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

TEAM NUMBER 28
Counsel for Respondent

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QUESTIONS PRESENTED

(1) Whether the State's exercise of eminent domain for economic development purposes constitutes a valid "public use" under the Fifth Amendment as applied to the states through the Fourteenth Amendment
(2) Whether, despite minimal textual support and ample historical evidence suggesting the contrary, the Fifth Amendment's Takings Clause creates a cause of action against a state for just compensation in the absence of an independent statutory or common law remedy

STATEMENT OF THE CASE

Factual Background

The State of New Louisiana is working tirelessly to revitalize its economy. R. at 1. As part of that effort, the New Louisiana government is pursuing policies that will create jobs and increase tax revenue. R. at 1–2. More jobs will lead to greater prosperity for New Louisianans and new tax revenue can be reinvested in local communities to ensure the state's long-term economic health. R. at 2.

The New Louisiana legislature took a major step towards achieving those goals by passing the Economic Development Act ("The Act"). R. at 1. The Act authorized the New Louisiana governor to pursue these economic revitalization efforts by contracting with businesses to expand the State's tourist attractions and create new jobs. R. at 1–2. After the Act took effect, Governor Anne Chase moved quickly to pursue these economic development efforts for her constituents. R. at 2. She set the stage for the construction of a new luxury ski resort right on the edges of the state capital and contracted with Pinecrest, Inc. ("Pinecrest") to build it. *Id.* Projections indicate this development will significantly increase tax revenue for the area, attract wealthy tourists who will spend their money at New Louisiana businesses, and create thousands of new jobs. *Id.* Fifteen percent of the tax revenue from the ski resort will also be allocated toward furthering local economic revitalization efforts. *Id.* The ski resort is being built on 1,000 acres of land which previously belonged to 100 different property owners. *Id.*

Consistent with the Supreme Court's decision in *Kelo v. City of New London*, 545 U.S. 469, 484 (2005), New Louisiana law permits the State to condemn private property to pursue economic development. See NL Code § 13:4911; R. at 2. Additionally, there are no general statutory or common law causes of action under New Louisiana law which property owners can use to sue the State for a taking. R. at 2, 6. Under NL Code § 13:5109, statutory or executive

waiver of sovereign immunity is required for a property owner to make such a claim for just compensation. R. at 2. New Louisiana has not waived its immunity in any way for the ski resort project. *Id.* Despite the property owners having no avenue through the courts to seek just compensation under state law, the State nonetheless made offers to purchase the properties from the 100 owners. R. at 2–3. Ninety of those owners agreed to sell their land for the project. R. at 2. Ten, however, refused. R. at 3.

The holdout property owners are largely from small family-owned farms and single-family homes in a poor, predominantly minority neighborhood. R. at 2. On most of the farms, the soil conditions are poor and plots are overgrown. *Id.* This has nearly eliminated any value the properties had as farmland. *Id.* Many of the homes on these properties are also in dismal condition and require significant improvements. R. at 3. These aforementioned factors, on top of sentimental attachments and they could not afford to find new housing, influenced the ten owners to refuse to accept the State's offers to purchase their properties. *Id.*

On March 13, 2023, New Louisiana approved Pinecrest to begin construction for the ski resort on the ninety properties that the State had purchased. R. at 3. Simultaneously, the State commenced eminent domain proceedings against the owners of the ten holdout properties.

Procedural History

Two days later, on March 15, 2023, the ten holdout property owners—with Karl Fischer as the lead plaintiff—filed a lawsuit against the State under the Fifth and Fourteenth Amendments in the United States District Court for the District of New Louisiana. R. at 2–3. The plaintiffs sought injunctive relief for violations of the Fifth Amendment's Takings Clause, arguing that New Louisiana's taking was not for public use. R. at 3. In the alternative, they claimed that the State owed just compensation for any takings deemed valid. *Id.* Pursuant to Rule

12(b)(6) of the Federal Rules of Civil Procedure, New Louisiana filed a motion to dismiss the plaintiffs' lawsuit for failure to state a claim. *Id.*

Responding to the first claim, the State pointed to this Court's ruling in *Kelo v. City of New London*, which held that a taking for economic development is a proper "public use" under the Takings Clause. 545 U.S. 469, 484 (2005); R. at 3. The State noted that its claim of eminent domain is consistent with what *Kelo* permits, making New Louisiana's plan for the ski resort a valid public use. R. at 3. As for the second claim, New Louisiana argued that the Takings Clause is not self-executing with respect to a cause of action seeking just compensation. *Id.*

