's ruling to determine if an error occurred that was "egregiously wrong" or "deeply damaging." *Id.* Second, the Court will examine the "quality of the reasoning" of the prior Court to determine if the ruling was made on weak grounds. *Id.* To aid in determining this, the Court, like in *Dobbs*, will look to see if the decision is grounded in text, such as the Constitution, or other history or precedent. *Id.* at 268-70. Next, the Court asks if the precedent has shown to be "workable." *Id.* at 268, 280-81. In other terms, how easily a rule can be understood and applied in a predicable manner. *Id.* Further, the Court will consider how the present case has caused "distortion" of legal doctrines and other areas of law. *Id.* at 268, 286. Lastly, the Court questions to what extent people have relied upon the precedent to determine if hardships will ensue if overruled. *Id*. at 268, 287-88. How this Court weighs the *stare decisis* factors have been called "inherently standardless" by this Court itself. *Id.* at 281. Yet, while this

Court did not find reliance in abortion precedent, this Court promptly confirmed that in other contexts, namely property and contract rights, firm reliance interests exist. *Id.* at 215, 220.

When considering overruling precedent, new majorities of this Court bear the weight of justifying why the constitutional interpretation of their predecessors was erroneous. Amy Coney Barrett, *Symposium: Constitutional Foundation: Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1722 (2013). Absent such a rule favoring precedent, this Court's predecessors could overturn a decision without explanation. *Id.* While it is common for the Court to encounter vague constitutional text, for 200 years this Court has relied on history when confronted with vague text of the founders. *United States v. Rahimi*, 144 S. Ct. 1889, 1912 (2024). History is much less subjective and thus should guide this Court before policy. *Id.*

A. American jurisprudence holds the doctrine of *stare decisis* in high esteem in order to foster consistency and avoid arbitrary discretion in the American legal system.

1. Kelo v. City of New London does not have any special justification to be overruled because it passes the bar set by the stare decisis balancing test created and continually recognized by this Court.

Like the circumstances in *Kelo*, New Louisiana's Economic Development Act is distinct from the conditions in *Dobbs*. Even using the most recent *stare decisis* test from *Dobbs*, Petitioner cannot find the authority for this Court to overrule the precedent in *Kelo*. In *Dobbs*, this Court found prior precedent, namely in *Roe*, not in accordance with historical constitutional interpretation and thus erroneous. This is unlike in *Kelo* where this Court's interpretation of the term "public use" has been broadly interpreted, consistent with historical analyses of the Takings Clause from both courts and scholars alike. Next, *Dobbs* explained that *Roe* incorrectly reasoned that the right to an abortion was grounded in either the Constitution's text or precedent. While the precedent over the last decades has expanded who and what can constitute a constitutional taking, the principles remain. Principles tracible to *Kohl* in 1875 when a federal taking was deemed

constitutional as "public use." Additionally, *Dobbs* held *Casey*'s test unworkable in part due to its vague language open to many interpretations. Whether an individual agrees with the holding of *Kelo* or not, even detractors concede it is very simple to understand due to the straightforward test allowing anything that is for "public use" or "benefit" to be acquired via a taking. Further, this Court in *Dobbs* considered the impact of a decision on various areas of the law. Unlike *Roe* and *Casey*'s impact on various legal areas such as standing, the First Amendment, *res judicata* and more, *Kelo* maintains its narrow focus on the term "public use" strictly in the context of Fifth Amendment takings.

Lastly, *Dobbs* considers the impact on society when precedent is overruled and reasons that reliance arises "where advance planning of great precision is most obviously a necessity." This Court in *Dobbs* reasoned that an abortion due to an unplanned pregnancy is unplanned thus no reliance interests exist to consider. This factor's application is highly distinctive to *Kelo* where massive planning occurs in various forms such as compressive development plans, cost, tax, and revenue analyses in addition to numerous other considerations. Even though *Dobbs* overruled precedent, this Court in *Dobbs* affirmed property cases as having concrete reliance. *Dobbs*, 597 U.S. at 215, 220 (asserting while they do not find Casey's reliance supported in *Dobbs*, other concrete reliance matters specifically include property and contract rights). Each factor in *Dobbs* is distinct from the circumstances in *Kelo*. Due to the substantial reliance on *Kelo*, the rights conferred in *Kelo* must be protected under *stare decisis* by honoring precedent and letting the decision stand. As in *Dobbs, Kelo* returned the issue of "public use" to state legislatures.

