No. 22-913

In The
Supreme Court of the United States

RICHARD DEVILLIER, ET AL.,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

KATHRYN D. VALOIS
Pacific Legal Foundation
4440 PGA Blvd., Suite 307
Palm Beach Gardens, FL 33410
561.691.5000
KValois@pacificlegal.org

DEBORAH J. LA FETRA
ROBERT H. THOMAS
Counsel of Record
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
916.419.7111
DLaFetra@pacificlegal.org
RThomas@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation

QUESTION PRESENTED

In *First English Evangelical Lutheran Church v. County of Los Angeles*, this Court recognized that the Fifth Amendment's Takings Clause was "self-executing" and that "[s]tatutory recognition was not necessary" for claims for just compensation because they "are grounded in the Constitution itself[.]" 482 U.S. 304, 315 (1987). Since *First English*, several state courts of last resort have held that the self-executing nature of the Takings Clause requires them to entertain claims directly under the Clause without the need for statutory authorization. Two federal Circuits, the Fifth and the Ninth, disagree and have held that claims for just compensation are only available if they are legislatively authorized. The question presented is:

May a person whose property is taken without compensation seek redress under the self-executing Takings Clause even if the legislature has not affirmatively provided them with a cause of action?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized for the purpose of litigating matters affecting the public interest in private property rights, individual liberty, and economic freedom. Founded 50 years ago, PLF is the most experienced legal organization of its kind. PLF attorneys have participated as lead counsel in numerous landmark United States Supreme Court cases generally in defense of the right to make reasonable use of property and the corollary right to obtain just compensation when that right is infringed. *See, e.g.*, *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021); *Pakdel v. City and Cnty. of San Francisco*, 141 S.Ct. 2226 (2021); *Knick v. Twp. of Scott*, 139 S.Ct. 2162 (2019); *Murr v. Wisconsin*, 137 S.Ct. 1933 (2017); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). PLF also routinely participates in important property rights cases as amicus curiae. *See, e.g.*, *Horne v. Dep't of Agric.*, 576 U.S. 350 (2015); *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012). Additionally, PLF attorneys have extensive experience with the question here, having advocated

---

[1] Pursuant to Rule 37.2, PLF provided timely notice to all parties. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

for the Takings Clause's self-executing nature several times. *See, e.g.*, *Ariyan Inc. v. Sewerage & Water Board of New Orleans*, 143 S.Ct. 353 (2022); *Financial Oversight and Management Board for Puerto Rico v. Cooperative de Ahorro y Credito Abraham Rosa*, 143 S.Ct. 774 (2023).

INTRODUCTION AND SUMMARY OF ARGUMENT

When government takes, it must compensate. This is the plain meaning of the Fifth Amendment's fundamental limitation on sovereign power, as this Court has repeatedly, and recently, emphasized. *See Cedar Point*, 141 S.Ct. at 2077 (Government's obligation to compensate owners when it takes property is not an "empty formality, subject to modification at the government's pleasure."); *Phelps v. United States*, 274 U.S. 341, 343 (1927) ("Under the Fifth Amendment plaintiffs were entitled to just compensation ... the claim is one founded on the Constitution."). This petition asks what it means when this Court describes the Fifth Amendment's Just Compensation Clause as "self-executing." *See, e.g.*, *Knick*, 139 S.Ct. at 2171 ("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.") (cleaned up, citation omitted); *United States v. Clarke*, 445 U.S. 253, 257 (1980) ("A landowner is entitled to bring such an [inverse condemnation] action as a result of the self-executing character of the constitutional provision with respect to compensation") (cleaned up, citation omitted). At the very least, it means that the Constitution itself recognizes the right, and most importantly

establishes the remedy when the government fails to live up to its constitutional obligations. *See Cedar Point*, 141 S.Ct. at 2077 (Government's obligation to compensate owners when it takes property is not an "empty formality, subject to modification at the government's pleasure.").

Consequently, because neither Congress nor a state legislature need agree to pay compensation, they do not need to adopt an implementing statute—and no waiver of sovereign immunity is necessary—for a plaintiff to invoke the judiciary's authority to enforce the Constitution and impose a remedy. That is, if Congress repealed Section 1983 tomorrow, the constitutional mandate for just compensation remains. Or as this Court has put it, the Just Compensation Clause "of its own force" "furnish[es] a basis for a court to award money damages against the government[.]" *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty.*, 482 U.S. 304, 316 n.9 (1987) (quotation omitted). *See* 1 Laurence H. Tribe, *American Constitutional Law* § 6-38, at 1272 (3d ed. 2000) (observing, based on *First English*, that the Takings Clause "trumps state (as well as federal) sovereign immunity"). The Constitution's plain text, which acknowledges the fundamental right to just compensation when one's property is pressed into public service, would be deprived of its power and meaning should the executive and the legislature need first to agree to be bound by this essential limitation on all free governments.