The District Court granted the State's motion, holding that the taking was valid and that the plaintiffs have no claim to seek just compensation. R. at 4. The court recognized that the Pincecret project clearly falls within the takings conferring an economic development benefit that the *Kelo* holding permits. R. at 5. The opinion also carefully navigated the claim for just compensation. R. at 5–8. Reviewing the history of the Takings Clause, as well as principles of sovereign immunity, the court concluded that (1) "another source of law must provide the right to seek just compensation because the Fifth Amendment does not include an implied cause of action," and (2) statutes like the Tucker Act and 42 U.S.C. § 1983 did not simply waive sovereign immunity for takings claims against the federal government, but provided the very causes of action for property owners to seek just compensation. R. at 8. An independent source of law would therefore be necessary for plaintiffs to sue New Louisiana for just compensation, and no such law exists. *Id.* Accordingly, the court dismissed the case with prejudice. *Id.*

On appeal, the Thirteenth Circuit Court of Appeals affirmed the ruling of the District Court. R. at 10. This Court then granted certiorari upon appeal by Petitioners and scheduled Oral Argument for the October Term of 2023. R. at 20.

SUMMARY OF THE ARGUMENT

The Court should affirm the Thirteenth Circuit's holdings on both questions presented. *Kelo v. City of New London* has settled the law on public use takings for nearly two decades. Further, none of the stare decisis factors weigh in favor of overturning the decision. Its reasoning is sound: legislatures, not courts, are best-positioned to determine public needs, and they deserve broad policy deference as to which of those needs justifies the use of the takings power. This principle has been applied and built upon consistently for more than half a century in a line of cases that have a clear, logical throughline. The standard is also clearly workable, as the broad legislative discretion makes for easy application of the rule to subsequent cases and few thorny issues for courts to parse through. Overturning *Kelo* would undermine decades of reliance on the decision and create significant roadblocks for New Louisiana and other state or local governments that wish to engage in economic revitalization efforts.

The Thirteenth Circuit also correctly concluded that the Takings Clause does not, on its own, create a cause of action against a state to seek just compensation. Constitutional rights are generally defensive, not offensive. The rights protect people from government overreach. They do not, however, provide the people a tool to sue to the government for damages arising from such conduct. The text and post-ratification history of the Takings Clause both confirm this. The Fifth Amendment itself neither explicitly provides for nor implies a cause of action for damages that property owners can use against the government. Rather, the history of private congressional bills and common law claims for trespass against governments paint the opposite picture. Just compensation is a condition on governments conducting public use takings, not a constitutionally guaranteed remedy that property owners can seek absent an independent claim. This Court has never disputed this notion and it should not do so now.

ARGUMENT

I. *Kelo* Should Not be Overruled and It Properly Outlines the Scope for Public Use

A. New Louisiana's Economic Revitalization Plan is a Valid Taking

New Louisiana satisfied the "public use" requirement of the Fifth Amendment's Takings Clause when it initiated eminent domain proceedings against the plaintiffs' properties to pursue economic development. The Fifth Amendment allows takings for public use. This Court has consistently construed "public use" broadly to include takings that confer an economic benefit. This broad construction of "public use" has well established roots in Supreme Court precedent. It began as early as *Berman v. Parker* in 1954, when this Court wrote that "the acquisition and the assembly of real property and the leasing or sale thereof for redevelopment pursuant to a project area redevelopment plan . . . is hereby declared to be a public use." 348 U.S. 26, 29 (1954). The Court further reiterated this broad conception of "public use" in *Haw. Hous. Auth. v. Midkiff*, equating the takings power with the state's inherent police powers:

> The people of Hawaii have attempted, as much as the settlers of the original 13 colonies did, to reduce the perceived social and economic evils of a land oligopoly traceable to their monarchs . . . . Regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers.