2. *The implementation of New Louisiana's Economic Development Act aligns with Kelo v. City of New London.*

Kelo is distinct from *Dobbs* under this Court's own analysis. The implementation of New Louisiana's Economic Development Act cannot legitimately be distinguished from the

circumstances in *Kelo*. In *Kelo*, a development project was approved which allowed the city to take private land, condemn non-blighted structures, and give the land to the pharmaceutical company, Pfizer, for its research facility. This Court deemed the city's comprehensive development plan constitutional under the Fifth Amendment as "public use." As a result, the city would gain benefits, increase property taxes, and more job opportunities.

In parallel, New Louisiana developed its comprehensive plan to likewise add thousands of jobs and increase tax revenue. Yet even above and beyond the comprehensive plan in *Kelo*, New Louisiana's economic development would attract an influx of tourists and unlike the non-blighted structures in *Kelo*, here the property at issue consisted of unproductive farm grounds and homes in poor condition. R. at 2-3. Together this depressed the market value of the property. *Id.* When compared to the City of New London, here, New Louisiana's circumstances go beyond the justification presented in *Kelo*. Thus, to affirm here, there is no need to distinguish *Kelo* because New Louisiana presented additional compelling factors.

After all, at the turn of the nineteenth century this Court reasoned in *Clark* that taking of an entire area of "slums[,]" as opposed to piece by piece, or even merely areas that "may" produce "slums" was a constitutional taking.

3. *To maintain the confidence of the populous, this Court should exercise judicial restraint.*

This Court need not partake in impractical rulings where the decisions stray away from being based in the law. *U.S. ex rel. Tennessee Valley Auth. v. Welch*, 327 U.S. 546, 552 (1946) (deducing that a lack of adherence to judicial restraint causes courts to determine government function not based on law or legislation but rather "on the basis of their view on that question at the moment of decision"); *see also Midkiff*, 467 U.S. at 242-43. Here, both *Kelo* and *Dobbs* are based in this Court's historical understanding of the Constitution and thus *stare decisis* should be

further upheld in adherence with judicial restraint. Even proponents of judicial activism may be inclined to concede that judicial restraint best prevents the judiciary from encroaching on democratic principles. Thus, affirming protects democratic norms and confidence in this Court.

B. The Fifth Amendment allows for government takings for public use and because New Louisiana's proposal would reach the public it is a permissible taking.

1. *When a taking occurs for "public use" but is given to a private party, evidence of a "comprehensive plan" is often required.*

In *Kelo*, this Court reasoned, as one of four rationales, a comprehensive plan justified the taking. New Louisiana's goal of improving economic development occurred by bringing together the executive branch, legislature, and privacy industry; this did not occur overnight. From the state legislative act authorizing the New Louisiana Economic Development Plan, to calculating a precise number of jobs such plan would create, and the exact number of acres required to implement it undoubtably called for "thorough deliberation" which this Court in *Kelo* championed. Without citing legal authority, Petitioners contend the sentimental value of their land is important in the argument of a just taking. In the alternative, *Kelo* makes no mention that sentimental value is material in determining whether a taking is justified. Nor does *Kelo* permit sentimental value to halt a "thorough[ly] deliberated" economic development plan. Paige Bolt, *Condemning Fair Market Value: An Appraisal of Eminent Domain's "Just Compensation",* 1 TEX. A&M J. PROP. L. 131, 150 (2012) (asserting the market value determines if the displaced property owner's chattels are of enough value to move and disregards all sentimental value a person attaches to their property before it is condemned).

The majority in *Kelo* further stressed the importance of a development plan to avoid a taking from one private party to give to another just because the government feels that the latter party will put it to more productive use. *Kelo*, 545 U.S. at 487. Thus, even the controversial *Kelo*

opinion acknowledged potential unjust takings could occur without a detailed development plan in place prior to a taking. This demonstrates that *Kelo* has strict prerequisites and safeguards in place to ensure only constitutional takings occur as governmental bodies cannot simply state a public purpose but must prove with data and diligence. Here, New Louisiana has met that burden.

2. *Deference is to be given the legislature on what qualifies as a public benefit.*

Petitioners incorrectly argue that taking of property to develop a ski resort does not align with the historical understanding of "public use." Despite previously described academics and the chronological history of "public use" maintaining otherwise, New Louisiana still prevails due to another long-standing practice of this Court. For instance, it is widely known that this Court and other courts will usually defer to what the local municipality or state has defined as a public benefit as they are the "main guardian of the public needs." *Berman v. Parker*, 348 U.S. at 35-6 (reasoning that upon finding a public purpose, the quantity and character of land to be taken is at the discretion of the legislature). Inherently, this historical understanding is logical as the state and local entities are closer to the citizens and best understand their economic needs. Here, the New Louisiana legislature and governor are best equipped to improve the economic conditions of their state.

