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 THE RESPONDENT

Team: 4
Counsel for Respondent
October 21, 2024

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QUESTIONS PRESENTED

I. Whether, after two decades, this Court should overrule *Kelo v. City of New London*'s holding that economic development constitutes a "public purpose" within the Fifth Amendment's historically broad definition of "public use," and whether a novel definition of public use should now be assembled?

II. Whether the Takings Clause of the Fifth Amendment meets this Court's strict constitutional tradition and historical precedent that requires a constitutional provision be "complete in itself" to establish a self-executing cause of action?

STATEMENT OF THE CASE

I. Statement of the Facts

Within three of the counties bordering New Louisiana's state capital exists overgrown farmland with poor soil conditions that struggles to grow marketable crops and unsatisfactory housing. R. at 2. Rather than allowing these uneconomical farming operations to continue, Governor Anne Chase contracted with Pinecrest, Inc. to revamp 1,000 acres of the land into a lucrative ski resort. *Id.* Governor Chase acted pursuant to New Louisiana's Economic Development Act, which vests her office the authority to contract with private parties in order to "revitalize the economy" through tourism and job creation. R. at 1–2. Specifically, this project is forecasted to increase tourism, create 3,470 new job opportunities, and increase surrounding property values to the benefit of New Louisiana's business owners and employees. R. at 2. Furthermore, fifteen percent of the tax revenue generated by the ski resort will be reinvested in the surrounding community for their continued revitalization and support. *Id.*

However, the petitioners, ten owners of farms and homes located in the desired 1,000 acres, refuse to sell. *Id.* Their primary reason for holding out is the lands are important to them because their families have owned the properties for a long time. R. at 2–3. They represent only ten percent of the affected property owners; ninety other owners have already sold their property to the State. R. at 2. While their properties do not pose a public safety risk, many of the homes require substantial renovations. R. at 3. These poor conditions have reduced the area's market value. *Id.*

On March 13, 2023, construction began on the ski resort, and New Louisiana commenced eminent domain proceedings against the holdout owners. R. at 3. In New Louisiana, takings for economic development are expressly permitted by statute under NL Code § 13:4911. R. at 2.

Furthermore, to receive just compensation in the form of monetary relief, NL Code § 13:5109 requires that New Louisiana waive its sovereign immunity, either statutorily or executively. *Id.* The State has not done so. *Id.*

II. Procedural History

Two days later, on March 13, 2023, the holdout owners sued the State of New Louisiana in the United States District Court for the District of New Louisiana. R. at 1, 3. They sought to enjoin the State from condemning their property by claiming that New Louisiana violated the Fifth Amendment's "public use" requirement as incorporated by the Fourteenth Amendment. R. at 3. Alternatively, they requested a monetary award of just compensation. *Id.* New Louisiana, without answering, moved to dismiss the matter under Federal Rule of Civil Procedure 12(b)(6). *Id.* It contended that the issue of "public use" had already been decided under *Kelo v. City of New London*, 545 U.S. 469 (2005), which permits takings for economic development. R. at 3. Furthermore, the State argued that the Fifth Amendment is not self-executing and, therefore, the holdout owners were precluded from bringing a monetary compensation claim in the absence of a statute providing such relief. R. at 3–4. In response, the holdout owners proposed that the takings would not be consistent with the Takings Clause's text and history. R at 4. They further argued that the Takings Clause is self-executing and that there is no need for a statute to provide a cause of action for monetary relief. *Id.*

The district court agreed with New Louisiana as to both issues. *Id.* It found *Kelo* determinative as to the takings' validity and that there must be another source of law outside of the Constitution's text to bring a claim for just compensation R. at 5, 8. The United States Court of Appeals for the Thirteenth Circuit affirmed. R. at 10.

On August 17, 2024, this Court granted the holdout owner's Petition for Writ of Certiorari. R. at 20. There are two issues for review. First, should *Kelo v. City of New London* be overruled, and if it is, what should be considered a valid "public use"? *Id.* Second, does the Takings Clause create a self-executing cause of action for just compensation against a state? *Id.*

SUMMARY OF THE ARGUMENT

The United States Court of Appeals for the Thirteenth Circuit correctly affirmed the dismissal of Petitioners' claims for injunctive relief and just compensation. First, the holding of *Kelo v. City of New London* expressly permits state takings for economic development; therefore, injunctive relief is impossible. Second, this Court has historically disfavored finding implied causes of action hidden in constitutional provisions and has never derived a cause of action from the Takings Clause; therefore, there is no claim for monetary relief in the form of just compensation. This Court should affirm the Thirteenth Circuit's decision and hold that *Kelo* is *not* overruled and that no implied cause of action exists under the Takings Clause.

***Kelo* does not bear the characteristics of a decision that should be overturned, and there are no prudential alternatives that can take its place.** The stare decisis factors this Court uses when reconsidering its prior decisions reveal that *Kelo* was correctly decided in 2005 and remains correct nearly twenty years later. *Kelo*'s holding, which included economic development takings within this Court's broad reading of "public purpose," was reached through high-quality reasoning. The framework laid out in the decision is workable as well as consistent with a century of this Court's precedent. The Court expressly allowed states to add their own unique limitations to their eminent domain power—which they did. The states that still permit takings for economic development, like New Louisiana, rely on *Kelo* when drafting eminent domain legislation or exercising their takings power. Furthermore, there is no superior alternative

that can take *Kelo*'s place. "Use by the general public" is an antiquated standard that has long been recognized as unwieldy in its application and inconsistent in its results. Likewise, maintaining public purpose as the standard but deeming economic development as an invalid public purpose invites judicial legislation and makes this Court's public purpose framework less consistent and workable.

The Takings Clause provides the right to just compensation but no procedure through which that compensation may be claimed, and it is unconstitutional for a federal court to force a state to pay just compensation to private persons. There is a reason no claim for just compensation has ever been brought successfully under the Takings Clause alone in the hundreds of years of the Fifth Amendment's existence: The clause is not self-executing. The Takings Clause delineates a landowner's right to receive just compensation for a government taking of his property, but the clause is utterly silent when it comes to vindicating that right. Instead, property owners have always had to resort to other sources of law to bring claims for just compensation against their governments. Moreover, state sovereignty is a fundamental principle of our government—so much so that, absent its guarantee, the Constitution likely would not have been ratified. A crucial aspect of state sovereignty is a state's right not to be sued in federal court for monetary damages absent that state's consent.

Kelo was decided two decades ago but is founded upon a century of consistent decisions that promote a broad and deferential reading of public purpose; there is no reason to overrule it. For centuries this Court has not recognized an implied cause of action within the Takings Clause nor abrogated the foundational principle of state sovereignty; there is no reason to do so now. The State of New Louisiana therefore requests that this Court affirm the judgement of the Thirteenth Circuit.