467 U.S. 229, 241-42 (1984). This indicates that public use is not narrowly configured to its literal definition, nor a singular policy scheme. Both *Berman* and *Midkiff* guided the Court when it decided *Kelo v. City of New London*, a decision which extended their conception of public use in relation to the Takings Clause. In *Kelo*, the Supreme Court outlined a new contour to the public use justification. The Court "has defined that concept broadly, reflecting its longstanding policy of deference to legislative judgments as to what public needs justify the use of the takings power." 545 U.S. 469. *Kelo* affirmatively approves redevelopment plans that are not explicitly

constructed for public use – such as a park, apartment complex, or public golf course. As long as the government taking has some public purpose as the thrust of its vision, and it is not removing property from one private individual to another private individual solely for the latter's benefit, the taking will likely fall under the affirmative precedent of *Kelo*.

Specifically, *Kelo* sharpens the contours of what "public use," really means. In granting *cert*, the Supreme Court intended to answer the question of whether a city's decision to take property for the purpose of economic development satisfies the "public use" requirement of the Fifth Amendment." *Id.* at 477. As outlined above, the *Kelo* court articulates that "the City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party." *Id.* Furthermore, there is a genuine public purpose requirement, "[n]or would the city be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." *Id*. at 478. Any development plan under *Kelo*, the first primary requirement of a proper taking requires a "carefully considered development plan." *Id.*

Importantly, *Kelo* indicates that the redevelopment plan does not require the private lessees, or benefactors of the taking, to operate as common carriers, or to provide their services to all interested comers. "[T]his 'Court long ago rejected any literal requirement that condemned property be put into use for the general public." *Id.* at 479. Pinecrest, Inc.'s ski resort development plan would ostensibly be open to the public, for all that could patronize this establishment in New Louisiana. It would also dramatically increase tax revenue in the State, attract interstate and intrastate tourism, and support 3,470 new jobs. R. at 2. Additionally, 15% of the tax revenue generated by the Pinecrest resort would be used to revitalize and support the immediate community to ensure long-lasting benefits. *Id.*

On top of being broadly interpreted, "public use" is not narrowly circumscribed to a literal definition. "The concept of the public welfare is broad and inclusive …. The values it represents are spiritual as well as physical, aesthetic as well as monetary. . . there is nothing in the Fifth Amendment that stands in the way." *Kelo v. City of New London*, 545 U.S. 469, 481 (2005) (citing *Berman*, 348 U.S. at 33). Given such a broad construction of "public purpose", States themselves can expand or narrow this application as they see fit. "States already impose 'public use' requirements that are stricter than the federal baseline." *Id.* at 489.

Here, New Louisiana's state law determines that this is a taking for economic development, and thus a valid public use that satisfies a genuine public purpose and is therefore well within the confines of the state law itself. Therefore, the Supreme Court's precedent in *Kelo*, that "over a century of our case law interpreting that provision dictates an affirmative answer to that question, we may not grant petitioners the relief that they seek." *Id.* at 490. Pinecrest's taking of private property for the purpose of legitimate economic development serves a public purpose and constitutes a valid public use under the Fifth Amendment. New Louisiana's use of eminent domain in this case is constitutionally valid because it envisions revitalizing an economically distressed area, which not only benefits the entire community with economic growth, tourism, additional tax revenue, and thousands of jobs, but also improves the quality of life of New Louisiana's residents.

B. Overturning Decades of Precedent Is Not Appropriate In This Case

This case aligns with *Kelo*, and the longstanding precedent interpreting "public use." There is a strong presumption of Stare Decisis in our judicial history because it promotes stability and fairness. After the Supreme Court's decision in *Dobbs v. Jackson's Women's Health Org.*, the process for overturning Supreme Court precedent has become more explicitly defined than before. There are four main considerations that shape the stare decisis analysis the Supreme

Court must make. The first is the quality of the reasoning, how logically does the present case flow from the reasoning of prior cases. The second is the workability of the rule, how easily the rule can be understood and applied in a consistent and predictable manner. The third is consistency with other related decisions, whether or not there is a tension between this decision and those preceding it. Lastly, the reliance factor indicates whether overturning this decision would impact how communities calculate and trust significant impacting legal decisions. In terms of New Louisiana's redevelopment project, none of the four outlined factors indicate a legal tension significant enough to depart from the precedent established by *Kelo*.