3. *Governmental bodies are constrained, more so than private parties, and thus eminent domain takings by governmental entities are given greater flexibility.*

Historically, this Court and lower courts have granted the government increased flexibility. Since *Kohl*'s original grant of eminent domain power to the federal government, this Court extended the power to states and cities. Because governments face restraints more so than private parties, the government was granted flexible taking authority. For example, private investors can simply move their development projects to a neighboring town or state if holdout landowners exist. However, various levels of government simply do not have such a luxury, especially cities and states. Here, the proposed plan would bolster tourism and the quality of life in the capital city of

New Louisiana. New Louisiana cannot simply move the location of the state capital due to holdout property owners. This Court in *Kelo* recognized the notion of a constrained government by providing a flexible rule for government private takings which is distinct from the scrutiny private takings should encounter. Therefore, New Louisiana's taking as proposed by their comprehensive plan is best suited to meet the needs as determined by their elected officials.

C. Even if *Kelo v. City of New London* were overruled and special justification was found for not adhering to *stare decisis*, the Court of Appeals ruling for New Louisiana is affirmed.

1. *This Court should not return to the narrow "use by the public" test which this Court abandoned over 100 years ago and instead should affirm under subsequent jurisprudence.*

Interpreting the Fifth Amendment to only include "use by the public" proved to be a faulty test, riddled with exceptions and loopholes. Prior to the turn of the twentieth century, in the few Fifth Amendment cases heard by this Court, the narrow "use by the public" test was adopted. *Falbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158-64 (1896). This test mirrored that of many state courts which shifted analysis away from "public benefit" to use by the public. *Beckman v. Saratoga & Schenectady R. Co.*, 13 Paige 45, 73 (N.Y. Ch., 1831). Due to the narrowness of the test, both state and federal courts found exceptions and loopholes in order to meet industrial and economic needs. Philip Nichols Jr., *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U. L. REV. 615, 615-30 (1940) (outlining the erosion of the narrow rule). This Court rejected the narrow rule, citing administrability concerns due to changing needs of communities. *Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co.*, 240 U.S. 30, 32 (1916) ("The inadequacy of use by the general public as a universal test is established."). After rejecting the narrow test, this Court clarified its interpretation stating, "[i]t is not essential that the entire community, nor even any considerable portion, should directly enjoy or participate in any

improvement in order to constitute a public use." *Rindge Co. v. Los Angeles Cnty.*, 262 U.S. 700, 707 (1923); *see generally* Nichols, *supra*, at 630 ("[A] group in the community, not all of it, may use the facility provided, is immaterial: that is equally true of a hospital or a school. . . . [A] project actually benefiting only a single person may be for a public use, even under the narrow doctrine.").

Even if this Court were to overturn *Kelo*, this Court's rejection of the "use by the public" test and resulting jurisprudence qualify this taking as constitutional. This Court has held that states, including Louisiana, may take property and then restrict access; if public access is required, private railroads and utilities could not function. Further, this Court permitted takings for the expansion of a private individual. Here, although the taking was for a private individual, it provides clear public benefit through increased tax revenues spread upon all New Louisiana residents. Therefore, even without the sound reasoning of *Kelo*, this Court may affirm based upon its century old rejection of the strict "use by the public" test.

2. *Adhering to the flexible public use interpretation that this Court and history describes is critical in reducing waste.*

It is widely undisputed, as even Petitioners would find it hard to disagree in good faith, that an enormous amount of time and taxpayer dollars are spent in government funded economic development. From the planners, engineers, architects, project managers, and more that are either externally contracted or are state or city employees, the cost of their labor into merely the planning stage is undoubtably immense. The doctrine of waste exists in many property law contexts and has a presumption against waste of land and resources. *See Eyerman v. Mercantile Tr. Co., N.A.*, 524 S.W.2d 210, 217 (Mo. Ct. App. 1975). Here, if just a few property owners contest this constitutional taking, publicly funded resources, such as time, go to waste. Hence, public policy has long had a presumption against waste which this Court should adhere to by affirming.