ARGUMENT

I. *Kelo v. City of New London* Does Not Exhibit the Characteristics of a Decision That Overcomes Stare Decisis; Therefore, This Court Should Not Overrule *Kelo* and Replace It with a Substandard Definition of "Public Use."

This Court should adhere to precedent and affirm the United States Court of Appeals for the Thirteenth Circuit. This Court's holding in *Kelo v. City of New London*, 545 U.S. 469 (2005), reinforced established eminent domain jurisprudence, which had been developed and refined for a century. *See, e.g.*, *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 244–45 (1984); *Berman v. Parker*, 348 U.S. 26, 33 (1954); *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531–32 (1906). Importantly, *Kelo* did not expand the permissible scope of federal or state eminent domain power; instead, the decision clarified how extensive the power *already was*. *See Kelo*, 545 U.S. 469, 483 (2005).

Yet, Petitioners want to cast *Kelo* aside. They seek to include *Kelo* among a group of recently overturned cases—these are opinions that this Court has labeled as "exceptionally weak" and "egregiously wrong from the start." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022); *see also, e.g.*, *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2272 (2024); *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 534–35 (2022). But *Kelo* is different. Despite its controversial holding, *Kelo* should not be overruled for two prominent reasons: reverence to stare decisis and the lack of a practical alternative.

First, the factors applied when dealing with issues of stare decisis weigh heavily in favor of retaining *Kelo*'s allowance of economic development takings. *See Janus v. AFSCME, Council 31*, 585 U.S. 878, 917 (2018). This Court produced a workable rule that gives proper deference to the states through its high-quality reasoning in *Kelo*. This is consistent with prior decisions that emphasized the need for judicial deference. Additionally, *Kelo* had a positive subsequent impact and has led to the overwhelming majority of states revising their own eminent domain

schemes. As a result, the states rely on the holding of *Kelo* when examining what takings are permissible and in implementing their unique restrictions on their eminent domain power. Therefore, overruling *Kelo* would frustrate a foundational aspect of stare decisis that precedent "must be followed, unless flatly absurd or unjust." 1 William Blackstone, *Commentaries on the Laws of England* *70.

Second, Petitioners lack a meaningful alternative. One proposed alternative is for this Court to return to its old standard that examines whether the taking is for "use by the general public." *See Kelo*, 545 U.S. at 521 (Thomas, J., dissenting). However, a natural reading of the Takings Clause when it was drafted reveals that "public use" always encompassed "public purposes." Another proposition is that the Court should maintain the public purpose standard but subject state-deemed public purposes to an ongoing judicial check and hold that economic development takings are, in effect, impermissible public purposes. *See id.* at 497 (O'Connor, J., dissenting). However, this makes the established eminent domain framework unworkable and inconsistent with precedent that encourages judicial restraint.

For these reasons, this Court should affirm the United States Court of Appeals for the Thirteenth Circuit and preserve *Kelo v. City of New London*.

A. The recognized stare decisis factors this Court uses when it reconsiders prior decisions confirm that *Kelo* should not be overruled.

The holding that this Court reached in *Kelo* was correct. The power to condemn private property is so broad that this Court has found it "coterminous with the scope of a sovereign's police powers," *Midkiff*, 467 U.S. at 240, and it has been recognized as "the most awesome grant of power under the law of the land." *E.g.*, *Winger v. Aires*, 89 A.2d 521, 522 (Pa. 1952). For over a century, "public use" has encompassed "public purpose." *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 164 (1896). This is a deferential standard that recognizes that "state legislatures

and state courts" have inherent expertise "in discerning local public needs." *See Kelo*, 545 U.S. at 482–83 (citing *Hairston v. Danville & W. Ry. Co.*, 208 U.S. 598, 606–07 (1908)). Economic development takings are naturally encompassed within this standard.

The facts of *Kelo* are familiar to anyone who has endured a law school real property course since 2005. In 1998, New London, Connecticut, reported unemployment rates that roughly doubled the rest of the state and reported its lowest population since 1920. *Id.* at 473. In response, city officials finalized a plan to construct a hotel, restaurants, shops, marinas, a riverwalk, a new neighborhood, a museum, offices, and parking. *Id.* at 474. Pfizer even disclosed it would be developing a $300 million research lab. *Id.* at 473. The city then began purchasing the necessary property, but nine owners, including Susette Kelo, refused to sell. *Id.* at 475. As a result, the city initiated condemnation proceedings against the holdout owners. *Id.*

The owners contended that the planned takings would not be for a "public use" as required by the Fifth Amendment. *Id.* at 475–76; U.S. Const. amend. V. However, the Supreme Court of Connecticut disagreed, holding that the takings would be proper. *Id.* at 476. This Court affirmed and explained that encouraging "economic development is a traditional and long-accepted function of government" and that there is no acceptable manner of "distinguishing economic development from the other public purposes" that the Court had recognized. *Id.* at 484.

There is no reason to disturb this holding. Indeed, the applicable stare decisis factors this Court uses weigh heavily in favor of preserving *Kelo*. *See Janus*, 585 U.S. at 917. Notably, the majority's holding in *Kelo* (1) reinforced an already *workable* rule through *high-quality reasoning*, (2) is *consistent* with over a century of eminent domain precedent, and (3) is *relied* upon by the states as evidenced by *subsequent legislative developments*. Therefore, this Court should not overrule *Kelo v. City of New London*.

1. This Court's excellent reasoning in *Kelo* produced a remarkably workable rule that encourages proper deference to the states.

This Court's reasoning in *Kelo* is *high-quality* and produced a *workable* constitutional floor, which is rooted in the judiciary's traditional understanding of the Fifth Amendment's text and prior precedent. *Cf. Dobbs*, 597 U.S. at 270. This historically focused reasoning guided this Court's analysis to its natural conclusion: Takings for economic development fall within the purview of public purpose and, therefore, public use. *See Kelo*, 545 U.S. at 484 (2005).

Fundamentally, the quality of a court's prior reasoning is imperative when deciding whether to overrule a previous decision. *See, e.g.*, *Janus*, 585 U.S. at 917. Some believe that the quality of a court's reasoning is so important that a threshold showing of *bad reasoning* must be made before reconsideration of the prior decision is entertained. *See* Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 Wash. & Lee L. Rev. 411, 418 & n.28 (2010). Furthermore, if a court's reasoning is poor, the workability of the resulting rule must be called into question. *See id.* at 423 ("[S]aying that a precedent is 'unworkable' is functionally equivalent to saying it is 'badly reasoned.'"). However, a review of *Kelo*'s analysis reveals only first-rate reasoning.