Addressing the first factor, the quality of the reasoning applied here, and in *Kelo* and its predecessors indicate a consistent century of expanding public use precedent in regard to the state's power of eminent domain. *Berman*, *Midkiff*, and *Kelo* demonstrate a consistent logical flow that only expands on the category of "public use." *Berman* and *Midkiff* established that public use includes private takings that serve a legitimate public purpose such as beautification or redevelopment of a blighted area, or breaking up land oligopolies. *Kelo* expands on this same reasoning and adds economic development to the valid conceptions of proper government eminent domain takings. The *Kelo* decision indicates that economic development benefits the public, whether through establishing long term economic growth, or aesthetic rehabilitation. Here, Pinecrest's redevelopment fits squarely into the precedent carved out by *Kelo*. There is very little to distinguish the legal questions in this case from *Kelo* itself. The economic projections indicate a thorough vision for development, tax revenue, and job creation. Furthermore, this private taking is not merely a pretext for a purely private taking from one individual to another with no consideration for "public use". The quality of Kelo's reasoning is sound and flows directly from the past eminent domain precedent already established.

C. *Kelo*'s Rule Is Workable and Can Be Easily Applied

When analyzing stare decisis, "the workability factor requires the court to assess how easily a rule can be understood in a consistent and predictable manner." R. at 12 (citing *Dobbs v. Jackson's Women's Health Org.,* 597 U.S. 215, 280-81 (2022)). This is important to maintain the stability of the law over time, allowing governments to confidently plan for the future, while also promoting fairness and uniformity in judicial decision making. Thankfully, *Kelo* is not a difficult ruling to understand nor apply. "*Kelo* creates a straightforward rule that provides flexibility for the government to serve the public good." R. at 12. The trend of eminent domain cases that have expanded the "public use" configuration, while simultaneously maintaining bright line prohibitions against takings that only confer private benefits, demonstrate that the *Kelo* rule is sound and easily administered, especially as applied to this case. "The more flexible rule that evolved to the holding in *Kelo* is more workable than a strict interpretation of public use and better serves the purposes of the Takings Clause." *Id.* Overturning *Kelo* risks unnecessarily overburdening the judicial system as a whole and overturning a century of Supreme Court precedent broadly interpreting the "public use" configuration of the Fifth Amendment.

D. This Decision Is Consistent With Public Use Precedent

The consistent thread between *Berman*, *Midkiff*, *Kelo*, and this case is the clear articulation of public use identified throughout. These cases, and other related Takings cases, identify that the Supreme Court has consistently supported the idea that public use includes a wide range of public purposes, even if private entities could conceivably benefit from the taking. In Pinecrest's redevelopment plan, it is arguable that the public has *greater* access to the fruits of this taking – the eventual ski resort redevelopment – than the "public" did in *Kelo*, a private research facility for Pfizer. Regardless, these eminent domain decisions support the broad

judicial deference to legislative bodies to determine what constitutes the public interest as articulated by "public use." These consistent decisions demonstrate that *Kelo* fits within a broader established jurisprudence, or framework, reinforcing the presumption of stare decisis.

E. *Kelo* Is Strongly Relied Upon

Reliance upon *Kelo* is extremely important for the proper economic development plans of government and private contractors to operate efficiently. Because New Louisiana's eminent domain laws track the limits of federal law, the State and its developers both rely upon the two decades of settled *Kelo* precedent in managing and developing economic projects. These expectations provide the infrastructure for the negotiations and planning that accompany complex redevelopment projects. While *Dobbs* overturned decades of precedent, it dealt with an unenumerated right. *Kelo* deals directly with a constitutionally enumerated provision and the proper interpretation of "public use." Its rule came from interpretation of the Fifth Amendment itself, not judicial invention. This constitutional provision also has long standing historical precedent. Although *Kelo* has established reliance factors for the last two decades, eminent domain jurisprudence has remained consistent within the Supreme Court for a century.

While *Dobbs* and *Kelo* involve significant reliance interests, and the Supreme Court has established a recent direction overturning precedent, the justification for upholding *Kelo* under stare decisis should remain ironclad. The constitutional grounding of the Takings Clause is directly interpreted by *Kelo*, and property law is much more settled overall than the law regarding the nature of unenumerated constitutional rights. The reliance issues are also more aligned with commercial, financial, and governmental planning, where legal predictability is essential. These reliance issues are embedded within the legal and economic expectations.
For the aforementioned reasons, this Court should affirm the judgment of the Court of Appeals.