This Court should resolve the confusion among lower courts by granting certiorari and holding that the Just Compensation Clause is self-executing and states may not immunize themselves from the

constitutional mandate to pay just compensation. *See Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 304 (1923) ("Just compensation is provided for by the Constitution and the right to it cannot be taken away by statute."); *PennEast Pipeline Co., LLC v. New Jersey*, 141 S.Ct. 2244, 2258–59 (2021) (Eleventh Amendment does not bar eminent domain suits by private delegatees of the federal government against nonconsenting states). The petition should be granted.

ARGUMENT

I. The Fifth Circuit Conflicts With This Court's Emphasis That the Fifth Amendment Is "Self-Executing"

A. The Right to Secure Compensation for a Taking Is a Fundamental Property Right

This Court has long recognized that property rights are "necessary to preserve freedom[.]" *Cedar Point*, 141 S.Ct. at 2071. The core nature of the right to be actually compensated is reflected in its lineage—as long as any in Anglo-American law. Over eight centuries ago, suffering under the practice of purveyance—where the Crown "took goods, crops, horses, and carts for the king's use without (or intending to pay) for them"[2]—the barons forced King John to promise to provide compensation. *See* Magna Carta art. XXVIII (1215), *quoted in* Jones*, supra,* at 209. This was not an unenforceable promise, but one with a potent enforcement mechanism: if John failed to live up to these promises, the barons could abandon their feudal obligations and revolt. History tells us that they did just that, after John almost immediately

[2] Dan Jones, *Magna Carta – The Birth of Liberty* 138 (2015).

repudiated his promises. *See Horne v. Dep't of Agric.*, 576 U.S. 350, 358–59 (2015) (the "categorical" duty to pay just compensation "goes back at least 800 years to Magna Carta" and the Takings Clause was included in the Bill of Rights in part because of Revolutionary War property seizures).

Just compensation lies at the heart of property rights, and this Court has emphasized its central role. *See Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 241 (1897) (just compensation was the first right in the Bill of Rights "incorporated" against states under the Fourteenth Amendment); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 536–37 (2005) ("As its text makes plain, the Takings Clause … 'is designed not to limit governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking.'") (citation omitted). The sole measure of justice for most takings is compensation. *People ex rel. Wanless v. City of Chicago*, 378 Ill. 453, 459 (1941) ("It must be remembered that a landowner whose property is taken or damaged for public use through the exercise of the power of eminent domain is an involuntary creditor who has no right to prevent the city from taking or damaging his property.").

Compensation is meant to indemnify—the "full and perfect equivalent" for property taken. *United States v. Miller*, 317 U.S. 369, 373 (1943) ("The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken.") (citation omitted). But the "justness" of compensation is not only the value of the property taken, but includes how and when it is paid. The right to obtain compensation when the government fails to proffer it

reflects the normative (and intuitive) expectation that if property must be appropriated and surrendered to a public use, the owner has the right to pursue judicial relief to be made whole.

The syntax of Magna Carta's "takings clause" ("no constable shall take [property] … without immediate payment") is familiar, because the Fifth Amendment is phrased similarly ("nor shall private property be taken … without just compensation"). These plain terms obligate government to provide just compensation when it takes property for public use, and uncompensated takings are beyond the powers of free governments. Unique among the Bill of Rights, the Just Compensation Clause acknowledges in the constitutional text the limitations on government power—and most importantly sets forth the remedy if government should fail to abide by these limitations. Whether this provision is viewed as recognizing that a taking without compensation is beyond the legitimate power of government, or as a constitutional waiver of sovereign immunity,[3] the result is the same: when government takes property, it is obligated to provide just compensation. If it does not, property owners are entitled to seek compensation themselves without additional government permission.

---

[3] "Sovereign immunity," government's common-law immunity from civil lawsuits, describes a "fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution." *Alden v. Maine*, 527 U.S. 706, 713 (1999). For this reason, government may not be sued without its consent. *Weinstein, Bronfin & Heller v. LeBlanc*, 192 So.2d 130, 132 (La. 1966) (The "basic premise of this proposition that the State does enjoy immunity from suit and may not be sued without its consent …. derives from and is inherent in the most elementary concepts of governmental sovereignty[.]").

