No. 24-386

IN THE

Supreme Court of the United States

KARL FISCHER, ET AL.,

Petitioners,

v.

THE STATE OF NEW LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT
FOR THE THIRTEENTH CIRCUIT

BRIEF OF THE PETITIONERS

Team 9
Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

United States Supreme Court

United States Circuit Courts of Appeals

United States District Courts

State

Statutes

Federal

State

Federal Rules

Other Authorities

QUESTIONS PRESENTED

1. Whether *Kelo v. City of New London,* 545 U.S. 469, 480 (2005), should be overturned under accepted *stare decisis* factors when its ruling incorrectly attributed economic development as a limiting principle instead of other exigent circumstances present in precedential authority.

2. Whether the taking of Karl Fischer's property for the purposes of building a privately owned ski resort is a permissible public use under the Takings Clause if *Kelo* is no longer binding precedent.

3. Whether the Takings Clause is self-executing under the Fifth Amendment when New Louisiana withholds the statutorily required waiver of sovereign immunity necessary for a property owner to seek just compensation from the state for a taking and there is no alternative federal remedy available.

STATEMENT OF THE CASE

I. Factual History

Karl Fischer's ("Fischer") family has owned a small farm in New Louisiana for 150 years. R. at 3. The farm has been passed down from generation to generation, as have his neighbors' homes, resulting in a tight-knit community with a sentimental attachment to the land. R. at 2. While some of these homes are in need of repair, they pose no risk to the public. R. at 3. His family's property is just one of ten small farms and single-family homes owned by poor, predominately minority residents resisting an eminent domain action by the State. *Id.* Community members—owning 90 properties with land covering 1,000 acres and spanning three counties—were given no choice but to sell their properties to the state government at well below market value. *Id.* This land passed from these private individuals into the hands of Pinecrest, Inc., a privately held company. R. at 4.

This taking of land was possible because New Louisiana's legislature passed the Economic Development Act. R. at 1. This statute empowered the governor to contract with businesses to maximize the economy by expanding tourism attractions and creating new jobs. R. at 1-2. The State approved a contract with Pinecrest Inc. to build a luxury ski resort on the outskirts of the state capital, anticipating positive outcomes for state government and business owners in the form of an increase in tax revenue, attraction of wealthy tourists, and provision of new jobs. R. at 2. Outside of Fischer's community, the remaining homeowners are expected to enjoy an increase in their property values. *Id.* The area surrounding the seat of the state's government will receive 15% of the tax revenue from the ski resort because of this taking. *Id.*

New Louisiana State law allows takings purely for economic development. *Id.* With no general or specific waiver of immunity for an eminent domain action, the property owners have

no right to just compensation under state law.[1] *Id.* On March 13, 2023, New Louisiana authorized construction to begin on the luxury ski resort, and the state initiated eminent domain proceedings against the ten holdout properties.

II. Procedural History

These ten property owners, led by Petitioner Fischer, filed suit against the state of New Louisiana in the United States District Court for the District of New Louisiana on March 15, 2023, under the Fifth[2] and Fourteenth Amendments[3]. R. at 3. Without filing an answer, New Louisiana moved to dismiss the claims under FRCP 12(b)(6). *Id.* Finding no source of law that provided a cause of action for compensation, and thus a failure to state a claim for which relief may be granted, the District Court granted New Louisiana's motion to dismiss. *Id.*

The property owners appealed the decision to the United States Court of Appeals for the Thirteenth Circuit. R. at 10. The owners argued that the taking was not for public use and therefore invalid, and in the alternative, that the Fifth Amendment required just compensation for the land taken. R. at 9-10. The appellate court affirmed the District Court's dismissal of the claims. R. at 10.

Fischer and the other property owners petitioned this Court for a writ of certiorari, which was granted on August 17, 2024. R. at 20. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1).

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[1] NL Code § 13:5109 provides that a statutory or executive waiver of sovereign immunity is required for a property owner to obtain just compensation from the State for a taking.

[2] "The Takings Clause was the first constitutional provision to be incorporated against the states, which reflected the importance of property rights, specifically, the right to exclude others and be compensated." R. at 17 (quoting *Chic. Burlington & Quincy Ry. v. Chicago*, 166 U.S. 226, 239 (1897)).

[3] "... nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V

SUMMARY OF THE ARGUMENT

To protect the constitutional rights of private landowners, a self-executing solution must be available for just compensation under the Fifth Amendment. While states retain the ability to offer a waiver of sovereign immunity, they may not prevent a suit for just compensation by refusing to waive. Nearly *all* state governments provide just compensation remedies to their citizens by statutory or constitutional enactments. In this case, New Louisiana has failed to meet that obligation and provides no such route. New Louisiana Code § 13:5109 provides that a statutory or executive waiver of sovereign immunity is required for a property owner to obtain just compensation from the state but does *not* offer that required waiver.