3. *States and municipalities' great reliance and faith in democratic norms should not be eradicated.*

This nation has long recognized the rights of states through federalism. Either under the traditional idea of dual federalism, where state and the federal governments had exclusive spheres of jurisdiction, or under today's concurrent jurisdiction, this taking is within the power and reliance of the state. Hence, states, like New Louisiana, are empowered to amend their constitutions or change their laws to afford greater protections to landowners than provided by federal law and *Kelo*. States are laboratories of democracy, seen on full display by a super-majority that amended their takings laws following *Kelo*. While New Louisiana could have enacted greater landowner protections, the elected legislature instead remained silent. Further, like dozens of states, New Louisiana residents may have the power to enact landowner protections through citizen-initiated measures, but did not act. Therefore, this Court should not be sympathetic to the inaction of the people of the state in affording themselves greater protections. As a result, this Court must follow the laws enacted. If desired, Petitioners are free to later advocate for eminent domain reform that they have previously failed to do.

New Louisiana's economic development is consistent with both the Constitution and precedent, both historically and recently, regarding "public use." While *stare decisis* is *a* reason this Court should dismiss Petitioners' motion, it is not the only one. Hence, New Louisiana is to prevail regardless of the state of *Kelo*.

II. A FIFTH AMENDMENT TAKINGS CLAIM REQUIRES A STATUTORY CAUSE OF ACTION AND A WAIVER OF SOVEREIGN IMMUNITY FROM THE STATE BEING SUED.

The Takings Clause establishes a right to just compensation, however it is silent in regard to providing a cause of action or waiver of sovereign immunity required to sue a state. Although the Takings Clause establishes a right, "the distinction between rights and remedies is fundamental. A right is a well founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury." *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 445 (2001). This Court consistently uses a state cause of action when deciding taking claims. *Stern v. Marshall,* 564 U.S. 462, 484 (2011).

Along with a state created cause of action, a state must waive its sovereign immunity for Takings Clause claims. Petitioners incorrectly argue that the Fifth Amendment is self-executing. If the Takings Clause were self-executing, "[it] creates by its own force a cause of action authorizing suits for just compensation." *DeVillier v. Texas*, 601 U.S. 285, 291 (2024). Self-executing would also establish the Amendment itself provides the right, remedy, and cause of action to sue for a taking, but "[t]he right of individuals to sue a State, in either a federal or a state court, cannot be derived from the Constitution or laws of the United States. It can come only from the consent of the State." *Palmer v. Ohio*, 248 U.S. 32, 34 (1918).

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). When a complaint fails to "state a claim upon which relief can be granted" a motion to dismiss the complaint may be granted based on Federal Rules of Civil Procedure Rule 12(b)(6). *See Ashcroft* v. *Iqbal*, 556 U.S. 662, 678-79 (2008); *see* Fed. R. Civ. P. 12(b)(6).

Because New Louisiana has not provided a state takings claim cause of action nor consented to waive its sovereign immunity, Petitioners have not stated a valid claim. Thus, this Court should affirm the lower court and dismiss Petitioners' claims in which relief cannot be granted.

A. This Court should dismiss Petitioners' just compensation takings claim because no statute provides a cause of action to bring the claim.

The Takings Clause of the Fifth Amendment creates a substantive, or legal right, stating, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. "[I]t is …well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684 (1946). Likewise, "[w]hen the United States creates rights in individuals against itself, it is under no obligation to provide a remedy through the courts." *Lynch v. United States,* 292 U.S. 571, 582 (1934).

If the Takings Clause were self-executing there would be no need to "pass legislation to create the right to just compensation for a governmental taking but also that the doctrine of sovereign immunity does not apply to it." *Trinco Inv. Co. v. United States*, 140 Fed. Cl. 530, 532 (Fed. Cl. 2018). Regardless, "[t]here is simply no precedent that the doctrine of sovereign immunity is waived by the mere fact of the presence of the [T]akings [C]lause in the Constitution." *Id.* at 533.

1. *Overwhelming precedent establishes statutes alone provide the cause of action for a takings claim.*

The Fifth Amendment's text does not create a cause of action to just compensation. Without a federal or state statute providing a cause of action to sue for an invasion of legal rights, the "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 292. This Court recognized that the Takings Clause "[did] not establish that it create[d] a cause of action for damages, a remedy that is legal, not equitable, in nature." *Id*. at 292.

"Constitutional rights do not typically come with a built-in cause of action to allow for private enforcement in courts." *Id*. at 291. A claim for just compensation under the Takings Clause has never by itself been recognized as an implied common law cause of action. *Stern*, 564 U.S. at 484 (Establishing that, "in general, Congress may not withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.") (internal quotation marks omitted). This Court is prohibited from creating an implied cause of action, at common law, because "'[t]here is no federal general common law,' and therefore federal courts today cannot fashion new claims in the way that they could before 1938." *Hernandez v. Mesa*, 589 U.S. at 100 (2020) (citation omitted).