Thus, this Court has consistently described the Just Compensation Clause as "self-executing," meaning that no additional acquiescence or authorization is necessary to enforce the compensation requirement. This means that no further action by the government is a necessary predicate to enforcing the right, nor is a waiver of sovereign immunity, nor an enabling statute. Thus, an owner whose property has been taken is entitled to seek compensation without invoking any particular statute or state court procedures. *See, e.g.*, *Knick*, 139 S.Ct. at 2171; *Clarke*, 445 U.S. at 257.

The term "self-executing" implies an *enforceable* right. *Davis v. Burke*, 179 U.S. 399, 403 (1900) ("'A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; 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.'") (citation omitted); *cf. Medellin v. Texas*, 552 U.S. 491, 505 (2008) (treaty stipulations that are *not* self-executing are enforce–able only pursuant to implementing legislation). Here, the Fifth Amendment explicitly commands payment of just compensation when government takes property for public use. This is a "sufficient rule" as evidenced by courts' ability to apply it since the earliest days of the United States.

Indeed, the compensation mandate cannot be limited or diminished, even by other constitutional powers. *See*, *e.g.*, *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589 (1935) (the bankruptcy power cannot limit the obligation to provide just

compensation); *see also United States v. Security Industrial Bank*, 459 U.S. 70, 75 (1982) (reaffirming the holding in *Radford* and explaining, "[t]he bankruptcy power is subject to the Fifth Amendment's prohibition against taking private property without compensation"); *Blanchette v. Connecticut General Ins. Corps.*, 419 U.S. 102, 155 (1974) (ability of takings claimants to pursue any compensation shortfall in the Court of Claims ensured that their constitutional rights were protected).

There is a "*constitutional* obligation to pay just compensation." *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (emphasis added); *see also Jacobs v. United States*, 290 U.S. 13, 16 (1933) ("[A] promise [to pay] was implied because of the duty to pay imposed by the [Fifth] Amendment."). Critically, unlike other civil actions, claims for just compensation do not determine culpability—the owner possessed property taken for a public use and a court's main task is to establish the amount representing the full and perfect equivalent for the property taken. *See United States v. Commodities Trading Corp.*, 339 U.S. 121, 124 (1950) ("The word 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equity'...."). *Knick* held that property owners seeking just compensation for a taking need not pursue state administrative remedies prior to filing suit in federal court. 139 S.Ct. at 2170–75. The challenged exhaustion requirement was wrongly imposed because the property owner's right to compensation "arises at the time of the taking," *id.* at 2170, and there is no reason why constitutionally-protected property rights should be uniquely excepted from the general rule that plaintiffs alleging violations of their constitutional rights may proceed directly to federal court without exhausting state

procedures. *Id.* at 2167 (citing *Heck v. Humphrey*, 512 U.S. 477, 480 (1994) (quoting *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 501 (1982))). Nothing in *Knick* justifies immunizing state governments; the Court simply emphasized the government's obligation to pay just compensation for property it has already taken. *See Knick*, 139 S.Ct. at 2172 (citing *First English* as holding that a "property owner acquires an irrevocable right to just compensation immediately upon a taking").

In short, as one commentator explained,

> It is a proposition too plain to be contested that the Just Compensation Clause of the Fifth Amendment is "repugnant" to sovereign immunity and therefore abrogates the doctrine …. A taking without payment of just compensation is a constitutional oxymoron. Faced with proof that the government has effectuated such a condition, a court must do one of two things if it is to enforce the supreme law of the land. Either it must oust the government and restore the property owner to possession of his or her property, or it must confirm the taking and exact just compensation from the government. Between these alternatives, both of which abrogate sovereign immunity, there is no middle ground.

Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 Nw. U. L. Rev. 144, 199–200 (1996).

Any impulse to wait for the executive and legislature to first agree to a judicial remedy must give way to the self-executing Just Compensation Clause,

which necessarily implicates civil rights. *First English*, 482 U.S. at 316 n.9. ("[I]t is the Constitution that dictates the remedy for interference with property rights amounting to a taking."). Here, the takings claimants filed suit in state court. The State of Texas removed the case to federal court then convinced the Circuit Court that by doing so, it immunized itself from paying just compensation. This Court should not countenance such self-dealing governmental machinations at the expense of property owners seeking vindication of constitutional rights. *See Arrigoni Ent., LLC v. Town of Durham*, 136 S.Ct. 1409 (2016) (Thomas and Kennedy, JJ., dissenting from denial of certiorari) (procedural bar from federal court "inspired gamesmanship"); *Lapides v. Board of Regents*, 535 U.S. 613, 621 (2002) (decrying state's manipulation of legal doctrine "to achieve unfair tactical advantages").