Additionally, Petitioners in this case do not have a federal statutory remedy available. Routes mentioned by the lower courts such as the Tucker Act, a § 1983 claim, or a Bivens claim are not available to this set of facts. 28 U.S.C.A. § 1491; 28 U.S.C.A. § 1983; 28 U.S.C.A. § 1331. Therefore, in the absence of a state and federal route, the Takings Clause must be self-executing.

Allowing the use of the Takings Clause to be self-executing in these limited cases will not lead to an expansion of federal power against the states. It will instead serve as a final route for landowners to utilize if no other underlying cause of action is available. This court and our country have always recognized the importance of private property rights. Further, the Takings Clause historically represents ideas of fairness and equity. To continue these longstanding ideals, the Court should find that the Takings Clause is self-executing in this case and allow Petitioners to receive their constitutionally afforded right to just compensation.

Kelo v. City of New London should be overruled, thus precluding the taking of Karl Fischer's land purely for the sake of economic development as that is not a permissible public use under the Fifth Amendment. *Stare decisis* is an important doctrine in the judicial system, but it is

not immutable and has been challenged before. When faced with such a challenge, this Court has looked to the following factors: the quality of the ruling's reasoning, its workability, its consistency with other similar decisions and how that ruling has been relied upon since promulgation.

The quality of *Kelo's* reasoning is insufficient because it misinterprets the root causes for takings in prior cases. Specifically, this Court cited *Berman v. Parker* and *Hawaii Housing Authority v. Midkiff* as examples of takings where the public use was economic development. However, each of those cases had exigent circumstances of some public harm that justified the takings. An economic development benefit, though present, was not the sole cause of the taking and it was incorrectly construed as such.

The ruling of *Kelo* has proven to be unworkable in the near decade following its inception. The workability of a rule can be defined by whether it continuously raises difficult threshold questions and if the Court is repeatedly asked to clarify it. By including economic development as a permissible public use under the Takings Clause, this Court expanded the threshold of the eminent domain power greatly. As recently as 2021 this Court had the opportunity to readdress the *Kelo* ruling but denied cert in avoidance of having to clarify the decision once again.

Kelo's ruling is inconsistent because it established economic development as a permissible public use, thereby supplanting previously accepted time-tested principles. Before *Kelo*, the taking of privately owned land through eminent domain generally had to be for public ownership or to combat harms like public health concerns or greater public policy issues. While some of these may have had incidental economic benefits as a result, this Court never went as far as stating that the economic benefit itself was permissible for a taking.

Reliance on the *Kelo* ruling has been limited. Most states amended their constitutions in the aftermath of *Kelo* and in doing so strengthened the protections of private landowners against

takings strictly for economic development. The Takings Clause, in its inception, was a power with limitations; if the mere possibility of an economic benefit constitutes a valid use of eminent domain, that power becomes limitless.

Finally, without *Kelo* the State of New Louisiana would not be able to permissibly take Fischer's and the other petitioners' land. The luxury ski resort that the state and Pinecrest, Inc. plan to build would not be owned by the public. This taking is an example of a transfer from one private party to another which has been permissible in the past, but only in rare circumstances that involve some sort of public harm. Fischer's land is not blighted nor would transferring it resolve some perceived evil to the public; instead, it would create one.

ARGUMENT

I. Under the Fifth Amendment's Takings Clause, this Court should overrule *Kelo v. City of New London* because economic development is not a valid "public use."

Stare decisis plays an important role in American jurisprudence, but it is not an "inexorable command…and it is at its weakest when [the Court] interpret[s] the Constitution." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 264 (2022). At times, an issue was "settled" rather than "settled right" and in those "circumstances [the Court] must be willing to reconsider and, if necessary, overrule Constitutional decisions." *Id.* This Court has identified several factors that must be considered when making a judgment that would overturn precedent: the quality of the Court's reasoning, the workability of the rule that was established, the consistency of that rule with other related decisions, and the reliance upon that decision. *Knick v. Township of Scott, Pennsylvania*, 588 U.S. 180, 203 (2019). The two most important of these factors are the quality of reasoning and the rule's consistency with related decisions. *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2280 (2024) (Gorsuch, J., concurring) (internal citation omitted). "[T]he first factor recognizes that the primary power of any precedent lies in its power to persuade—and poorly reasoned decisions may not provide reliable evidence of the law's meaning" and the second because it "reflects the fact that a precedent is more likely to be correct and worthy of respect when it reflects the time-tested wisdom of generations than when it sits 'unmoored' from surrounding law." *Id.* The other factors "do not often supply reason enough on their own to abide a flawed decision …." *Id.*

A. The quality of *Kelo's* reasoning is lacking because it misinterpreted precedent when finding that economic development was sufficient to satisfy the public use requirement of the Takings Clause in the absence of affirmative harm to the public.