II. The Takings Clause Does Not Provide a Cause of Action Against a State

The Court of Appeals correctly held that the Fifth Amendment's Takings Clause does not, on its own, provide plaintiffs a cause of action to seek just compensation from New Louisiana. Constitutional rights generally do not supply justiciable causes of action. It is the job of *legislatures* to create the avenues for citizens to pursue remedies, not courts. Nothing about the Fifth Amendment's Takings Clause refutes these established principles. A careful review of the text, history, and jurisprudence surrounding the Takings Clause makes that clear.

The Takings Clause has never been understood to provide a cause of action against a state. Its text makes no mention of any judicial mechanism to enforce the right. The Clause acts as a substantive bar on government taking of private property for public use absent just compensation, not an affirmative right to pursue just compensation. In other words, the Takings Clause shields people from an overreaching government. It does not give people a sword to swing back at the government without an *independent* cause of action providing such force.

Post-ratification history affirms this understanding. Until the late nineteenth century, Congress—not courts—addressed just compensation claims exclusively, and did so by passing private bills. Congress did not enable claims against the federal government and municipalities in federal court only until it enacted the Tucker Act and 42 U.S.C. § 1983. These acts waived the sovereign immunity that would otherwise bar such claims. New Louisiana has not crafted such a claim, meaning they have not waived that immunity and cannot be hauled into federal court.

Prior precedents do not alter this reality. All the Court's prior Takings Clause cases were either brought under separate sources of law or sought equitable relief, not just compensation. While the right to just compensation attaches upon the taking, the Takings Clause is not itself the instrument through which petitioner may seek that remedy against a State.

A. The Takings Clause's Text Does Not Create a Cause of Action

The Fifth Amendment's Takings Clause provides that "private property" shall not "be taken for public use, without just compensation." U.S. CONST. amend. V. This language serves as a constraint on the government's ability to take private property for public use. That is the only right that the text of the Takings Clause grants to the people: the protection against such government conduct. On top of the *right*, the Clause also grants a *remedy*. The government must provide people just compensation if it takes their private property for public use. It is not that the government lacks the power to conduct such a taking. The Takings Clause simply imposes a necessary condition—just compensation—for a taking to be lawful.

Rights and remedies, however, are distinguishable from *causes of action*. The text of the Takings Clause is distinct from other constitutional amendments and provisions in the sense that it explicitly contemplates the remedy for a violation of its proscription of certain government conduct. However, nothing in the text of the Takings Clause or the Fifth Amendment explicitly lays out or implies that a cause of action lies within.

The text of the Takings Clause does not suggest that potential plaintiffs can file lawsuits to obtain compensation in court. Nor does anything within that text indicate that the Takings Clause alone provides a cause of action for damages if Congress does not make compensation available. In fact, the Clause makes no mention of how to enforce that remedy. It therefore follows that the Takings Clause's mandate for just compensation does not amount to an express creation of a cause of action to sue for that compensation. *See, e.g., Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1016–17 (1984) (noting that the Tucker Act, not the Fifth Amendment, provides the source of law and forum for seeking just compensation for takings conducted by the federal government). Nor should the Court imply one, as a long line of precedents make clear

that doing so is a "disfavored judicial activity." *Ziglar v. Abbasi*, 582 U.S. 120, 135 (2017); *see also Hernandez v. Mesa*, 589 U.S. 93, 100 (2020) (noting that "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").

B. Post-Ratification History Verifies That the Takings Clause Does Not Create a Cause of Action For Just Compensation

The Founders did not understand the Takings Clause to inherently provide a cause of action. At the time of the founding, "there were no general causes of action through which plaintiffs could obtain compensation for property taken for public use." *Knick v. Township of Scott*, 588 U. S. 180, 199 (2019) (citing Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57, 69–70, and n. 33 (1999)). Instead, citizens had to request "individually tailored waivers of sovereign immunity, through private Acts of Congress," in order to seek just compensation for a public use taking. *Libr. of Cong. v. Shaw*, 478 U.S. 310, 316 n. 3 (1986) (citing WILSON COWEN, ET AL., THE UNITED STATES COURT OF CLAIMS, PART II 4 (1978)). These private bills provided citizens the only avenue to seek just compensation for nearly for nearly a century after the founding. *Id.* Legislatures would sometimes "create a special owner-initiated procedure for obtaining compensation" if they passed bills which authorized government takings. *Knick*, 588 U.S. at 199. But as a general matter, "there usually was no compensation remedy available to property owners." *Id.*