In *Kelo*, this Court began its analysis by laying out a spectrum with impermissible takings at one extreme and permissible takings at the other. *See Kelo*, 545 U.S. at 477. On the impermissible side were purely private takings and pretextual "public" takings—i.e., where the taking's *asserted* purpose was for a public use but "its *actual* purpose was to bestow a private benefit." *Id.* at 477–78 (emphasis added). At the permissible end were takings for "use by the general public" or for use by common carriers. *Id.* at 478. However, these uses, while permissible, are not the sole methods for determining public use. *Id.* at 479 (quoting *Midkiff*, 467 U.S. at 244). Indeed, history demonstrated that such a narrow view produced unmanageable results, and strict compliance had long been obviated. *Id.*

The principle of "public purpose" was recognized in order to fill the gap between the extremes. *Id.* at 480 (citing *Bradley*, 164 U.S. at 158–64). "Public purpose" has been applied in a deferential and broad manner for nearly a century. *Id.* at 480–82; *see* discussion *infra* Section I.A.2. This deference has safeguarded the awareness that "the needs of society [vary] between different parts of the Nation." *Id.* at 482. From New London's perspective, there was a pressing need for economic rejuvenation, and this Court deferred to the city's judgment. *Id.* at 483–84.

This recognition of historical principles and precedent, as well as *proper* deference, is what distinguishes *Kelo*'s reasoning from that of recently overturned decisions. For example, when deciding to overrule *Roe v. Wade*, 410 U.S. 113 (1971), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 883 (1992), this Court detailed just how weak the historical foundations of those opinions were. *See Dobbs*, 597 U.S. at 270. This Court found that *Roe* had "relied on an erroneous historical narrative" and was not derived from the Constitution, history, prior decisions, or any other source. *Id.* at 270. This incorrect historical analysis had even been "silently abandoned" by *Casey*. *Id.* Additionally, this Court recently held that the administrative deference standard expressed in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), afforded agencies *improper* deference and was "misguided because agencies have no special competence in resolving statutory ambiguities. Courts do." *See Loper Bright*, 144 S. Ct. at 2266.

Kelo is different. Unlike *Roe* and *Casey*'s misguided historical analysis, *Kelo*'s reasoning is firmly rooted in precedent that for "*more than a century*" has denied a strict approach "in favor of affording legislatures broad latitude" when establishing public purposes. *Kelo*, 545 U.S. at 484 (emphasis added). Furthermore, unlike the improper deference that *Chevron* provided administrative agencies, *Kelo*'s deferential standard is entrenched in federalism concerns. *Id.* at

482. The decision highlights the "great respect" owed "to state legislatures and state courts in discerning local public needs." *Id.* (citing *Hairston*, 208 U.S. at 606–07). Because of this alignment with history and precedent, the quality of this Court's reasoning in *Kelo* is good.

This reasoning produced an exceptionally *workable* framework that allows for takings for economic development. *Id.* at 489. Workability focuses on the rule's simplicity, ease of use for courts, and consistent and predictable applications. *See Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 459 (2015); *Dobbs*, 597 U.S. at 220. *Kelo* is especially workable. A court must first examine if the taking is permissible under state law. *See Kelo*, 545 U.S. at 489. If it is permissible, a court must determine if the taking violates the federal Constitution. U.S. Const. amend. V. This requires the court to examine if the taking is for "public use," which encompasses "public purposes." *Id.* at 480. This inquiry is deferential to the legislature's finding of a public purpose. *Id.* Takings to clear blight, to break up land oligopolies, and, under *Kelo*, for economic development are public purposes. *Id.* at 480–83. If the taking is *purely* private, i.e., for the purpose of benefiting "a particular class of identifiable individuals," or pretextual, i.e., the hidden actual purpose is to "bestow a private benefit," the taking is impermissible. *Id.* at 477–78. However, a taking is not invalid just because another private person derives a benefit from it. *See id.* at 486 (quoting *Berman*, 348 U.S. at 34).

Applying this framework to New Louisiana's present taking reveals how workable *Kelo*'s framework is. First, New Louisiana does *not* prohibit takings for economic development; in fact, NL Code § 13:4911 expressly permits it. R. at 2. Therefore, condemning overgrown farmland in order to build a ski resort that will increase tourism, create thousands of new jobs, increase property values, and generate tax revenue that will be reinvested into the community is for a public purpose, and therefore a public use, under New Louisiana law. *Id.* Furthermore, the taking

is not prohibited under the Constitution because *Kelo* permits such economic redevelopment takings and is not invalidated just because Pinecrest, a private entity, has benefited. *Id.*; *see Kelo*, 545 U.S. at 486. Thus, New Louisiana's exercise of its eminent domain power was proper.

That's it. There are no arbitrary lines being drawn between permissible and impermissible public purposes; instead, *Kelo* differentiates between *public* purposes and *private* purposes. *See Kelo*, 545 U.S. at 485. Likewise, a court does not need to explore whether the public purpose will arise with "reasonable certainty." *Id.* at 487–88. The states, in their variety and uniqueness, are free and encouraged to add additional limitations to their own eminent domain power as they deem necessary because *Kelo* reserves that choice for them. *Id.* at 489.

2. Takings for economic development are consistent with a century of eminent domain precedent and have not been limited by this Court's later decisions.

Kelo's broad holding is not unfamiliar to American eminent domain jurisprudence but is *consistent* with prior opinions and has not been questioned by later decisions. *See, e.g.*, *Berman*, 348 U.S. at 33; *Strickley*, 200 U.S. at 531; *cf. Eychaner v. City of Chicago*, 141 S. Ct. 2422, 2423–24 (2021) (Thomas, J., dissenting). Indeed, *Kelo* is neither a "doctrinal dinosaur" nor a "legal last-man-standing" within the realm of Takings Clause decisions. *See Kimble*, 576 U.S. at 458. Rather, it stands in "close relation to a whole web of precedents." *Id.*

Since the end of the 1800s, this Court has equated "public use" with "public purpose." *Bradley*, 164 U.S. at 164. This transition marked this Court's rejection of "use by the general public" as the only test of "public use." *Kelo*, 545 U.S. at 479. At the heart of "public purpose" is the cardinal belief that state governments[1] are positioned to run their local affairs best. *Hairston*,

[1] Or Congress in cases dealing with the District of Columbia. *See Shoemaker v. United States*, 147 U.S. 282, 300 (1893) ("[T]he United States possess[es] full and unlimited jurisdiction, both of a political and municipal nature, over the District of Columbia."); *see also Berman*, 348 U.S. at 31–32.

208 U.S. at 606–07. This conviction has been present since public purpose was established as the appropriate standard under the Takings Clause:

> The people of California and the members of her legislature must in the nature of things be more familiar with the facts and circumstances which surround the subject and with the necessities and the occasion for the irrigation of the lands than can any one be who is a stranger to her soil.