The bulk of *Kelo's* reasoning is centered on the dispositive issue of "whether the City's development plan serve[d] a 'public purpose.'" *Kelo v. City of New London*, 545 U.S. 469, 480

(2005). The Court stated that the phrase had been defined broadly in the past, with great deference granted to legislative judgments; reasoning that "public use jurisprudence [had] wisely eschewed rigid formulas and intensive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power." *Id.* at 480, 483. This "broad latitude" led the City of New London to argue that economic development fits into the definition of "public use" and since its plan would "provide appreciable benefits to the community including—but by no means limited to—new jobs and increased tax revenue" the Court supported this justification. *Id.* at 483. It stated the plan "unquestionably serves a public purpose" and "the takings challenged here satisfy the public use requirement of the Fifth Amendment." *Id.* at 484. This is where the quality of the Court's reasoning falters and where criticisms of the *Kelo* decision arise.

The Court cast aside *Kelo's* plea for a "brightline rule that economic development does not qualify as a public use" and instead established the inverse. *Id.* While the Court was correct to state that economic development is an accepted function of the federal government, its assertion that this equates to "public use" under the Takings Clause was overbroad. *Id.* The Court supported its argument by referencing *Berman v. Parker* and *Hawaii Housing Authority v. Midkiff*, but the economic developments in those cases were not the primary goal of the takings.

In *Berman*, the Planning Commission of Washington D.C. wanted to use eminent domain to take a blighted neighborhood and revitalize it in the interest of public health. *Berman v. Parker*, 348 U.S. 26, 30 (1954). A majority of the dwellings within that neighborhood were beyond repair; lacking accessible heating, electricity, and sanitary plumbing. *Id.* The appellant's property was not in disrepair, but the Court was persuaded by the Commission's argument:

> It was not enough…to remove existing buildings that were insanitary or unsightly. It was important to redesign the whole area so as to eliminate the conditions that

> cause slums—the overcrowding of dwellings, the lack of parks, the lack of adequate streets and alleys, the absence of recreational areas, the lack of light and air, the presence of outmoded street patterns. It was believed that the piecemeal approach, the removal of individual structures that were offensive, would be only a palliative. The entire area needed redesigning so that a balanced, integrated plan could be developed for the region ….

Id. at 34. While a total neighborhood overhaul would lead to an increase in economic development, the Court in *Berman* was focused on public health, not financial gain.

Midkiff, in turn, dealt with a taking enacted to break apart a land oligopoly which skewed Hawaii's "residential fee simple market, inflating land prices, and injuring public tranquility and welfare." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 232 (1984). 47% of Hawaii's land was in the hands of only 72 private owners, who leased their lands instead of selling them due to federal tax fees. *Id.* To combat this, the state legislature established an act that essentially made the sales involuntary and lessened the tax penalties while still redistributing the properties. *Id.* at 233. The Court held this was a justifiable use of the takings power, in that it was used "to attack certain perceived evils of concentrated property ownership in Hawaii—a legitimate public purpose." *Id.* at 245. The land in question was not economically stagnant, it was being used and leased out. The primary purpose of the taking was to break up a "perceived evil" that was contrary to public policy.

Kelo's reliance on *Berman* and *Midkiff* was ill-placed, as the economic development benefits in those cases were secondary to greater public welfare issues. As Justice O'Connor's dissent in *Kelo* pointed out the "holdings in *Berman* and *Midkiff* were true to the principle underlying the Public Use Clause. In both those cases, the extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society—in *Berman* through blight resulting from extreme poverty and in *Midkiff* through oligopoly resulting from extreme wealth." *Kelo*, 545 U.S. at 500 (O'Connor, J., dissenting). Unlike the cases the majority relied on, *Kelo* made no

proposition that the petitioners' properties were "the source of any social harm." *Id.* The Court's reasoning "significantly expand[ed] the meaning of public use" so much so that "if predicted (or even guaranteed) positive side effects are enough to render transfer from one private party to another constitutional, then the words "for public use" do not realistically exclude any takings, and thus do not exert any constraint on the eminent domain power." *Id.* at 500, 501.

B. *Kelo's* inclusion of economic development as an acceptable public use under the Takings Clause has created difficult threshold questions that this Court has been repeatedly asked to clarify.

The ruling of *Kelo* was not complicated, but workability is not synonymous with simplicity. A ruling can be construed as unworkable if the Court is "forced to clarify the doctrine again and again" and if that doctrine "continues to spawn difficult threshold questions that promise to further complicate the inquiry." *Loper Bright Enterprises*, 144 S. Ct. at 2271 (Gorsuch, J., concurring). Prior to *Kelo*, workability of public use within the context of the Fifth Amendment was broadly defined, but cases "generally identified three categories that comply with the [this] requirement." *Kelo*, 545 U.S. at 497 (O'Connor, J., dissenting). These categories were

> [f]irst, [a taking of] private property to public ownership—such as a road, a hospital, or a military base. Second,... [a taking of] private property to private parties, often common carriers, who make the property available for the public's use—such as with a railroad, a public utility, or a stadium. [Third,] ... in certain circumstances to meet certain exigencies, takings that serve a public purpose also satisfy the Constitution even if the property is destined for subsequent private use.