When private property is taken without compensation and a state statute provides a cause of action for a takings claim, this Court refrained from holding the Takings Clause as self-executing. In *DeVillier*, the State of Texas executed a flood management project that adversely affected private property. *DeVillier*, 601 U.S. at 287. The project made portions of the private property unusable during storm seasons. *Id.* DeVillier alleged Texas had "effected a taking of [their] property." *Id.* Because the owners did not cite a statute authorizing a cause of action, Texas moved to dismiss the claim. *Id.* at 293. DeVillier argued the Fifth Amendment is self-executing, therefore it did not require another statute to authorize a cause of action. *Id.* This Court recognized that "[c]onstitutional rights do not typically come with a built-in cause of action." *Id.* at 291. In *DeVillier*, this Court found that Texas law created a cause of action for a takings claim, remanded, and permitted the owners to pursue their claims through the cause of action available under Texas

law. *Id.* at 295. Rather than answering the question of the self-executing nature in the affirmative, this Court in *DeVillier* deliberately refrained. *Id.* at 292. When a state law provides a cause of action, this Court has refused to answer whether the Takings Clause is self-executing. *Id.*

There have been a few federal takings claims that only cite the Takings Clause, those claims were equitable and not legal. *Id.* Those cases brought only under the Fifth Amendment "sought injunctions to prevent the Government from interfering with their property rights, such as by obtaining easements or imposing zoning regulations." *Id.* at 291-92 (holding "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"); *see also Dohany* v. *Rogers*, 281 U. S. 362, 364 (1930); *Delaware, L. & W. R. Co.* v. *Morristown*, 276 U. S. 182, 188 (1928); *Vill. of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 384 (1926); *Cuyahoga River Power Co.* v. *Akron*, 240 U. S. 462, 463 (1916); *Norwood* v. *Baker*, 172 U. S. 269, 276 (1898). This Court has yet to deem the Takings Clause as self-executing for a legal claim of just compensation under the Fifth Amendment.

Petitioners' alternative takings cause of action for just compensation, a legal not equitable claim. Few cases demonstrate a cause of action directly brought under the Takings Clause for an equitable claim such as an injunction. Petitioners' alternative claim is distinguished from the few cases brought to this Court solely through the Fifth Amendment for only equitable remedies. This Court has never recognized a takings claim for a legal remedy and it should not do so now. Petitioners maintain a constitutional right, but are without a legal path to remedy, and the government who "creates rights," "is under no obligation to provide a remedy through the courts." *Lynch,* 292 U.S. at 582. Because Petitioners do not provide a valid cause of action for their takings claim against New Louisiana, this Court should affirm the dismissal for failure to state a claim for which relief can be granted.

2. *The legislature, not judiciary, is the proper branch to craft laws creating a cause of action for takings claims.*

"[C]reating a cause of action is a legislative endeavor." *Egbert v. Boule*, 596 U.S. 482, 491 (2022). This Court recently held that "in all but the most unusual circumstances, prescribing a cause of action is a job for Congress, *not the courts*." *Id.* at 487 (emphasis added). Under those rare circumstances, this Court held the Fourth Amendment provided its own cause of action for civil rights claims through a court-created "*Bivens* claim" when there was no statute authorizing a claim. *Bivens v. Six Unknown Names Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971).

Against federal agents, this Court extended *Bivens* claims for implied causes of action for civil rights violations under the Fifth and Eighth Amendments. *See Davis v. Passman,* 442 U.S. 228, 242 (1971) (finding an inherent cause of action in a Fifth Amendment claim of dismissal based on sex discrimination); *see also Carlson v. Green*, 446 U.S. 14, 25 (1980) (creating an inherent cause of action in the Eighth Amendment for a prisoner's claim of denial of adequate medical treatment). "After those decisions, however, the Court changed course." *Hernandez v. Mesa*, 589 U.S. 93, 99 (2020).

Following *Bivens,* this Court in *Hernandez* recognized its overreach in legislating from the bench in creating claims in *Bivens*, and the need to reign in its overreach of legislative power:

> In later years, we came to appreciate more fully the tension between [creating implied causes of action in the Amendments] and the Constitution's separation of legislative and judicial power. The Constitution grants legislative power to Congress; this Court and the lower federal courts, by contrast, have only "judicial Power." Art. III, §1. But when a court recognizes an implied claim for damages on the ground that doing so furthers the "purpose" of the law, the court risks arrogating legislative power. No law "pursues its purposes at all costs."