In fact, any claim seeking monetary damages from the United States Treasury remained unavailable until Congress created the Court of Claims in 1855, largely because Congress itself remained unsure whether it even could waive sovereign immunity for decades after the founding. Michael Dichio, Logan Strother & Ryan J. Williams, *"To Render Prompt Justice": The Origins*

and Construction of the U.S. Court of Claims, 36 STUDIES IN AMERICAN POLITICAL DEVELOPMENT 120, 120 (2022). The Takings Clause also did not even apply to state governments until the ratification of the Fourteenth Amendment. *Barron v. City of Baltimore*, 32 U.S. 243, 250 (1833) (holding that the Fifth Amendment does not apply to state governments); *Chi.*, *Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 239 (1897) (reversing course and holding that the Due Process Clause of the since-ratified Fourteenth Amendment incorporates the requirements of the Fifth Amendment onto state governments).

Instead, or about the first ninety years of the nation's history, "the typical recourse of a property owner who had suffered an uncompensated taking was to bring a common law trespass action against the responsible corporation or government official." *Knick*, 588 U.S. at 199. The officials would then "raise the defense that his trespass was lawful" because it was "authorized by statute or ordinance," at which point the plaintiff would invoke the Takings Clause to challenge that law's constitutionality since "it provided for a taking without just compensation." *Id.* Even if the plaintiff prevailed on this argument, they would have "had no way at common law to obtain . . . just compensation for the total value of [their] property." *Id.* His only available remedies would have been "retrospective damages, as well as an injunction ejecting the government from his property going forward." *Id.* (citing Brauneis, *supra*, at 67–69, 97–99).

The immunity aspect changed in the final decades of the nineteenth century. First, Congress enacted the Civil Rights Act of 1871, which included amongst its provisions 42 U.S.C. § 1983 ("Section 1983"). Section 1983 enabled people to sue persons acting "under color of law" for violating their federal constitutional rights. 42 U.S.C. § 1983. Nearly two decades later, in 1887, Congress passed the Tucker Act. 28 U.S.C. § 1491. This Act saw the government waive sovereign immunity with respect to certain lawsuits—namely Fifth Amendment takings

claims—and assign them to the Court of Claims.[1] Both of these laws waived some degree of sovereign immunity that could be invoked against takings claims.

However, those waivers do not apply to state governments. Petitioners properly conceded below that they cannot pursue claims against New Louisiana under either Section 1983 or the Tucker Act. R. at 10. This is because "persons" under Section 1983 do not include state governments or state officials acting in their official capacities. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 63 (1989). Further, the Tucker Act only provides claims against the federal government, not states. 28 U.S.C. § 1491. The federal government and the federal government alone waived of sovereign immunity in these contexts.[2]

States, like the federal government, have sweeping sovereign immunity protections. These protections are a "fundamental aspect of sovereignty which the states enjoyed before the ratification of the Constitution, and which they retain today." *Alden v. Maine*, 527 U.S. 706, 713 (1999). The Eleventh Amendment—ratified less than a decade after the Constitution itself and less than five years after the Bill of Rights—clarifies and crystallizes a broad scope of these protections, making "explicit reference to the States' immunity from suits 'commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.'" *Id.* at 712–13 (citing U.S. CONST. amend. XI). States can certainly waive sovereign immunity. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984). However, waivers of this protection are not lightly assumed. The State's consent must be "unequivocally expressed." *Id.* New Louisiana has not made such a waiver. Under NL Code § 13:5109, the State must make a "statutory or executive waiver of sovereign immunity . . . for a

[1] The Court of Claims was renamed the Court of Federal Claims and reorganized into the appellate division of the newly created Federal Circuit as part of the Federal Courts Improvement Act of 1982. 28 U.S.C. §§ 1491–1509.
[2] The Court has also held that municipalities or other local governments may be sued under Section 1983. *Connick v. Thompson*, 563 U.S. 51, 60 (2011) (citing *Monell v. New York City Dep't of Social Servs,*, 436 U.S. 658, 692 (1978). However, this is irrelevant in the current context because New Louisiana is a state, not a municipality.

property owner to obtain just compensation from the State for a taking." R. at 2. The District Court properly noted that the New Louisiana legislature did not "waive[] immunity generally or specifically" in the Economic Development Act. *Id.*

Taken together, the history of the Takings Clause, combined with principles of the aforementioned sovereign immunity, points to the Takings Clause not being self-executing with respect to a cause of action seeking just compensation. Had they understood the Takings Clause in the way Petitioners advocate it should be, Congress would not have felt the need to create a separate court and expressly waive sovereign immunity over takings claims. We would also have a more robust record of just compensation claims against States and the United States than the early United States history of takings litigation provides.