The structure and plain language of the Fifth Amendment as incorporated through the Fourteenth Amendment cannot justify such immunity. The Just Compensation Clause does not dictate how or when compensation is provided. *See Crozier v. Fried. Krupp Aktiengesellschaft*, 224 U.S. 290, 306 (1912). But it requires some kind of enforceable remedy, even when the government has not consented to be sued.

B. The Fourteenth Amendment Was Adopted to Protect Civil Rights, Including Property Rights

When, as here, a state is involved, the Fourteenth Amendment's empowerment of federal courts to ensure that states do not violate individual rights is also implicated. *Mitchum v. Foster*, 407 U.S. 225, 238–39 (1972) (recognizing the role of the Amendment in

elevating "the Federal Government as a guarantor of basic federal rights against state power"); Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 268 (1998) (the Amendment was adopted in part to protect "citizens of the United States, whose property, by State legislation, has been wrested from them"). Before the foundational shift in constitutional thinking in the aftermath of the Civil War, the Fifth Amendment's condition on government's exercise of eminent domain power limited only the federal government. *See Barron v. Mayor & City Council of Baltimore*, 32 U.S. (7 Pet.) 243, 250–51 (1833).[4]

It was not until the Fourteenth Amendment (and the civil rights statutes adopted to give it teeth), however, that federal courts protected property and other constitutional rights against predation from state and local governments. When Congress enforces a Fourteenth Amendment right without violating state immunity, it is because the Amendment itself overrides any state action that purports to render a right immune from judicial enforcement. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) ("[T]he Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment.") (citation omitted).

The Fifth Circuit's decision relies on a partial quote from *Hernandez v. Mesa*, 140 S.Ct. 735, 742 (2020): "[A] federal court's authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress[.]" The full quote in *Hernandez*,

---

[4] State constitutions and state tort law contained analogous protection against uncompensated takings. *See Knick*, 139 S.Ct. at 2175–76.

which rejected an expansion of *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), to permit recovery of tort damages,[5] states, "[w]ith the demise of federal general common law, a federal court's authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress, and no statute expressly creates a *Bivens* remedy." 140 S.Ct. at 742 (citation omitted). The heart of *Hernandez* is the Court's grappling with whether it could or should *create a new cause of action* in the absence of a federal statute. The Court declined to do so. The issue presented here is different: whether the Fifth Amendment's Takings Clause itself establishes an independent cause of action. Texas convinced the Fifth Circuit that it does not—that property owners' sole avenue to federal court is via the Civil Rights Act.

Section 1983 operates to provide a private cause of action to enforce rights guaranteed by the Fourteenth Amendment. It provides a remedy against "[e]very person" who, under color of state law, deprives a citizen of the United States of "any rights, privileges, or immunities secured by the Constitution and laws." Section 1983 is not an independent source of constitutional or statutory rights; it authorizes plaintiffs to sue for violations of the Constitution and

---

[5] In *Bivens*, the Court held that a person claiming to be the victim of an unlawful arrest and search could bring a Fourth Amendment claim for damages against the responsible agents even though no federal statute authorized such a claim. 403 U.S. at 397. The *Hernandez* case involved a cross-border shooting where a U.S. Border Patrol agent shot and killed a Mexican teen who had crossed back into Mexico when he was shot. After an investigation absolved the agent, the teen's parents sued in federal district court, alleging that the agent violated the teen's Fourth and Fifth Amendment rights. 140 S.Ct. at 740–41.

other federal statutes. However, as the court below noted, plaintiffs cannot sue states directly for constitutional violations under Section 1983, and the states themselves are not "persons" as that term is used in the statute. *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 69 (1997). If takings claimants are required to proceed solely under Section 1983 against a state, the lawsuit "dies aborning." *See Knick*, 139 S.Ct. at 2167–68 (rejecting the same "Catch-22" caused by the *San Remo* preclusion trap).[6] This Court should grant the petition to ensure that property owners have a means for constitutional redress against any government actor—local, state, or federal—that takes private property for public use without just compensation.