Id. at 100 (citation omitted). Further, this Court expressed its "reluctan[ce] to create new causes of action," correctly recognizing that "Congress is best positioned to evaluate

'whether, and the extent to which, . . . liabilities should be imposed upon individual officers and employees of the Federal Government.'" *Id.*

"All legislative Powers herein granted shall be vested in a Congress of the United States." U.S. CONST. art. I, § 1. The role of the judiciary is, "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). This Court recognized its constitutionally proscribed role as limited to judicial review and not legislative power. *Egbert,* 596 U.S. at 491 ("creating a cause of action is a legislative endeavor"). The Framers well understood Congress is "far more competent than the Judiciary" to make laws. *Schweiker v. Chilicky,* 487 U.S. 412, 423 (1988).

In considering whether this Court may go outside of its strictly defined constitutional powers in creating implied causes of action from the Constitution, this Court rejected the premise that they "should provide for a wrong that would otherwise go unredressed." *Bush v. Lucas*, 462 U.S. 367, 388 (1983). This Court gave no weight that "existing remedies do not provide complete relief." *Id.* "Rather, the court must ask only whether it, rather than the political branches, is better equipped to decide whether existing remedies 'should be augmented by the creation of a new judicial remedy.'" *Egbert*, 596 U.S. at 493 (citation omitted).

Here, Petitioners bring their claim for just compensation without stating a legislatively created cause of action; as Justice Thomas stated in *DeVillier*, the claim is without a "procedural vehicle" therefore Petitioners' appeal is without merit. *DeVillier*, 601 U.S. at 286. This Court has never decided a case by holding the Fifth Amendment as self-executing; doing so here would create a new federal common law, a practice this Court disfavors. Petitioners bring a property takings claim, unlike the few civil rights *Bivens* claims upheld through self-executing constitutional amendments. Even if Petitioners' claims were similar to the *Bivens* claims, this Court signaled such claims should be used sparingly. This Court correctly recognized in *Hernandez*, "when a

court recognizes an implied claim for damages . . . the court risks arrogating legislative power." Further, in *Hernandez,* this Court declared it was "reluctant to create new causes of action." This Court's reluctance and understanding of these risks encourages judicial restraint in creating any implied cause of action. Creating laws is the delegated power reserved solely for the legislature.

This Court respects the boundaries its constitutionally vested powers provide. The Framers delegated law-making powers to the legislative branch and, as cemented in *Marbury*, interpretative powers to the judicial branch. Separation of delegated powers is an important principle in the Constitution and democratic system of government. A cause of action must be fashioned by the law-making branch alone—the legislature. As this Court recognized in *Schweiker*, the Framers understood the legislature is better equipped to craft laws. It remains the same today, the legislature of the State of New Louisiana, as our Founders understood, is best equipped to create laws establishing a cause of action for its citizens.

This Court should not exercise nondelegated powers by stepping into the legislature's role, despite New Louisiana's not providing a cause of action for a takings claim. Exercising judicial restraint, this Court in *Bush*, rejected the notion it must "provide for a wrong that would otherwise go unredressed." Therefore, the fact that New Louisiana does not provide complete relief is irrelevant, just as this Court weighed in *Bush*.

In *Egbert*, the lack of an existing cause of action was not this Court's focus, instead, this Court emphasized which branch is best equipped to craft law. Similarly here, New Louisiana's legislature is better equipped to draft law for its citizens. Conversely, judges are equipped to review cases and interpret law. Therefore, New Louisiana's legislature is best equipped to resolve its constituent's diverse needs by crafting laws.

Because Petitioners' claim fails to provide a legislatively created cause of action, this Court should affirm the dismissal.

B. Even if the Takings Clause provides an implied cause of action, Petitioners' claims should be dismissed because New Louisiana has not waived its sovereign immunity through consent or statute, as required by the Eleventh Amendment.

1. *New Louisiana has not waived its sovereign immunity neither through consent nor statute.*

This country has a strong history and tradition of upholding sovereign immunity. "Although the Constitution establishes a National Government with broad, often plenary authority over matters within its recognized competence, the founding document 'specifically recognizes the States as sovereign entities.'" *Alden v. Main*, 527 U.S. 706, 713 (1999) (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 71, n. 15 (1996)). "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual WITHOUT ITS CONSENT." The Federalist No. 81, at 487-88 (Alexander Hamilton) (C. Rossiter ed., 1961) (emphasis in the original).