Bradley, 164 U.S. at 160. This recognition of local expertise in determining "public purpose" resulted in a naturally broad and deferential standard. *See Strickley*, 200 U.S. at 531.

At the onset of the 1900s, this Court would routinely allow takings for a state-deemed public purpose. *See, e.g.*, *id.* at 531–32. For instance, in *Strickley*, a mining company required a right of way through a private mining claim in order to erect an aerial bucket line to transport ores from its mine to a railroad station two miles away. *Id.* at 529. The Supreme Court of Utah affirmed a final order condemning the right of way in favor of the mining company. *Id.* at 532. This Court unanimously agreed with this holding and found that the taking was proper. *See id.* at 531–32. It explained that both the Utah legislature, by statute, and the Supreme Court of Utah, by judicial opinion, had established that the public welfare of Utah required the taking. *Id.* at 531. Accordingly, this Court declined to replace the state's determination with its own. *See id.*

This broad "public purpose" standard continued into the mid-twentieth century when this Court permitted Washington, D.C., to condemn private property to ameliorate the harmful effects of urban "blight" even if the taking benefited a private entity. *See Berman*, 348 U.S. at 33. In *Berman*, this Court unanimously explained that a taking is within the scope of "public purpose" when it is for the community to be "beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." *Id.* at 33–34. This Court further found private management of a redevelopment project permissible because the "public end may be as well *or better* served through an agency of private enterprise." *Id.* (emphasis added).

This sentiment extended into the 1980s when this Court held that taking property to clear extreme concentrations of land ownership was a public purpose. *See Midkiff*, 467 U.S. at 241–43. In *Midkiff*, Hawaii found that seventy-two private owners possessed 47% of the state's landmass. *Id.* at 232. The Hawaii legislature sought to break up this land oligopoly by compelling landowners to sell their properties to their tenants. *Id.* at 232. This Court found nothing in the Constitution that would prevent such takings. *Id.* at 243. Justice O'Connor, a future dissenter in *Kelo*, wrote for a unanimous Court that "if a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, courts *must* defer to its determination that the taking will serve a public use." *Id.* at 244 (emphasis added).

After a century of these unanimous holdings, this Court found no grounds for exempting economic development takings from its "traditionally broad understanding of public purpose." *Kelo*, 545 U.S. at 486. Since 2005, *Kelo* has controlled without any limitation from this Court. *See Eychaner*, 141 S. Ct. at 2423–24 (Thomas, J., dissenting). This is because a court's role in determining public purposes "is an extremely narrow one." *Berman*, 348 U.S. at 32 (first citing *Old Dominion Co v. United States*, 269 U.S. 55, 66 (1925); and then citing *United States ex rel. Tenn. Valley Auth. v. Welch*, 327 U.S. 546, 552 (1946)).

New Louisiana's present takings are also consistent with these decisions. While *Kelo* permits the states to limit their eminent domain power, New Louisiana chose not to. R. at 2. Similar to how Utah's government established its state's public purposes in *Strickley*, New Louisiana's government has determined that constructing a ski resort is for a public purpose. *See* R. at 1–2. The state legislature has provided that economic development is a public purpose under NL Code § 13:4911. *Id.* With legislative authorization, Governor Chase decided that the benefit the public would receive from a ski resort outweighed the benefits derived from the

land's current use as unproductive farmland and subpar housing. *See id.* The people's elected officials have spoken: The state desires a ski resort. Like Washington, D.C., in *Berman*, New Louisiana is justified in wanting its territory to be beautiful, spacious, healthy, clean, and well-balanced—*not* overgrown, uneconomical, and nutrient deficient. *See* R. at 2. The State has articulated a substantial reason for wielding its eminent domain power, and the judiciary "must defer to its determination that the taking will serve a public use." *Midkiff*, 467 U.S. at 244.

3. Subsequent developments after *Kelo* demonstrate that the decision accomplished its objective of encouraging future state limitations on "public purpose," and this is an outcome that states still rely on.

While the above factors focus on *Kelo* itself, *subsequent developments* and *reliance* on the decision are equally important when reconsidering prior precedent. *See Ramos v. Louisiana*, 585 U.S. 83, 121 (2020) (Kavanaugh, J., concurring). Since *Kelo*, the states have restricted their takings power and use *Kelo* as the baseline. *See, e.g.*, 42 R.I. Gen. Laws. § 42-64.12-2(5) (2024). Some states still allow economic development takings, and some even created unique limitations that do not amount to outright prohibitions. *See* 42 R.I. Gen. Laws. § 42-64.12-7 (2024).

The two decades following *Kelo* have demonstrated a positive subsequent impact on eminent domain legislation. While the initial public reaction to *Kelo* was pessimistic, over forty states have since revised their eminent domain statutes or amended their state constitutions. *See* David McCord, 13 *Powell on Real Property* § 79F.03[3][b][iv] (2024) [hereinafter *Powell on Real Property*]; Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 Minn. L. Rev. 2100, 2108–14 (2009). These reactions are the type of state-created limitations that this Court encouraged in *Kelo*. *See Kelo*, 545 U.S. at 489. Indeed, they serve as a testament to the adage that "all press is good press."

These new state restrictions reinforce the longstanding awareness that the states have unique needs. *See, e.g.*, *Dayton Gold & Silver Mining Co. v. Seawell*, 11 Nev. 394, 409 (1876) ("Nature has denied to this state many of the advantages which other states possess; but by way of compensation to her citizens has placed at their doors the richest and most extensive silver deposits ever yet discovered."). Since 2005, some states have restricted their power to disallow takings for economic development or blight. W. Va. Code Ann. § 54-1-2(a)(11) (West 2024) (economic development); Fla. Stat. Ann. § 73.104 (West 2024) (economic development and blight). However, not every state believed flat prohibitions were needed, and it is these states that *directly rely* on *Kelo*'s holding. *See, e.g.*, 42 R.I. Gen. Laws. § 42-64.12-2(5) (2024).

Rhode Island and Connecticut restricted *but did not prohibit* takings for economic development. *See* R.I Const. art. VI, § 18; 42 R.I. Gen. Laws. § 42-64.12-7 (2024) (requiring explicit legislative authority, a satisfactory plan, and notice); Conn. Gen. Stat. § 8-127a (2024) (banning takings for generating local tax revenue and placing procedural restrictions on other economic development takings). These small states are naturally interested in maintaining their power to condemn property for economic development as their limited landmass requires available property be used in a manner that does not hinder the states' progress. *See, e.g.*, *Windsor v. Whitney*, 111 A. 354, 356 (Conn. 1920) ("The State . . . cannot preserve and protect the rights committed to it if private owners may lay out streets at will and build at will. . . . The practical loss to the community will be large.").