Id. at 497-98 (O'Connor, J., dissenting) (citations omitted). *Kelo's* ruling expanded the Constitution's language to include "economic development" and in doing so made it "not exert any constraint on the eminent domain power." *Id.* at 501. By expanding the definition of "public use" to such a degree, the rule becomes *too* workable and no longer serves as a limiting function of the federal government's power. Further, leaving Kelo undisturbed will lead to increasingly

difficult threshold questions as the public use definition continues to expand in favor of state economic interests with no constitutional protections.

This Court has also been asked to clarify the *Kelo* decision as recently as 2021. In *Eychaner v. City of Chicago*, a Chicago company wanted to purchase the petitioner's nearby land, but he was not interested in selling. 141 S. Ct. 2422, 2422 (2021) (Thomas, J., dissenting). The city notified petitioner that they would use eminent domain to transfer the property and petitioner sued. *Id.* at 2423. Petitioner's land was not blighted at the time, but the city nonetheless found an "ostensible 'public use'…[it] needed to transfer the land to the factory because otherwise it 'may become a blighted area.'" *Id.* Petitioner lost at both the trial and appellate levels and later asked for a writ of certiorari that was ultimately denied. *Id.* Justices Thomas and Gorsuch dissented to this denial with Justice Thomas stating that this case presented the opportunity to correct *Kelo* which was "wrong the day it was decided…[a]nd it remains wrong today." *Id.* Though he did not join the dissent, Justice Kavanaugh would have granted cert. *Id.* at 2422. *Eychaner* further detracts from *Kelo's* workability, as it shows that there is a desire for clarification from district, circuit, and this Court.

C. *Kelo's* ruling is inconsistent with precedent because it allows economic development to supplant time-tested limiting factors: legitimate public purposes, public health concerns, and transfer of privately owned property to another private entity.

The *Kelo* decision falters in its consistency with other similar decisions. Its reasoning diverged from the rulings of *Berman* and *Midkiff* with the taking in the former occurring because of a blighted neighborhood and the taking in the latter focusing on breaking up a land oligopoly detrimental to public interest. These were not the only cases inconsistent with *Kelo*.

The Court also discussed public use when the Interstate Commerce Commission ("ICC") "issued an order…requiring conveyance of 48.8 miles of railroad track from…Boston and Maine

Corporation (B & M) to the [National Railroad Passenger] Corporation [Amtrak]." *National R.R. Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407, 409-10, 422 (1992). The tracks in question were poorly maintained and Amtrak believed that B & M could not be relied upon for proper maintenance so it began purchase negotiations, but a deal could not be reached. *Id.* at 411-12. Amtrak then petitioned the ICC to issue the conveyance of the track which led to litigation. *Id.* at 413. B & M objected to this conveyance, stating it violated the public use requirement of the Fifth Amendment as it was a transfer from one private party to another. *Id.* at 422.

The Court disagreed and stated that precedent (specifically *Berman* and *Midkiff*) established this was a correct use of the Takings Power as it was serving a *public purpose*—that purpose being the facilitation of Amtrak's public railways. *Id.* The Court had the opportunity in this case to establish economic development as a public use, but it refrained from doing so. Instead, it relied on prior precedent, as *Kelo* should have, and worked within the trappings of the Takings Clause.

Long before *Kelo*, *Berman, Midkiff,* or *National R.R. Passenger Corp.*, the Court had struck down uses of eminent domain even if there was a conceivable public purpose. In *Missouri Pacific Railway Company v. State of Nebraska*, a group of farmers sought to erect an additional grain elevator on the railway company's land. 164 U.S. 403, 411 (1896). The railway denied the farmers' application and the farmers complained to the board of transportation. *Id.* at 412-13. The board found that

> [t]he two existing elevators were insufficient to handle the grain shipped at [the] station, and the owners and operators of those elevators had entered into a combination to fix the prices of grain, and to prevent competition in the price thereof, and there were not sufficient facilities for the handling and shipping of grain at that station; that it was necessary for the convenience of the public that another elevator should be erected and operated there ….

Id. at 413. When that case eventually came before this Court, it held that none of these reasons created a constitutional use of eminent domain. *Id.* at 417. It reasoned that granting the application would force the railway company to transfer privately owned and publicly used land to a separate group of private individuals. The Court's holding denied the existence of public benefits—including economic development—outlined by the board of transportation. *Id.* If economic development was consistent with the definition of "public use" this Court had the opportunity to establish it in 1896. It did not, however, because that would be an overindulgence of an already broad definition.

D. Instead of relying on *Kelo's* decision, most states have amended their constitutions by adding protections that insulate landowners and limit the scope of takings that transfer to private owners.