"The limited and enumerated powers granted to the Legislative, Executive, and Judicial Branches of the National Government, moreover, underscore the vital role reserved to the States by the constitutional design[.]" *Alden*, 527 U.S. at 713. "The Eleventh Amendment confirms 'the structural understanding that States entered the Union with their sovereign immunity intact.'" *EEE Mins., LLC v. North Dakota*, 81 F.4th 809, 815 (8th Cir. 2023) (quoting *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 253 (2011)). "The doctrine of sovereign immunity is a common law principle which provides that a state cannot be sued without its consent." Philip L. Malet, BUSINESS TORTS, Ch. no., 19, Sovereign Immunity § 19.08 (2nd ed. 2024); *see also Colonia Pipeline Co. v. Morgan*, 263 S.W.3d 827, 848 (Tenn. 2008) ("The doctrine of sovereign immunity is 'a principle of the common law as old as the law itself, that the king is not bound by any statute, if he be not expressly named to be so bound.'" (citation omitted)).

"It is not in the power of individuals to call any state into court." 3 Debates on the Constitution 533 (James Madison) (J. Elliot ed. 1876). "The right of individuals to sue a State, in either a federal or a state court, cannot be derived from the Constitution or laws of the United States. *It can come only from the consent of the State.*" *Palmer*, 248 U.S. at 34 (emphasis added) (citations omitted).

The history and laws of this nation together with the NL Code § 13:5109 establish that a statutory or executive waiver of sovereign immunity is required for a property owner to bring a just compensation takings claim against the state. "If a property owner wishes to obtain compensation for such a taking, he or she must contend with the doctrine of sovereign immunity[.]" *Trinco Inv. Co.*, 140 Fed. Cl. at 534 (holding a waiver of sovereign immunity is always required from a takings claim against a state).

This Court "reject[ed] any contention that substantive federal law by its own force necessarily overrides the sovereign immunity of the States." *Alden*, 527 U.S. at 732. "Sovereign immunity principles enforce an important constitutional limitation on the power of the federal courts." *Sossamon v. Texas*, 563 U.S. 277, 284 (2011). "Although the sovereign immunity of the States derives at least in part from the common-law tradition, the structure and history of the Constitution make clear that the immunity exists today by constitutional design." *Alden*, 527 U.S. at 733. "There is simply no precedent that the doctrine of sovereign immunity is waived by the mere fact of the presence of the [T]akings [C]lause in the Constitution. To the contrary, one can find statements that sovereign immunity is limitless and that it applies even to rights granted by the Constitution." *Trinco Inv. Co.,* 140 Fed. Cl. at 534.

Sovereign immunity bars claims against a state unless that state's legislature has expressly consented. Malet, *supra*, at § 19.08. The "'power granted by the Constitution' does not embrace

authority to entertain such suits in the absence of the State's consent." *Alden*, 527 U.S. at 754 (citation omitted). "[S]overeign immunity 'protects all levels of governments from legal action unless they have waived their immunity from suit[.]'" *Ramos v. Owens*, 881 S.E.2d 464, 446 (Ga. Ct. App. 2022) (citation omitted in original).

As discussed below, the federal government recognized the requirement to waive sovereign immunity by passing statutes providing waivers in specific situations. For example, two commonly used federal statutes authorize a claim against the federal government, waiving sovereign immunity, when there is an alleged violation of constitutional rights—The Tucker Act and 42 U.S.C. § 1983. "The Tucker Act only applies to federal takings claims filed against the federal government. No court has applied the Tucker Act to the States." *Manning v. Mining & Mins. Div. of the Energy, Mins. & Nat. Res. Dep't,* 144 P.3d 87, 96 (N.M. 2006). Regarding state actors, 42 U.S.C. § 1983 expressly crafted a "species of liability in favor of persons deprived of their federal civil rights by those wielding state authority." *Felder v. Casey*, 487 U.S. 131, 139 (1988). This Court, however, has held that § 1983 does not apply to states because "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) (citation omitted). Additionally, this Court has held states retain their sovereign immunity unless explicitly waived, and § 1983 "does not abrogate the States' sovereign immunity." *Ladd v. Marchbanks*, 971 F.3d 574, 578 (6th Cir. 2020). Both the Tucker Act and § 1983 demonstrate the government's recognition of the need for a waiver of sovereign immunity outside of the Constitution.

