No. 22-913

In the Supreme Court of the United States

RICHARD DEVILLIER, ET AL.,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF CERTIORARI

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SUPPLEMENTAL BRIEF FOR THE PETITIONER

As explained in the Petition, on January 11, 2023, the Fifth Circuit entered an order denying rehearing en banc in this matter, no poll having been requested. See Pet. App. 41a. On March 23, 2023, however, after the Petition in this case was filed, the Fifth Circuit entered a second order denying rehearing, this time stating that a poll had been taken at the request of one of its members. See Supp. App. 43a. Three judges filed opinions respecting this second denial of rehearing en banc: Two of the judges on the initial panel (Judges Higginbotham and Higginson) filed separate solo concurrences in the denial while Judge Oldham filed a dissent, which was joined by Judges Smith, Elrod, Engelhardt, and Wilson. All three opinions are set forth in full in the Supplemental Appendix. Supp. App. 44a–97a.

The two solo concurrences each expand upon the one-sentence conclusion reached in the original panel decision below, though in slightly different ways. Judge Higginbotham's concurrence frames this case as a question of jurisdiction: In the absence of a "jurisdictional grant such as 42 U.S.C. § 1983[,]" it argues, federal courts are not empowered to hear claims arising under the Takings Clause. Supp. App. 45a. Instead, Takings Clause claims against States must proceed exclusively through state courts, with the only avenue for federal review of those claims lying in this Court.* *Ibid*. Judge Higginson's concurrence, by contrast, frames the question as

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* The Higginbotham concurrence does not acknowledge that this case was originally filed in state court and arrived in federal court only after Texas chose to remove it.

whether there is "an implied cause of action" under which property owners may enforce their right to just compensation. Supp. App. 51a. Relying heavily on this Court's modern reluctance to extend *Bivens* remedies to new contexts, the concurrence argues that continuing to recognize the historical right to seek just compensation directly under the Constitution "would undermine the scheme Congress has set forth to enforce the Takings Clause [through Section 1983]." Supp. App. 63a.

Judge Oldham, joined by four other judges of the Fifth Circuit, disagreed. Judge Oldham's dissent emphasizes the importance of the Question Presented here by demonstrating the breadth of the panel's holding, which, "barring Supreme Court intervention[ ] . . . is an insuperable obstacle to any plaintiff asserting any federal takings claim against any state in federal *or state* court." Supp. App. 64a–65a. In other words, "[t]he panel decision reduces the Takings Clause to nothing" because if a Takings claim is filed in state court, "the State removes [and] the federal court must assert jurisdiction and dismiss the claim with prejudice[.]" Supp. App. 78a. "Likewise if the landowner tries to bring suit originally in federal district court." *Ibid*. With two options, both of which lead to dismissal, the upshot of the panel opinion is that "the Takings Clause [is] a dead letter" as applied to the States in the Fifth Circuit. *Ibid.*

Not only does the panel opinion eviscerate the Takings Clause, the dissent argued, it does so for no good reason. The panel opinion "reflects a deeply ahistorical understanding of takings litigation in our nation" and fails to grapple with this Court's cases treating the Takings Clause differently from other parts of the Bill of Rights. Supp. App. 80a–90a.

Ultimately, Judge Oldham concluded, property owners in the Fifth Circuit who want a judicially enforceable right to just compensation when States take their property have no viable option except "to ask the Supreme Court to reverse" the decision below. Supp. App. 79a.

The dissent is correct. History and tradition, as well as the precedents of this Court, teach that property owners can sue for just compensation without first invoking a legislatively created cause of action like Section 1983. See Pet. 7–10. The contrary holding of the panel below means, in Judge Oldham's words, that the Takings Clause is now a "dead letter" as applied to the states within the Fifth Circuit. Supp. App. 78a. But in other jurisdictions, it remains very much alive, which is a split of authority that warrants this Court's attention. See Pet. 10–17. The petition for certiorari should therefore be granted.

Respectfully submitted.

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