Undoubtedly, *Kelo* was a controversial decision. The Court was split five to four, and since its ruling numerous states have instituted statutes to shelter against it. Following *Kelo*, in 2005 Ohio's General Assembly unanimously passed an act that placed "a moratorium on any takings of [*Kelo's*] nature by any public body until further legislative remedies may be considered." *Norwood v. Horney*, 853 N.E.2d 1115, 1123 (Ohio 2006). In that act,

> [t]he legislature expressly noted…its belief that as a result of *Kelo* "the interpretation and use of the state's eminent domain law could be expanded to allow the taking of private property that is not within a blighted area, ultimately resulting in ownership of that property being vested in another private person in violation of Sections 1 and 19 of Article I, Ohio Constitution."

Id. at 1122. Similarly, the Pennsylvania state legislature introduced a bill that clarified the meaning of public use, requiring "a careful and…thoughtful consideration of weighing private property rights against the need of the government on rare occasions to exercise the extraordinary power of eminent domain." *Alpha Financial Mortgage, Inc. v. Redevelopment Authority of Fayette County*, 152 A.3d 375, 380 (Pa. Commw. Ct. 2016). The bill was later signed into law by Pennsylvania's

governor. *Id.* Missouri, too, enacted amendments in 2006 that aimed "to *strengthen* the rights of landowners in eminent domain actions." *Planned Indus. Expansion Authority of Kansas City v. Ivanhoe Neighborhood Council*, 316 S.W.3d 418, 426 (Mo. Ct. App. 2010) (emphasis in original). In total, "forty-four states changed their laws: Eleven changed their constitutions, while forty enacted a broad range of statutory changes" in *Kelo's* wake. Diana Berliner, *Looking Back Ten Years After Kelo*, 125 Yale L. J. 82, 84 (2015). States have found ways to work *around* the ruling of *Kelo* rather than relying on it. The expanded threshold of the Takings Clause was enough of a concern for most states to amend their constitutions mere months after the decision, enhancing their citizens' property rights.

The Court is presented with an opportunity to see *Kelo* "settle[d] right." The established factors that must be considered when overruling precedent greatly weigh in favor of casting *Kelo* aside. Its reasoning was lackluster and its interpretation of related decisions overlooked time-tested limiting principles in favor of economic development. Further, the ruling was too broad and unworkable, such that nearly every state took measures to protect private landowners. The Takings Clause of the Fifth Amendment was implemented to protect landowners from seizure of their land for public without just compensation, *Kelo's* holding establishes economic development as the superseding consideration in a taking.

II. A permissible "public use" taking involving private ownership is permissible only if there is substantial use by the public or rare exigent circumstances.

Kelo's error was its overbroad inclusion of economic development as a valid "public use." This ruling stretched the limits of a permissible taking to its breaking point and led states to intervene to adequately protect landowners. Before *Kelo*, precedent established that a taking is permissible "[w]here the exercise of the eminent domain power is rationally related to a conceivable public purpose…" and "[t]he mere fact that property taken outright by eminent

domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose." *Midkiff*, 467 U.S. at 230. Traditionally, this Court's decisions have placed permissible "public use" takings in three categories: a transfer of private property to public ownership; a transfer of private property to a private party that will make that property available for public use; and "exigent circumstance" takings that serve a public purpose. *Kelo*, 545 U.S. at 497-98 (O'Connor, J., dissenting).

A taking of private property for a transfer to public ownership is one of the more straightforward applications of the doctrine. An early example of such a taking was present in *Kohl v. United States*. There, the Court upheld Ohio's taking of a land parcel in Cincinnati for the construction of a "post-office and other public uses." *Kohl v. United States*, 91 U.S. 367, 368 (1875). Another common use of eminent domain in this category is the taking of property to construct roads and highways. This occurred in *Rindge Co. v. Los Angeles County*, where the State of California seized a ranch owner's land to build a highway. 262 U.S. 700, 703 (1923).

The taking of Fischer's farmstead does not fall into this category. His property, and that of the nine other owners, was taken by New Louisiana and transferred to Pinecrest, Inc. to build a new luxury ski resort. Fischer's property was not blighted, and though the area was lower income, it posed no risk or threat to the public. Originally this taking was done pursuant to NL Code § 13:4911, likely modeled after *Kelo*, which allows takings purely for economic development. As this luxury ski resort will not be owned by the public, it would not fall within the first category of "public use" and would need to be scrutinized under the other two categories.

A taking that is transferred from one private party to another is valid if that second party makes the property available for the public's use. Often, these secondary private parties are common carriers like a public utility company. *Kelo*, 545 U.S. at 498 (O'Connor, J., dissenting).