II. This Court Should Resolve the Lower Court Conflict on the Self-Executing Nature of the Just Compensation Clause

The lower courts do not agree on the import of this Court's "self-executing" description. The First Circuit requires just compensation as mandated by the self-executing nature of the Takings Clause while the Fifth and Ninth Circuits allow governments to avoid such payments. The First Circuit correctly concludes that it means that just compensation cannot be limited or diminished, even by other constitutional powers, or by statute. For example, in *In re Financial Oversight and Mgmt. Bd.*, 41 F.4th 29, 46 (1st Cir. 2022), *cert. denied*, 143 S.Ct. 774 (2023), the First Circuit rejected the argument that Puerto Rico's obligation to provide just compensation for property it had taken (both by eminent domain and by inverse

[6] *San Remo Hotel, L.P. v. City & Cnty. of San Francisco*, 545 U.S. 323, 335 (2005).

condemnation) could be reduced or discharged in bankruptcy.[7]

The First Circuit correctly relied on the unique qualities of just compensation—the only monetary remedy specifically commanded in the text of the Constitution. *Id.* at 44 ("just compensation is different in kind from other monetary remedies"). The command for just compensation is a "structural limitation" on government's authority to take private property, and it is a limitation that should encourage government officials to exercise the taking power with caution. *Id.* Because the Constitution itself demands payment of just compensation to remedy a taking, the First Circuit recognized that a judicial award of just compensation is different in kind than typical breach of contract or common law or constitutional tort-based damage awards. *Id.* at 43, 45 (Just compensation is not a "mere monetary obligation that may be dispensed with by statute."). The court declined to conflate constitutional tort recovery via 42 U.S.C. § 1983[8] with constitutionally mandated just compensation for takings. It explained,

> a claim under the Takings Clause is different in kind from actions under *Bivens* and section 1983. Neither *Bivens* nor section 1983 rest on a provision of the Constitution that mandates a specific remedy in the same way the Takings Clause mandates just compensation; nor do

---

[7] The First Circuit rested its analysis squarely on this Court's "very clear" cases declaring that bankruptcy laws are subordinate to the Takings Clause. *Financial Oversight*, 41 F.4th at 42 (citing *Sec. Indus. Bank* and *Radford*).

[8] *See Monell v. Dep't of Social Services of City of N.Y.*, 436 U.S. 658, 691 (1978).

> *Bivens* or section 1983 prescribe the quantum of compensation required in the event of a violation.

Financial Oversight, 41 F.4th at 46 (footnote omitted).

By contrast, the Fifth Circuit bars property owners from obtaining just compensation by immunizing governments' refusal to pay just compensation judgments. In addition to this case, in *Ariyan, Inc. v. Sewerage & Water Bd. of New Orleans*, 29 F.4th 226 (5th Cir. 2022), the Fifth Circuit considered whether New Orleans' residents whose homes and businesses were damaged and destroyed by a public infrastructure project could demand payment on the state court judgments awarding them compensation. *Id.* at 228. The Fifth Circuit denied them relief, dismissing as dicta this Court's description of the Just Compensation Clause as "self-executing." *Id.* at 231. The court held the Sewerage Board must consent to enforcement of just compensation judgments and property owners are left to "rely exclusively upon the generosity" of the government to satisfy the judgments, because Louisiana law alone controls the right to timely compensation, and does not create a right to receive it at any particular time (even years after the takings). *Id.* at 230 (quoting *Folsom v. City of New Orleans*, 109 U.S. 285, 295 (1883) (Harlan, J., dissenting)).

The Constitution's command to provide just compensation is a hollow one if all it demands is that, in return for surrendering property to the public, the owner nonetheless must rely on the legislative or executive branches to agree to provide compensation. *See Archbold-Garrett v. City of New Orleans*, 893 F.3d 318, 322 n.1 (5th Cir. 2018) (city allocates funds to pay