C. This Court Has Not Held that the Takings Clause Creates a Cause of Action For Just Compensation

While the Court has written that the Fifth Amendment's Takings Clause has a "self-executing character…with respect to compensation," it does not follow that the Clause provides a cause of action on its own force. *First English Evangelical Lutheran Church v. Cnty. of L.A.*, 482 U.S. 304, 315 (1987). The Court granted certiorari and heard arguments last term in *DeVillier v. Texas*, which posed the same question presented in this case. 601 U. S. 285, 290 (2024). However, the Court disposed of the case without answering the central question because it found that the plaintiff could vindicate his Fifth Amendment rights through a state inverse condemnation claim. *Id.* at 293.

The Court has held that the "just compensation" provision of the Takings clause creates a condition on the exercise of the power to take property for public use. *Id.* at 315. It has also held that plaintiffs need not exhaust state remedies, if available, before pursuing a federal takings claim. *Knick*, 588 U.S. at 185. But neither of these precedents provide the force to back the

notion that plaintiffs can point to the Takings Clause alone to locate a cause of action against New Louisiana.

While the *First English* opinion contained language rejecting the notion that "the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government," it also further elaborated what those words meant by stating that the Fifth Amendment "dictates the *remedy* for interference with property rights amounting to a taking." *First English*, 482 U.S. at 316 n. 9 (emphasis added). Remedies are distinct from causes of action, so the *First English* court "did not silently hold that there is an implied cause of action against the states in the Fifth and Fourteenth Amendments." *DeVillier v. State*, 63 F.4th 416, 426 (5th Cir. 2023) (Higginson, J., concurring). *Knick* similarly fails to resolve this question, as that case dealt with when a property owner could bring a takings claim in federal court under Section 1983, a vehicle Petitioners concede is unavailable to them. *Knick*, 588 U.S. at 185; R. at 10.

Other prior cases decided by the Court likewise provide no insight that favors Petitioner's arguments. There have been prior Takings Clause cases where the plaintiffs did not invoke a separate statutory or state common law claim. *See Dohany v. Rogers*, 281 U.S. 362, 364 (1930); *Delaware, L. & W. R. Co. v. Morristown*, 276 U.S. 182, 188 (1928); *Village 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). However, those were all equitable claims, not claims for damages. *See DeVillier*, 601 U.S. at 292 ("[T]he mere fact that the Takings Clause provided the substantive rule of decision for the equitable claims in those cases does not establish that it creates a cause of action for damages, a remedy that is legal, not equitable, in nature."). The holdings cannot be construed to imply the causes of action that Petitioners hope to find under the Fifth Amendment's hood.

D. Plaintiffs Nonetheless Have Avenues to Pursue Relief from New Louisiana

No parade of horribles would follow if this Court correctly decides that the Fifth Amendment's Takings Clause does not, on its own force, provide a cause of action to seek just compensation against states. Property owners can pursue injunctive remedies to stop state action they believe to be unconstitutional. *See Ex parte Young*, 209 U.S. 123, 149 (1908). This tracks how most lawsuits to vindicate Takings Clause rights unfolded before Congress passed the Tucker Act and most states crafted causes of action through which property owners can seek just compensation. *Knick*, 588 U.S. at 199. In the absence of a cause of action for just compensation, plaintiffs could still seek *Ex parte Young* injunctive relief or pursue common law claims like trespass. If plaintiffs proceed down the latter course, they could obtain both ejectment of the government from their property and any retrospective damages arising from the unlawful taking. *Id.*

Injunctive relief is unavailable in most states only because "nearly all state governments provide just compensation remedies to property owners who have suffered a taking." *Id.* at 200. It follows that even though New Louisiana does not provide an avenue for property owners to seek just compensation for a taking, they may still nonetheless seek this alternative form of relief. The Fifth Amendment is simply not the proper vehicle.

CONCLUSION

This Court should affirm the judgment of the United States Court of Appeals for the Thirteenth Circuit. Respectfully submitted this 21st of October, 2024.

Respectfully submitted,

_____/s/ Team 28 _____

TEAM NUMBER 28

Counsel for Respondent