National R.R. Passenger Corp. fit into this category as it involved the transfer of blighted railroad tracks from its current owners to others that would have maintained them better. This Court addressed a separate case under this umbrella in *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, when the State of Alabama instituted an action to take "land, water, and water rights belonging to petitioner" and grant them to the Alabama Interstate Power Company for the construction of a dam. 240 U.S. 30, 31 (1916). The purpose of this dam was "to manufacture, supply, and sell to the public, power produced by water as a motive force." *Id.* at 32. This Court declared that even though "use by the general public" is inadequate as a universal test, the use in this circumstance is clearly public. *Id*. It enabled the public to draw energy from the streams in such a way that resulted in "labor without brains" and "save[d] mankind from toil that can be spared." *Id.*

The taking from Fischer and the nine other petitioners does not align with this second category. While the land was taken from one private party and transferred to another, the public use of a luxury ski resort pales in comparison to a railroad track or dam that produces electricity. It is argued that the resort will increase tax revenue for the area, create new jobs, and potentially attract wealthy tourists, but "'[p]ublic use means something more than *any* conceivable 'public purpose.'" *Eychaner*, 141 S. Ct. at 2423 (emphasis added). If there were no restrictions on the meaning of "public use" within the Takings Clause, the Framers' intent would be nullified. Pinecrest, Inc. is not a common carrier such as a utility company or railroad service. The resort it intends to build would be outside the price range of the community it is displacing.

Justice O'Connor stated in her dissent of *Kelo* that this final category is reserved for exigent circumstances where "'public ownership' and 'use-by-the-public' are…too constricting and impractical…to define the scope of the Public Use Clause." *Kelo*, 545 U.S. 469 at 498 (O'Connor,

J., dissenting). The takings in *Berman* and *Midkiff* fall into this category. The takings in those cases involved two private parties with the secondary party putting the land to public use. These were not simply transfers of convenience or economic development—as *Kelo* reasoned—they were intended to cure a wrong. That is an important distinction and it is what keeps this category from being over-inclusive. However, this category should be utilized sparingly and cautiously as "[t]aking land from one private party to give to another rarely will be for 'public use.'" *Eychaner*, 141 S. Ct. at 2423.

There is no exigent circumstance to justify the takings of Fischer's and the nine other Petitioners' properties. The record established that the homes are not dilapidated, nor do they pose a risk to the public as they did in *Berman*. The homes and ancestral farms of the predominantly minority Petitioners are not akin to the oligopoly presented in *Midkiff* and do not justify a taking. There is a promise of economic benefit to the very people enacting the taking and nothing to support the need for economic development rising to the level of an exigent circumstance.

III. As part of the Fifth Amendment, the Takings Clause is self-executing and therefore may be asserted in the absence of an underlying state or federal cause of action for just compensation.

The Takings Clause of the Fifth Amendment, which has been applied to the states under the Fourteenth Amendment, prohibits the taking of private property "for public use, without just compensation." U.S. Const. amend. V; U.S. Const. amend. XIV. "Because of 'the self-executing character' of the Takings Clause 'with respect to compensation,' a property owner has a constitutional claim for just compensation at the time of the taking." *Knick*, 588 U.S. at 192 (quoting *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987)). At that point, the government "has a categorical duty to compensate the former owner ...." *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 233 (2003) (citing

United States v. Pewee Coal Co., 341 U.S. 114, 115 (1951)). As in this case, "if a local government takes private property without paying for it, that government has violated the Fifth Amendment—just as the Takings Clause says—without regard to subsequent state court proceedings." *Knick*, 588 U.S. at 189. "Our constitutional system assigns to state officers 'a coordinate responsibility to enforce [the Constitution] according to their regular modes of procedure.'" *DeVillier v. Texas*, 601 U.S. 285, 292 (2024) (quoting Howlett v. Rose, 496 U.S. 356, 367).

This issue was considered recently in *DeVillier v. Texas* in which this Court examined what the appropriate "procedural vehicle" was to vindicate the right of just compensation. 601 U.S. at 291. The plaintiff, DeVillier, sought just compensation under the Takings Clause and argued that the Constitution itself authorized him to bring suit. *Id.* at 290. However, that specific question remained unanswered due to this Court finding a viable cause of action under Texas State law. *Id.* at 293. The unanimous Court declared the importance of states to provide a route for citizens to assert their constitutional rights. *Id.* "We should not 'assume the States will refuse to honor the Constitution,' including the Takings Clause, because 'States and their officers are [also] bound by obligations imposed by the Constitution.'" *Id.* (quoting *Alden v. Maine*, 527 U.S. 706, 755 (1999)). Thus, a starting point for this analysis is looking to the state laws of New Louisiana in search of an alternative procedural vehicle.

A. The absence of a state cause of action for just compensation is an effort by New Louisiana to evade waiver of sovereign immunity, which is not permissible, and requires Petitioners to seek relief in federal court.

"[T]he States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today...." *Alden*, 527 U.S. at 713. The applicable state statute, NL Code § 13:5109 provides that a statutory or executive waiver of sovereign immunity is required for a property owner to obtain just

compensation from the state. However, New Louisiana does not offer a statutory waiver and therefore the statute is essentially useless and a violation of the Supremacy Clause. *See Zito v. N. Carolina Coastal Res. Comm'n,* 8 F.4th 281, 290 (4th Cir. 2021) ("The Supreme Court has warned that state procedures violate the Supremacy Clause if the procedures effectively deprive plaintiffs of their federal rights"). This Court has found that "[o]ur constitutional system assigns to state officers 'a coordinate responsibility to enforce [the Constitution] according to their regular modes of procedure.'" *DeVillier* 601 U.S. at 292 (quoting *Howlett*, 496 U.S. at 367). This responsibility may *not* be disregarded. *See Haywood v. Drown*, 556 U.S. 729, 736 (2009) ("although States retain substantial leeway to establish the contours of their judicial systems, they lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies"); *see also Manning v. N.M. Energy, Minerals & Natural Resources Dept.*, 144 P.3d 87, 97 (N.M. 2006) ("[w]e do not agree … that there must be a specific waiver of immunity before the state can be sued for 'just compensation' under the Takings Clause. In our view, the Fifth Amendment is 'self-executing.'").