just compensation only "as they see fit"). But describing the Just Compensation Clause as self-executing is not "hortatory fluff."[9] It means that states cannot refuse to pay just compensation judgments, and federal courts need not defer to state assertions of sovereign immunity. Whether viewing the Just Compensation Clause as an affirmative waiver of common-law immunity, or simply a textual affirmation that the sovereign power of eminent domain does not include the power to avoid paying just compensation, this Court has emphasized, "[t]he government's post-taking actions … cannot nullify the property owner's existing Fifth Amendment right[,]" and where it has taken property, "no subsequent action by the government can relieve it of the duty to provide compensation." *Knick*, 139 S.Ct. at 2171 (quoting *First English*, 482 U.S. at 321). The Ninth Circuit has suggested the same. In *In re City of Stockton*, 909 F.3d 1256 (9th Cir. 2018), a property owner with a stale inverse condemnation claim sought to recover his just compensation via Stockton's bankruptcy proceedings. *Id.* at 1262. The court, split 2-1, said that his claim, which would have required the court to invalidate the city's proposed plan of adjustment, was subject to "equitable mootness," *id.* at 1266, and barred on the basis that he "offer[ed] too little, too late." *Id.* The majority of the panel concluded that the city's obligation to provide compensation for

---

[9] *See Kelo v. City of New London*, 545 U.S. 469, 497 (2005) (O'Connor, J., dissenting) ("[W]ere the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff. An external, judicial check on how the public use requirement is interpreted, however limited, is necessary if this constraint on government power is to retain any meaning.").

an inverse condemnation claim was ordinary debt, dischargeable in Stockton's municipal bankruptcy). *Id.* at 1268–69. Judge Friedland dissented, however, concluding that based on "constitutional first principles," *id.* at 1271, and this Court's decisions, the Ninth Circuit should have concluded that "Congress's bankruptcy powers do not allow it to infringe upon rights guaranteed by the Takings Clause. Where a taking has occurred, just compensation is owed and cannot be reduced—bankruptcy notwithstanding …. [C]laims for just compensation should be excepted from discharge, such that they survive any bankruptcy intact." *Id.* at 1273 (Friedland, J., dissenting).

Only resolution by this Court can harmonize the divergent approaches of the lower courts on the meaning and implementation of the Constitution's self-executing command for just compensation after a taking.

III. The Just Compensation Remedy Presents Issues of National Importance That Can Be Resolved Only by This Court

The "critical terms [in the Takings Clause] are 'property,' 'taken' and 'just compensation.'" *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945). Recently, this Court has addressed all but one. The Court determined when a valuable interest qualifies as "private property." *See*, *e.g.*, *Cedar Point*, 141 S.Ct. at 2075–76 (right to exclude a fundamental attribute of property). It determined when a regulation restricts use of property and effects a "taking," *Lingle*, 544 U.S. at 536 (clarifying regulatory takings), and when a taking is "for a public use." *Kelo*, 545 U.S. at 489–90.

But lower courts require guidance regarding the subject of the overwhelming majority of takings cases—just compensation. Since this Court's last just compensation case, nearly four decades ago, *see United States v. 50 Acres of Land*, 469 U.S. 24, 26–29 (1984), lower courts have strayed from the Just Compensation Clause's foundational principles. *See*, *e.g.*, *City of Milwaukee Post No. 2874 V.F.W. of U.S. v. Redev. Auth. of City of Milwaukee*, 768 N.W.2d 749 (Wis. 2009) (undivided fee rule avoids compensation for long-term leasehold interest), *cert. denied*, 561 U.S. 1006 (2010); *In re John Jay College of Crim. Justice of City Univ. of N.Y.*, 905 N.Y.S.2d 18 (App. Div. 2010) (excluding evidence of deliberate government actions to depress the value of the taken property), *cert. denied sub nom.*, *River Ctr. LLC v. Dormitory Auth. of N.Y.*, 566 U.S. 982 (2012).

The Just Compensation Clause again cries out for this Court's attention, as two Justices recently commented. *See Bay Point Props., Inc. v. Mississippi Transp. Comm'n*, 137 S.Ct. 2002 (2017) ("But [Mississippi's] decision seems difficult to square with the teachings of this Court's cases holding that legislatures generally cannot limit the compensation due under the Takings Clause of the Constitution …. Given all this, these are questions the Court ought take up at its next opportunity.") (statement of Gorsuch and Thomas, JJ.). Only this Court can confirm the essential nature of the compensation remedy for takings.

CONCLUSION

The Court should grant the petition.

DATED: May 2023.

Respectfully submitted,

DEBORAH J. LA FETRA
ROBERT H. THOMAS
Counsel of Record
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
916.419.7111
DLaFetra@pacificlegal.org
RThomas@pacificlegal.org

KATHRYN D. VALOIS
Pacific Legal Foundation
4440 PGA Blvd., Suite 307
Palm Beach Gardens, FL 33410
561.691.5000
KValois@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation