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

REPLY BRIEF FOR THE PETITIONERS

DANIEL H. CHARESТ
E. LAWRENCE VINCENT
BURNS CHAREST LLP
900 Jackson Street,
Suite 500
Dallas, TX 75202
469-904-4550
dcharest@burnscharest.com
lvincent@burnscharest.com

ROBERT J. MCNAMARA
Counsel of Record
TRACE MITCHELL
INSTITUTE FOR JUSTICE
901 N. Glebe Rd.,
Suite 900
Arlington, VA 22203
(703) 682-9320
rmcnamara@ij.org
tmitchell@ij.org

Counsel for Petitioners
Additional counsel listed on inside cover

CHARLES IRVINE
IRVINE & CONNER PLLC
4709 Austin Street
Houston, TX 77004
713-533-1704
charles@irvineconner.com

Counsel for Petitioners

TABLE OF CONTENTS

Page

REPLY BRIEF FOR THE PETITIONERS 1

A. The circuit split here requires no further percolation. 2

B. Respondent identifies no barrier to answering the question presented. 5

C. The holding below is wrong. 7

CONCLUSION 11

TABLE OF AUTHORITIES

Page

<u>CASES</u>

Azul-Pacifico, Inc. v. *City of Los Angeles*, 973 F.2d 704 (9th Cir. 1992) 4

Boise Cascade Corp. v. *State ex rel. Or. State Bd. of Forestry*, 991 P.2d 563 (Or. Ct. App. 1999) ... 3

Brownback v. *King*, 141 S. Ct. 740 (2021) 5, 6

Burrows v. *Keene*, 432 A.2d 15 (N.H. 1981) 9

City of Baytown v. *Schrock*, 645 S.W.3d 174 (Tex. 2022) 3, 6

First English Evangelical Lutheran Church v. *County of Los Angeles*, 482 U.S. 304, (1987) 2, 4, 8–9, 11

Horne v. *Dep't of Agric.*, 576 U.S. 350 (2015) 9

Knick v. *Township of Scott*, 139 S. Ct. 2162 (2019) 4

Lawyer v. *Hilton Head Pub. Serv. Dist. No. 1*, 220 F.3d 298 (4th Cir. 2000) 4

Manning v. *Mining & Minerals Div. of the Energy, Mins & Nat. Res. Dep't*, 144 P.3d 87 (N.M. 2006) 2

McKesson Corp. v. *Islamic Republic of Iran*, 539 F.3d 485 (D.C. Cir. 2008) 8

SDDS, Inc. v. *State*, 650 N.W.2d 1 (S.D. 2002) 2

Whitehead Oil Co. v. *City of Lincoln*, 515 N.W.2d 401 (Neb. 1994) 2, 3

Zito v. *N.C. Coastal Res. Comm'n*, 8 F.4th 281 (4th Cir.) *cert. denied,* 142 S. Ct. 465 (2021). 6, 7

<u>CONSTITUTIONAL PROVISIONS</u>

U.S. Const. amend. V 9

<u>STATUTES</u>

28 U.S.C. § 1441 3

28 U.S.C. § 1441(c)(1)(a)... 3

42 U.S.C. § 1983 1

<u>OTHER AUTHORITIES</u>

Christine Desan, *Making Money: Coin, Currency, and the Coming of Capitalism* (2014) 10

Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia (1803)........ 10

Magna Carta cl. 28 (1215)....................................... 9

William Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* (2d ed. 1914)....................................... 9, 10

REPLY BRIEF FOR THE PETITIONERS

The Petition established that there is an active split of authority over whether the Fifth Amendment's Just Compensation Clause is enforceable in the absence of some authorizing legislation like 42 U.S.C. 1983. It further established that this split is important—at bottom, it asks whether that amendment's guarantee of compensation is truly "self-executing" and enforceable as a matter of right, or whether compensation is instead a matter of legislative grace. And at least five judges of the Fifth Circuit agree: After the Petition was filed, Judge Oldham (joined by four others) issued a dissent from denial of rehearing en banc, emphasizing that the panel opinion below has "staggering implications because it renders federal takings claims non-cognizable in any court at any time ever." Pet. Supp. App. 77a.

In its brief in opposition, Texas disputes almost none of this. It largely concedes the existence of the split, primarily arguing that this Court should refrain from review in order to allow further percolation in the lower courts. It asks the Court to deny certiorari because it has unrelated legal arguments (rejected by the district court and unaddressed by the Fifth Circuit below) on which it claims it will eventually prevail. And it suggests that certiorari should be denied because the decision below is correct. None of these is a reason to deny the petition.