In terms of the federal Takings Clause, creating a state cause of action is historically not a difficult burden to meet. *See Jachetta v. United States*, 653 F.3d 898, 909 (9th Cir. 2011) ("[T]his constitutionally enforced remedy against the states in state courts can comfortably co-exist with the Eleventh Amendment immunity of the states from similar actions in federal court."). This is not a disregard by New Louisiana—this is an impermissible attempt to evade suit for just compensation. *See Phillips v. Washington Legal Found.*, 524 U.S. 156, 167 (1998) ("a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law").

In *Knick*, this Court noted that "the federal and *nearly all* state governments provide just compensation remedies to property owners who have suffered a taking." 588 U.S. at 182 (emphasis added). *See* Tex. Const. art. I, § 17; *see also* Mich. Const. art. X, § 2; N.D. Cent. Code § 28-32-09; Utah Code ann. § 13-43-102; S.C. Const. ann. art. I, § 13; Nev. Const. art. 1, § 8. New Louisiana fails to meet its constitutional obligation, providing no such route.

Allen v. Cooper provides an example of a post-*DeVillier* case. 2024 WL 4009870, at *1 (E.D.N.C. Aug. 30, 2024). In *Allen*, the court looked to 4th Circuit precedent and found that "North Carolina's sovereign immunity bars this Court from hearing Allen's direct Fifth Amendment claims unless Allen can show that North Carolina courts do not offer a "'reasonable, certain, and adequate' means for challenging an action as a taking and obtaining compensation if the challenge is successful." *Id.* at *12 (E.D.N.C. Aug. 30, 2024) (quoting *Zito*, 8 F.4th at 288).

In the case at hand, Fischer maintains that New Louisiana does not offer a "reasonable, certain, and adequate" means for challenging the taking of his property and thus he is able to sue in federal court rather than state court.

Professor H. Seamon hypothesizes a solution in the event that states fail to meet this standard.

> Under these circumstances, the victim of a taking should be able to sue the State directly for just compensation in a state court of general jurisdiction. In such a suit, the plaintiff would have a cause of action under the Just Compensation Clause, as applicable to States under the Fourteenth Amendment.

Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 Wash. L. Rev. 1067, 1107 (2001). In the event of a taking "the property owner may sue the government at that time in federal court for the 'deprivation' of a right 'secured by the Constitution.'" *Knick,* 588 U.S. at 189. Thus, Fischer is not required to litigate in state court prior to bringing the action in federal court as he did in this case.

B. Federal statutes that have traditionally been used as jurisdictional avenues for the Takings Clause are not available to Petitioners and thus the Fifth Amendment must be assertable on its own.

This Court in *Knick* held that at the time of a taking, a property owner may bring the claim to federal court under § 1983. *Knick*, 588 U.S. at 206. However, a § 1983 claim is not available for the landowners in this case. Petitioners argue that the Fifth Amendment's Takings Clause is self-executing and provides its own cause of action. Although there is no binding precedent, Petitioners assert that this Court has previously alluded to the fact that the Takings Clause would be self-executing in the absence of a state or federal route. *See DeVillier*, 601 U.S. at 291; *see also Knick,* 588 U.S. at 192.

First, the Tucker Act gives the United States Court of Federal Claims jurisdiction to render judgment on claims against the federal government. 28 U.S.C.A. § 1491. Here, Judge Willis' dissent stated that while the Tucker Act provides a waiver of sovereign immunity, it does not create an underlying cause of action. Fischer's claim against the State of New Louisiana, does not benefit from the waiver of sovereign immunity against the federal government.

Second, a § 1983 claim provides a cause of action against state *actors*, not states themselves, and is not applicable. 28 U.S.C.A. § 1983. "[A] [s]tate nor its officials acting in their official capacities are "persons" under § 1983." *Will v. Michigan Dep't of State Police* 491 U.S. 58, 71 (1989). In the present case, neither Governor Anne Chase nor the State of New Louisiana are "persons" who would be subject to a suit under § 1983.

Finally, a Bivens claim is not available because it is limited to civil rights lawsuits for monetary damages against federal officials. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395 (1971). Fischer seeks both temporary and permanent injunctive relief, which would not be available to him in a Bivens claim. In the alternative, he seeks "just

compensation," not monetary damages for the property taken by *state* officials. The lower courts do not dispute that there is no federal remedy available to Fischer. R. at 8.