Likewise, New Louisiana directly relies on *Kelo* to define what constitutes a public purpose. *See* R. at 2. Following *Kelo*, the people of New Louisiana, like the residents of the other fifty states, had to determine if they wanted to limit their state's takings power. The people and their representatives in the state legislature declined to do so despite other states restricting their

eminent domain power. *See id.* Instead of restricting such takings, New Louisiana now expressly permits them under NL Code § 13:4911. *Id.* Indeed, New Louisiana's residents wanted their state to have full takings power for economic development. *See id.* As a result, New Louisiana now relies on *Kelo* even more than the small states of Rhode Island and Connecticut, which permit such takings but only under limited circumstances. The people of New Louisiana have not yet gone back on this desire. *Id.* They are relying on this Court not to make that decision for them.

There is no compelling reason to overrule *Kelo v. City of New London*. The Court's decision was thoroughly reasoned and produced a workable rule. *Kelo*'s deferential and broad holding is consistent with over a century of eminent domain jurisprudence. Two decades later, the states that have preserved their ability to condemn property for economic development actively rely on *Kelo* when drafting legislation or wielding their eminent domain power. Therefore, this Court should fall back on stare decisis, adhere to its established precedent, and preserve the broad definition of public purpose expressed in *Kelo*.

B. There are no practical alternatives to *Kelo*, and if this Court were to overrule *Kelo*, it would have to select from a catalog of substandard definitions of "public use."

Some propose *Kelo* went too far and expanded what constitutes public use. *See Kelo*, 545 U.S. at 503 (O'Connor, J., dissenting) ("Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton."). However, if *Kelo* were overruled, this Court would have to select an inferior standard of public use. One alternative is that the Court should return to "use by the general public" to determine public use. *See Eychaner*, 141 S. Ct. at 2423–24 (Thomas, J., dissenting). Another view is that the public purpose standard should remain, but that economic development would be considered a judicially invalid public purpose. *See Kelo*, 545 U.S. at 497 (O'Connor, J., dissenting). These standards are unmanageable.

The most drastic proposal is that this Court should return to the "use by the general public" standard. *Id.* at 521 (Thomas, J., dissenting). This attacks the entire concept of "public purpose" by arguing that a "natural reading" of the Takings Clause "allows the government to take property *only if* the government owns, or the public has a legal right to use, the property." *Id.* at 508 (emphasis added). However, this is flawed because when the Takings Clause was written, a natural reading of "public use" *was* "public purpose."

First, text should neither be construed in a manner that the intended reader would find unnatural nor expanded beyond what the drafters could have intended. *See Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 332 (1827). At the nation's founding, the term "use" meant "[t]he act of employing any thing *to any purpose*." *Use*, 2 *Samuel Johnson's A Dictionary of the English Language* (4th ed. 1773) (emphasis added). Justice Thomas even recognized this but contended that "it strains language to say that the public is 'employing' the property." *Kelo*, 545 U.S. at 508 (Thomas, J., dissenting). However, the same dictionary that was used states that "employ" can mean "[t]o use as means" and provides this example: "The money was *employed* to the making of gallies." *Employ*, 2 *Samuel Johnson's A Dictionary of the English Language* (4th ed. 1773). Despite being circular, inserting this meaning of "employ" into the meaning of the word "use" produces this definition: "the act of [using as means] any thing to any purpose." Under this interpretation, reading "use" to include "any purpose" no longer strains the English language and was a natural reading of the term when the Fifth Amendment was drafted.

Second, the public use limitation incorporated into the Fifth Amendment's text stems from a natural law view of eminent domain, and the proponents of this view unified under the conviction that "eminent domain power be for *the benefit of the public*." *See Powell on Real Property*, *supra*, § 79F.01[1][b] (emphasis added). "Public advantage," "public welfare,"

"necessity of the state," and "public utility" were all accepted understandings by natural law theorists. *Id.* Accordingly, some early exercises of eminent domain were for the "establishment of *private mills*" and the "construction of *private roads*." *Id.* (emphases added).

Finally, history has proven the "use by the general public" standard unmanageable. *See Strickley*, 200 U.S. at 531. This Court has repeatedly called the standard "inadequate" because it is an administrative nightmare indifferent to ever-changing societal needs. *See Kelo*, 545 U.S. at 479 & nn.7–8; *Strickley*, 200 U.S. at 531; *Midkiff*, 467 U.S. at 244. By 1900, "there had developed a massive body of case law, irreconcilable in its inconsistency, confusing in detail and defiant of all attempts at classification." *See The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 Yale L. J. 599, 605–06 (1949). This Court should not return to it.

Another view is that public use should encompass only public purposes that courts deem *valid*—economic development not being one. *See Kelo*, 545 U.S. at 497 (O'Connor, J., dissenting) ("An external, judicial check on how the public use requirement is interpreted, however limited, is necessary."). *Kelo* draws a bright line: Private takings and pretextual "public" takings are impermissible. *Id.* at 477–78 (majority opinion). Adding a further judicial check makes the eminent domain framework less workable and less consistent. Indeed, even if a taking is acceptable under state law and the state deems it a public purpose, a federal court can simply declare that there is no "practical way to isolate the motives" underlying the taking and render it invalid. *Id.* at 502 (O'Connor, J., dissenting). This view cuts against workability, which requires that a rule "be understood and applied in a consistent and predictable manner." *Dobbs*, 597 U.S. at 281. It would implicitly grant legislative power to the judiciary, deeming some public purposes valid and others invalid. This Court has previously noted that "the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation." *Berman*, 348 U.S. at 32.

This Court occasionally reiterates that adherence to stare decisis requires "sticking to some wrong decisions." *Kimble*, 576 U.S. at 446. It echoes the words of Justice Brandeis that it is often "more important that the applicable rule of law be settled than that it be settled right." *See id.* at 446 (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932)). If a settled rule is *often* better than a correct rule, then a settled rule is *always* better than an incorrect rule.

Kelo was correctly decided, and this Court should not overrule it. If it is, an inferior standard will take its place and either bring back inconsistent results or allow judicial legislation. Therefore, this Court should affirm the United States Court of Appeals for the Thirteenth Circuit.

II. The Takings Clause of the Fifth Amendment to the United States Constitution is Not Self-Executing and Does Not Provide Petitioners with a Cause of Action for Just Compensation, and the Doctrine of Sovereign Immunity Bars Petitioners from Seeking Just Compensation from the State of New Louisiana in Federal Court.

This Court should adhere to the text of the Constitution and follow centuries of our country's constitutional tradition by affirming the United States Court of Appeals for the Thirteenth Circuit and holding that the Takings Clause is not self-executing. Petitioners are unable to bring a claim for just compensation under the Takings Clause against New Louisiana for two reasons: First, while the Takings Clause provides a substantive right to just compensation, it does not provide a procedural method for that right to be enforced. *DeVillier v. Texas*, 601 U.S. 285, 292 (2024). Therefore, the Takings Clause is not self-executing, and Petitioners would need to proceed with their claim under a different source of law; they have conceded that there is no other source of law under which they may bring their claim. R. at 6, 10. Second, the doctrine of sovereign immunity is a bedrock principle of our American constitutional system, and it prohibits federal courts from forcing states to pay monetary damages, such as just compensation, when the states have not consented to suit. *Alden v. Maine*, 527 U.S. 706, 744, 747–48, 755 (1999). The State of New Louisiana did not waive its immunity when taking private

property for the Pinecrest ski resort project. R. at 2. Therefore, this Court should uphold this nation's constitutional underpinnings and hold that the Takings Clause is not self-executing.

A. The Takings Clause is not self-executing because it does not create a cause of action within itself for just compensation, and other sources of law, such as the Tucker Act, are necessary for a property owner to bring a claim for just compensation.

A constitutional provision is "complete in itself," and therefore self-executing, when it provides a method by which the given Constitutional right may be enjoyed. *Davis v. Burke*, 179 U.S. 399, 403 (1900); Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 99 (2d ed. 1871). Though the Takings Clause provides for the substantive right to just compensation, it does not provide for a cause of action, either express or implied, through which that right may be vindicated. *DeVillier*, 601 U.S. at 292; *Me. Cmty. Health Options v. United States*, 590 U.S. 296, 323 n.12 (2020). While this Court has previously recognized implied causes of action within the Constitution in a handful of limited cases, this Court has since cautioned itself against assuming the role of a legislature by recognizing such causes of action. *Egbert v. Boule*, 596 U.S. 482, 490–91 (2022). Instead, claims for just compensation after a government taking have historically arisen under other sources of law, such as the Tucker Act, 28 U.S.C. § 1491, or 42 U.S.C. § 1983. Statutes such as the Tucker Act would be rendered unnecessary and redundant if the Takings Clause were self-executing. *Lion Raisins, Inc. v. United States*, 57 Fed. Cl. 435, 437–38 (2003).

1. The Takings Clause is not self-executing because it provides only a substantive right to just compensation and does not create an express or implied cause of action for seeking such just compensation.

The Takings Clause of the Fifth Amendment is not "complete in itself" and, therefore, is not self-executing. *Davis*, 179 U.S. at 403. This Court has adopted Judge Thomas M. Cooley's rule regarding self-executing constitutional provisions: A constitutional provision is self-

executing "if it supplies a sufficient rule by . . . which the right given may be enjoyed[,] . . . and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law." *Id.*

The Takings Clause of the Fifth Amendment reads, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The Takings Clause is not "complete in itself" because it "merely indicates [a] principle[] without laying down [a] rule[] by means of which [that] principle[] may be given the force of law." *Davis*, 179 U.S. at 403. In other words, the principle laid down by the Takings Clause is the substantive right to just compensation, and the absent legislative means would be "the procedural vehicle by which a property owner [would] seek to vindicate that right." *DeVillier*, 601 U.S. at 291. This Court drew this distinction between a "substantive rule of decision" and a "procedural vehicle" in *DeVillier v. Texas*. 601 U.S. at 291–92.

In *DeVillier*, the plaintiff, Richard DeVillier, sought just compensation from the State of Texas after the state, in essence, took his property to store stormwater. *Id.* at 287. Like Petitioners in this case, he brought suit solely under the Takings Clause of the Fifth Amendment, arguing that the clause is self-executing and creates, in itself, a cause of action for just compensation. *Id.* Texas did not contest "the nature of the substantive *right* to just compensation." *Id.* at 291 (emphasis added). Rather, the state took issue with *how* a plaintiff may act procedurally to receive such just compensation. *Id.* DeVillier relied on several cases, which Petitioners also rely on, to support his argument that he could bring a cause of action for just compensation solely under the Takings Clause. *Id.* at 291–92. Two notable cases that Petitioners here relied on that DeVillier also relied on are *Dohany v. Rogers*, 281 U.S. 362 (1930), and *Norwood v. Baker*, 172 U.S. 269 (1898). *DeVillier*, 601 U.S. at 291–92. DeVillier, as well as Petitioners here, argued that

the *Dohany* and *Norwood* plaintiffs had relied only on the Takings Clause and not on other sources of law for causes of action, and thus, the Takings Clause must be self-executing. *Id.* at 292; R. at 7.

This Court rejected such an argument. *See DeVillier*, 601 U.S. at 292. It said that even though the Takings Clause provides a substantive rule to govern equitable claims, it does not create a cause of action for damages because damages are a legal, not equitable, remedy. *Id.* In other words, though the Takings Clause may delineate the substantive right to just compensation, it does not necessarily indicate that it provides an *implied* cause of action for such a right. *See id.* And this Court has already said that "there is no *express* cause of action under the Takings Clause." *Me. Cmty. Health Options*, 590 U.S. at 323 n.12 (emphasis added). Thus, the Takings Clause is not "complete in itself." *See DeVillier*, 601 U.S. at 292; *Davis*, 179 U.S. at 403.

While this Court in *DeVillier* declined to expressly address whether the Takings Clause provides an implied cause of action for just compensation, *DeVillier*, 601 U.S. at 292, it is unlikely that this Court would do so, given that it has only "fashioned new causes of action under the Constitution" in a handful of cases. *Egbert*, 596 U.S. at 490–91. Most constitutional provisions are not self-executing; they typically do not create causes of action in and of themselves. *Id.* This Court has only expressly recognized in three situations, collectively known as *Bivens* claims, that a cause of action arises under the Constitution itself. *Id.* First, this Court authorized a cause of action under the Fourth Amendment for the use of excessive force during an arrest. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971). Next, this Court found that a cause of action arises under the Fifth Amendment for federal sex discrimination. *Davis v. Passman*, 442 U.S. 228, 248–49 (1979). Finally, this Court

found that a cause of action arises under the Eighth Amendment for inadequate care in prison. *Carlson v. Green*, 446 U.S. 14, 24–25 (1980).

Aside from the fact that these *Bivens* claims are permitted only against the *federal* government, this Court in *Egbert* recognized that it is not the role of the Court to forge "new causes of action under the Constitution." *Egbert*, 596 U.S. at 490–91. This Court said that it was "long past 'the heady days in which this Court assumed common-law powers to create causes of action,'" and it discussed how the Constitution mandates a separation between the legislative and judicial powers. *Id.* at 491 (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring)). The Court continued, discussing how "creating a cause of action is a legislative endeavor" and how creating a cause of action requires policy considerations which "Congress is 'far more competent than the Judiciary' to weigh." *Id.* (quoting *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988)). Thus, unless a case is very factually similar to one of the identified *Bivens* claims, the Court will not recognize a cause of action arising from the Constitution on its own. *Id.* The present case is not factually similar. Because, therefore, the Takings Clause is not self-executing, claims for just compensation have always arisen under other sources of law and not under the Takings Clause on its own. *DeVillier*, 601 U.S. at 288.

2. If the Takings Clause were self-executing, Congress would not have needed to create the Tucker Act for landowners to bring a cause of action for just compensation, and the Tucker Act would have been redundant.

Though this Court in *DeVillier* declined to expressly address whether the Takings Clause provides a cause of action for just compensation, *DeVillier*, 601 U.S. at 292, Congress has already done so. By promulgating statutes such as the Tucker Act, 28 U.S.C. § 1491, and 42 U.S.C. § 1983, which provide causes of action for just compensation under the Takings Clause, Congress undoubtedly recognized that the clause on its own is not self-executing. A brief

discussion of some of the history surrounding the Tucker Act is illustrative. Prior to the Tucker Act's creation in 1887, property owners whose land was taken by the United States Government could not bring a claim for just compensation against the federal government solely under the Takings Clause. *Lion Raisins,* 57 Fed. Cl. at 438. Plaintiffs could attempt to make contract claims against the government, arguing that the U.S. Government's taking of their property amounted to "implied in-fact promise[s] to pay for it." *Id.* But such claims could be heard only under very limited circumstances. *See id.* In some cases, plaintiffs successfully ejected Government officials from their property. *Id.* However, in most cases, property owners had "to petition Congress for private relief, but Congress was neither compelled to act, nor to act favorably." *Id.*; Evan C. Zoldan, *All Roar and No Bite: Lion Raisins and the Federal Circuit's First Swipe at the NAFI Doctrine,* 36 Pub. Cont. L.J. 153, 160–61 (2007); *see Lib. of Cong. v. Shaw*, 478 U.S. 310, 316 n.3 (1986).

It is important to note that the fact that landowners had to petition *Congress*, and not the *courts*, for relief from a government taking of property supports the aforementioned fact that creating a cause of action is an act typically reserved to the legislature. *Lion Raisins*, 57 Fed. Cl. at 438; Zoldan, *supra*, at 160; *Egbert*, 596 U.S. at 490–91. Because most property owners were left with no choice but to petition a Congress that did not need to act in their favor, numerous landowners "had suffered the misfortune of holding a legal right for which there was no enforceable legal remedy." *Lion Raisins*, 57 Fed. Cl. at 438. The disconnect between a property owner's substantive right to just compensation and his lack of procedural methods to enforce that right caused this Court to lament, "It is to be regretted that Congress has made no provision by any general law for ascertaining and paying this just compensation." *Langford v. United States*, 101 U.S. 341, 343 (1879). Eight years later, Congress enacted the Tucker Act, permitting "a

direct remedy for [just] compensation" when the United States Government takes a private person's property. *Lion Raisins*, 57 Fed. Cl. at 438; *see* Tucker Act, 28 U.S.C. § 1491.

This history plainly demonstrates that the Takings Clause is not self-executing. If the clause were self-executing and therefore "complete in itself," *Davis*, 179 U.S. at 403, no act of Congress such as the Tucker Act would be necessary to provide property owners with a cause of action for just compensation, and this Court would not have lamented as it did in *Langford*. *See* 101 U.S. at 343. Though the Takings Clause of the Fifth Amendment applies to the States through its incorporation by the Fourteenth Amendment, *Chic. Burlington & Quincy Ry. v. Chicago*, 166 U.S. 226, 239 (1897), it is still the exact same Fifth Amendment that applies to the federal government. If Congress needed to legislate the Tucker Act in order for property owners to be able to seek just compensation from the *federal* government—because the Takings Clause is not self-executing—there is no reason why the result should be any different when a property owner is seeking just compensation from his *state* government. A claim for just compensation against New Louisiana must come under a separate source of law and not under the Takings Clause itself.

Petitioners contend that "claims for injunctive relief predated the passage of" the Tucker Act and 42 U.S.C. § 1983. R. at 4. As the history of the Tucker Act suggests, Petitioners' contention is correct, but it does not support their argument that the Takings Clause is self-executing. Again, as this Court noted in *DeVillier*, there is a difference between equitable, injunctive relief and legal remedies such as "just compensation." *DeVillier*, 601 U.S. at 292; *see United States v. Miller*, 317 U.S. 269, 276 (1989). This difference between equitable and legal remedies dates back to at least the distinction between courts of law and courts of equity in England. Tyler J. Bowles, *Employment Discrimination: Distinguishing Between Equitable*

Remedies and Compensatory Damages, 15 J. Legal Econ. 11, 12 (2008) ("Historically, there was a distinction in England between courts of law and courts of equity. The former provided legal remedies while the latter provided equitable relief. . . . Although courts of law and equity have merged, the concept of legal versus equitable remedies remains." (citations omitted)). But even if injunctive relief were to be equated with a cause of action for just compensation as petitioners desire, such equalization would render statutes such as the Tucker Act redundant.

In a similar vein, if the Takings Clause were self-executing, the Tucker Act would have been redundant. Zoldan, *supra*, at 160–61. In *Lion Raisins*, the Court of Federal Claims discussed how, if the Takings Clause created a cause of action for just compensation, landowners would have already had the ability to seek compensation from the United States government before Congress, through the Tucker Act, even created that cause of action. *Id.*; *see Lion Raisins*, 57 Fed. Cl. at 437–38. The court further reasoned that "had the Fifth Amendment alone been sufficient to grant jurisdiction for takings claims, the 1887 Tucker Act would have been redundant." Zoldan, *supra*, at 161; *see Lion Raisins*, 57 Fed. Cl. at 437–38. To take the argument one step further and highlight its risibility: "[I]f the Fifth Amendment obviated the need for the Court of Claims to otherwise have jurisdiction over takings claims, then a suit against the Government for a takings claim should have been able to predate the creation of the Court of Claims itself." Zoldan, *supra*, at 161 n.57. This was clearly not the case, as no suits for just compensation were permitted against the Federal Government under the Takings Clause alone before the Tucker Act gave the Court of Federal Claims jurisdiction and created the cause of action. *Id.*; Michael F. Noone Jr. & Urban A. Lester, *Defining Tucker Act Jurisdiction After* Bowen v. Massachusetts, 40 Cath. U.L. Rev. 571, 575 n.28 (1991) ("The statute permitted a judicial remedy pursuant to the [F]ifth [A]mendment's [T]akings [C]lause.").