Claims are commonly dismissed for failure to state a claim when the state maintains its sovereign immunity. This Court upheld a dismissal of claims where the state had not waived its sovereign immunity, even where the state accepted federal funds under a federal act. *Sossamon*,

563 U.S. at 1655. This Court also upheld a dismissal on sovereign immunity principles, reasoning that "the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts." *Alden*, 527 U.S. at 712. The Georgia Court of Appeals dismissed claims against a sheriff, in his official capacity, on the grounds that the plaintiff failed to establish that Georgia waived its sovereign immunity. *Ramos,* 881 S.E.2d at 467. The Supreme Court of Delaware dismissed claims against a state agency when it found no waiver of its sovereign immunity. *Lee Lifeng Hsu v. Wooters*, No. N23C-05-052 FJJ, 2023 Del. Super. LEXIS 794, *6 (Super. Ct. Oct. 3, 2023). Since sovereign immunity implicates subject matter jurisdiction, this doctrine provides a basis for a court to grant a state's motion to dismiss. Malet, *supra*, at § 19.08. Therefore, affirming is well within this Court's authority.

Sovereign immunity applies to states, not municipalities. *Jinks v. Richland Cty.*, 538 U.S. 456, 466 (2003). Critically, Petitioners' reliance upon *Knick v. Township* is misguided as *Knick* is distinguishable from the present case. In *Knick*, the claim was against a municipality, not a state. *Knick v. Twp. of Scott*, 588 U.S. 180, 185 (2019). *Knick* was therefore decided because the municipality "ha[s] no entitlement to sovereign immunity under the Eleventh Amendment." *EEE Mins., LLC,* 81 F.4th at 816 (summarizing *Knick).* Similarly, in *Jinks*, this Court stated that "[a]lthough we have held that Congress lacks authority under Article I to override a *State's* immunity from suit in its own courts . . . may subject a *municipality* to suit in state court if that is done pursuant to a valid exercise of its enumerated powers." *Jinks*, 538 U.S. at 465-66 (citation omitted) (emphasis added).

New Louisiana's sovereign immunity is as important today as it was at the nation's founding. Petitioners cannot cite a statute expressly or impliedly waiving New Louisiana's

sovereign immunity for a takings claim. Therefore, Petitioners are without legal authority to bring their claim.

Not requiring a waiver of sovereign immunity from New Louisiana would be a complete rejection of the "all embracing" principle of state sovereign immunity. James Madison unequivocally declared, "[i]t is not in the power of individuals to call any state into court." 3 Debates on the Constitution 533 (James Madison) (J. Elliot ed. 1876). Petitioners lack the power to call New Louisiana into court, therefore, no relief may be granted.

2. *The principles of federalism support New Louisiana's sovereign immunity.*

"Sovereign immunity principles enforce an important constitutional limitation on the power of the federal courts." *Sossamon*, 563 U.S. at 284; *see also Pennhurst State School and Hospital* v. *Halderman*, 465 U.S. 89, 98 (1984). "[A]s the Constitution's structure, and 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[.]" *Alden,* 527 U.S. at 713.

"Even where states . . . allowed such claims in *state* courts through their judge-made law, statutes, and constitutions, the state was not treated as having consented to suit in the *federal* courts." Ann Woolhandler, Julia D. Mahoney & Michael G. Collins, *Takings and Implied Causes of Action*, CATO SUPREME COURT REVIEW 249, 258 (2024) (emphasis added). "[C]onsent to be sued in state court has not been treated as consent to being sued in the lower federal courts." *Id.* at 259. "Congress has not abrogated state sovereign immunity for takings claims." *Id.* at 260. When a plaintiff brings a takings claim against a state official in federal court, without the state waiving its sovereign immunity, the claim will be dismissed. *DLX, Inc. v. Kentucky*, 381 F.3d 511, 528 (6th Cir. 2004), *cert denied*, 544 U.S. 961 (2005)*, overruled on other grounds* by *San Remo*

Hotel, L.P., v. Cnty. of San Francisco, Cal., 545 U.S. 323 (2005). Under the same rule, Petitioners' claim cannot be supported.

The Founders understood the need for powers to be separated through federalism. "Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States." The Federalist No. 81, at 488.

New Louisiana, as all states, maintains its sovereign immunity unless waived. Here, New Louisiana has not done so through either statute or consent. Rather, New Louisiana's legislature enacted statutes specifically requiring a statutory or executive waiver of sovereign immunity for a takings claim.

The State has not waived its sovereign immunity, therefore this Court must affirm New Louisiana's motion to dismiss.

CONCLUSION

For the foregoing reasons, this Court should affirm the Court of Appeals for the Thirteenth Circuit's judgment.

Respectfully submitted on this 20th day of October 2024.

Team 23
Counsel for Respondent

APPENDIX A

U.S. CONST. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX B

U.S. CONST. amend. XI

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.

APPENDIX C

U.S. CONST. amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.