When available, these routes may be used as the underlying cause of action for a Fifth Amendment Takings Clause claim. However, in the limited circumstances, as here, where no federal or state route is available, this Court must allow the Takings Clause to be self-executing. If Fischer is required to litigate his claim in state court, in the absence of a state statutory or constitutional enactment, the decision will mirror the District Court's dismissal under FRCP 12(b)(6). As a result, the holdout property owners will not receive compensation—an unequivocal violation of Petitioner's constitutional rights.

Scholar Julia Grant noted this effect at the circuit court level. "The circuit courts are claiming that state courts have to be open to hear the claims, but they are doing little to make sure that plaintiffs can actually receive just compensation in those state courts." Julia Grant*, A Clash of Constitutional Covenants: Reconciling State Sovereign Immunity and Just Compensation*, 109 Va. L. Rev. 1143, 1160 (2023). Further, "even if the circuit courts *did* perform a robust assessment of the availability of state court remedies, this would force federal courts to carefully analyze various state sovereign immunity doctrines." *Id.* (emphasis added). Without the self-executing solution, federal courts will be tasked with the "parsing of state law" to determine whether a state is open to hear claims. *Id.* This may lead to inconsistent results and a higher probability that private property owners will be deprived of a constitutional right.

Jachetta v. United States provides an example of the frustrations that occur without a self-executing solution. *Jachetta*, 653 F.3d at 910. The court found that the plaintiff was unable to bring his inverse condemnation claim under § 1983 or the Federal Tort Claims Act, denying him access to federal court. *Id.* The court required plaintiff to instead re-file the claim against Alaska in state

court, assuring Jachetta that "if the state court nevertheless dismisses [plaintiff's] action for lack of jurisdiction, [he] can then seek review in the United States Supreme Court." *Id.* Their holding represents the cumbersome litigation that results in the absence of a self-executing cause of action.

C. Fischer has a valid Fifth Amendment claim, and the Takings Clause is self-executing in limited circumstances such as this one.

In looking to the Framers' intent and the overarching goal of the Fifth Amendment, a self-executing characterization of the Takings Clause is the correct finding in this case. In his concurrence and dissent, Judge Willis notes that "a property owner has no effective protection against a state that refuses to waive its immunity, notwithstanding the facial right to obtain just compensation." He further states that the majority's holding is inconsistent with the Framer's intent.

This Court has recently examined the history of takings in *Sheetz v. County of El Dorado* in deciding whether a fee imposed as a condition for a land use permit constitutes an unconstitutional taking. 601 U.S. 267, 277 (2024). In fact, the Court looked to the importance of property rights even *before* our country's founding when colonial governments passed their own statutes to secure land. *Id.* Even then, the statutes "invariably required the award of compensation to the owners when land was taken." *Id.*

"The Founders recognized that the protection of private property is indispensable to the promotion of individual freedom." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 147 (2021). "Property rights are necessary to preserve freedom, for property ownership empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them." *Murr v. Wisconsin*, 582 U.S. 383, 394 (2017).

As for the role of states, "state courts have a primary role in ensuring their State's compliance with the Just Compensation Clause, which is part of the broader role in safeguarding

constitutional rights contemplated for those courts by the Framers of the Constitution." Seamon, 76 Wash. L. Rev. at 1116.

When viewing Fischer's plight in light of this historical context, it is unlikely that the Takings Clause intended for family-owned farms and single-family homes to be taken for a private luxury ski resort without being reimbursed. This perspective persists in the modern era as demonstrated by nearly every state's statutory and constitutional incorporation of those rights.

It is also important to note that the use of the Takings Clause as its own cause of action will likely be rare. This will not result in some huge expansion of federal power against the states. It will merely be a final route for landowners to utilize if an underlying cause of action is unavailable to assert the Takings Clause. This Court agreed, stating "that constitutional concerns do not arise when property owners have other ways to seek just compensation." *DeVillier,* 601 U.S. at 292.

In this case, the constitutional concern *does* arise because there are no other ways for Fischer to seek just compensation. Fischer is asking this Court to allow the Fifth Amendment Takings Clause to be self-executing in the very limited circumstances in which no underlying cause of action is available. The few states with no statutory remedy, such as New Louisiana, will be compelled to incorporate just compensation to avoid federal suit. This will not lead to an expansion of constitutional claims, nor will it flood the courts because where another remedy is available, that route must still be used.

This Court has always recognized that "[t]he word 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equity.'" *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 631 (1961) (quoting *United States v. Commodities Trading Corp*., 339 U.S. 121, 124 (1950)). To promote this longstanding ideal and to respect the importance that has been placed on property

rights throughout the history of our country, this Court should allow the Fifth Amendment to self-execute—if and only if no other cause of action is available.

CONCLUSION

Petitioners request that this Court reverse the Thirteenth Circuit's judgment.

Respectfully submitted,
Team 9
Counsel for Petitioners