It is worth noting that neither the Tucker Act nor 42 U.S.C. § 1983 apply to the instant case. The Tucker Act is inapplicable because it permits suits against the Federal Government, whereas Petitioners are bringing a claim against the State of New Louisiana. Tucker Act, 28 U.S.C. § 1491; R. at 1, 3. Petitioners could not bring a § 1983 action because § 1983 waives immunity when a *person* operates under color of law, and states are not considered persons under § 1983. 42 U.S.C. § 1983; *see Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 69 (1997); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). Additionally, § 1983 waives immunity only for municipalities; states must still waive immunity before they become suable under § 1983. 42 U.S.C. § 1983; *Connick v. Thompson*, 563 U.S. 51, 60 (2011); *Mich. Dep't of State Police*, 491 U.S. at 66. Moreover, Petitioners concede that neither statute applies to this case, and "no other law provides the right to seek just compensation." R. at 6, 10. Thus, because Petitioners cannot proceed under any other law and because the Takings Clause of the Fifth Amendment is not self-executing, their argument fails, and the dismissal of this case must be affirmed.

B. The doctrine of state sovereignty immunity has been a fundamental principle of our nation's constitutional system for centuries, and it bars a state from being sued in federal court for monetary damages when that state has not waived its immunity.

Since the time of America's founding, state sovereignty has been viewed as an indispensable principle within our constitutional system of government. *Alden*, 527 U.S. at 748; *In re Ayers*, 123 U.S. 443, 505 (1887). Under the doctrine of sovereign immunity, states enjoy the right not to be forced to pay monetary damages in federal courts unless the states consent to suit. *Alden*, 527 U.S. at 747, 755; *Frew v. Hawkins*, 540 U.S. 431, 437 (2004). Congress has not passed, and cannot pass, a statute that abrogates this immunity. *Alden*, 527 U.S. at 744, 748.

The concept of states' rights has been a bedrock principle in our American system of government since the 1787 Constitutional Convention. The guarantee that the states would retain

rights and not sacrifice them all upon the altar of federal usurpation was "*the* key component" in "persuading the states to ratify the Constitution in 1787." Kevin R. C. Gutzman, *Jeffersonian Federalism and the Origins of State Rights*, The History Reader, https://www.thehistoryreader .com/us-history/jeffersonian-federalism/ (last visited Oct. 14, 2024) (emphasis added). Even after the signing of the Constitution and the passage of the Tenth Amendment, which safeguards states' rights, *see* U.S. Const. amend. X, Thomas Jefferson was still troubled by the Federal Government's infringing upon state sovereignty. *See* Thomas Jefferson, *Letter from Thomas Jefferson to William B. Giles* (1825). He cautioned:

> I see, as you do, and with the deepest affliction, the rapid strides with which the federal branch of our government is advancing towards the usurpation of all the rights reserved to the States, and the consolidation in itself of all powers, foreign and domestic, and that, too, by construction which, if legitimate, leave no limits to their power.

Id. Centuries later, this Court's decisions have fortified the necessity of states' rights. As it stated in *Alden*, "Although the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." 527 U.S. at 748 (first citing *United States v. Lopez*, 514 U.S. 549, 583 (1995); and then citing *Printz v. United States*, 521 U.S. 898, 935 (1997)). This Court continued, discussing how the Founders "thought it 'neither becoming nor convenient'" that the sovereign states be forced by private persons into courts of the United States. *Id.* (quoting *In re Ayers*, 123 U.S. at 505).

This Court has repeatedly held that it is a fundamental principle of state sovereignty that the states cannot be forced, absent their consent, in federal court to pay monetary damages such as just compensation. *Id.* at 747, 755; *Frew*, 540 U.S. at 437 ("The Eleventh Amendment confirms the sovereign status of the States by shielding them from suits by individuals absent

their consent." (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996))). As stated in *Alden*, "A general federal power to authorize private suits for monetary damages would also strain States' ability to govern in accordance with their citizens' will." 527 U.S. at 750–51.

NL Code § 13:5109, which provides that the State must waive its immunity before a landowner can seek just compensation from the State, is in line with the doctrine of sovereign immunity. R. at 2. And the State of New Louisiana did not waive its immunity for the Pinecrest ski resort project. *Id.* If this Court were to hold that Petitioners can sue the State in federal court for just compensation, it would upend Supreme Court precedent and hundreds of years of our country's constitutional tradition. *Alden*, 527 U.S. at 715–16 ("The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity . . . . [T]he doctrine that a sovereign could not be sued without consent was universal in the States when the Constitution was drafted and ratified." (citations omitted)); *Hans v. Louisiana*, 134 U.S. 1, 16 (1890) ("The suability of a State, without its consent, was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted."); *see generally* U.S. Const. amend. XI.

Congress has recognized as much. When Congress enacted the Tucker Act and 42 U.S.C.§ 1983, it waived sovereign immunity. Tucker Act, 28 U.S.C. § 1491; 42 U.S.C. § 1983. Under the Tucker Act, Congress waived the Federal Government's sovereign immunity. Tucker Act, 28 U.S.C. § 1491. With respect to § 1983 actions, Congress waived sovereign immunity in cases where a *municipality* is being sued for the actions of its officials acting under color of law, but states must still waive immunity before they can be sued. 42 U.S.C. § 1983; *Connick*, 563 U.S. at 60; *Mich. Dep't of State Police*, 491 U.S. at 66. But in cases such as this, where the State *itself* is being sued and has not waived its immunity, Congress has passed no statute that

abrogates the State's sovereign immunity in federal courts. *Alden*, 527 U.S. at 744. In fact, Congress essentially *cannot* pass such a statute. *Id.* at 748 ("[I]t is settled doctrine that neither substantive federal nor attempted congressional abrogation . . . bars a State from raising a constitutional defense of sovereign immunity in federal court."); *id.* at 733 ("[N]either the Supremacy Clause nor the enumerated powers of Congress confer authority to abrogate the States' immunity from suit in federal court."). This clearly reflects the fundamental principle that states cannot be forced in federal court to pay monetary damages, such as just compensation, without waiving their sovereign immunity. *Id.* at 747, 750–51, 755; *Frew*, 540 U.S. at 437. And again, the State of New Louisiana chose not to do so. R. at 2. Therefore, under the doctrine of state sovereignty and the weight of centuries of our nation's constitutional tradition, New Louisiana cannot be forced in federal court to pay Petitioners just compensation.

CONCLUSION

The Thirteenth Circuit properly affirmed the district court's dismissal of Petitioners' suit for failure to state a claim. *Kelo v. City of New London* is correct in its reasoning and its holding, consistent with a century of precedent, and has been relied on since it was decided. Likewise, this Court has never found the Takings Clause to be self-executing and should not do so now because the clause is not complete in itself and because New Louisiana has not waived its sovereign immunity. Therefore, the State of New Louisiana requests that this Court affirm the United States Court of Appeals for the Thirteenth Circuit.

Respectfully submitted,

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