A. The circuit split here requires no further percolation.

1. Texas largely concedes the existence of the circuit split described in the Petition except for a brief suggestion that the state high courts on the other side of the split should not count because they are "common-law courts" that are empowered to create their own causes of action. BIO 9. This distinction fails for two independent reasons.

First, even if these state courts could, in theory, create a state-law cause of action to enforce federal constitutional guarantees, that is not what any of the state courts cited in the petition say they are doing. Instead, they expressly state that they are following this Court's commands about federal law. For example, the New Mexico Supreme Court recognizes a property owner's right to file suit directly under the Fifth Amendment because this Court "has consistently . . . recognized, at least tacitly, the right of a citizen to sue the state under the Takings Clause for just compensation." *Manning* v. *Mining & Minerals Div. of the Energy, Minerals & Nat. Res. Dep't*, 144 P.3d 87, 90 (N.M. 2006); accord *SDDS, Inc.* v. *State*, 650 N.W.2d 1, 9 (S.D. 2002) (recognizing "Fifth Amendment takings claims that originate from the [United States] Constitution itself"). Indeed, not one of the state courts cited in the petition purports to be exercising its common-law authority to create a state-law cause of action. Instead, those courts uniformly look to this Court's precedents to guide their interpretation of *federal* law. See, *e.g.*, *Manning*, 144 P.3d at 91 (citing *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 316 & n.9 (1987)); *SDDS, Inc.*, 650 N.W.2d at 9 (same); *Whitehead Oil Co.* v. *City of Lincoln*, 515

N.W.2d 401, 405 (Neb. 1994) (same); accord *Boise Cascade Corp.* v. *State ex rel. Or. State Bd. of Forestry*, 991 P.2d 563, 567–68 (Or. Ct. App. 1999) (same). The outcome-determinative rule in each of those cases is that property owners have a *federal* right to compensation that they may enforce by exercising their *federal* right to sue directly under the Takings Clause—exactly the proposition of law rejected by the panel below. Pet. App. 2a.

Second, Texas's argument overlooks the fact that this case began in a "common-law court"—Texas's own. Petitioners brought claims arising directly under the Takings Clause in state court, as Texas courts have squarely held they are allowed to do. *City of Baytown* v. *Schrock*, 645 S.W.3d 174, 176 (Tex. 2022). Texas then removed those cases under 28 U.S.C. 1441. Pet. App. 5a. And fair enough: A claim under the Takings Clause is surely "a claim arising under the Constitution," no matter where it originates. 28 U.S.C. 1441(c)(1)(a); see BIO 8 n.4 (defending the existence of federal jurisdiction in this case). But that claim, originating in a common law court, *does not exist* according to the decision below. Again, the plain holding below was not that removal was inappropriate. It was that "the Fifth Amendment Takings Clause as applied to the states through the Fourteenth Amendment does not provide a right of action for takings claim against a state" regardless of where the claim is originally filed. Pet. App. 2a. That holding puts the Fifth Circuit directly at odds with the courts (including the Texas Supreme Court) that have held the Takings Clause provides exactly that right of action, which is a split warranting this Court's intervention.

2. Instead of seriously contesting the split, Texas instead urges the Court to deny the petition because the split warrants further percolation. BIO 9–10. This, too, is wrong.

To begin, there has been ample time for percolation. The first federal appellate court to hold that a property owner may not sue directly under the Takings Clause did so over 30 years ago. *Azul-Pacifico, Inc.* v. *City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992); see also Pet. 14–15. Since then, other courts have had the opportunity to observe that this holding is likely wrong. *E.g.*, *Lawyer* v. *Hilton Head Pub. Serv. Dist. No. 1*, 220 F.3d 298, 302 n.4 (4th Cir. 2000) (noting that *Azul-Pacifico*'s holding was "in apparent conflict with [this Court's holding in] *First English*"). And a variety of other courts, including state courts of last resort, have used those intervening decades to adopt rules that are irreconcilable with *Azul-Pacifico*. See Pet. 10–14 (collecting cases). The panel below disagrees and holds that *Azul-Pacifico* got it right in the first place. Pet. App 2a & n.1. That is a mature split that requires this Court's intervention.

Moreover, Texas's stated reason to allow further percolation makes no sense. Texas insists that further lower-court development is required because most of the cases cited in the Petition pre-date this Court's decision in *Knick* v. *Township of Scott*, 139 S. Ct. 2162 (2019). BIO 10. But *Knick* was concerned with whether property owners could file a takings claim in federal court without first exhausting their state-court remedies. *Id.* at 2167–68. That concern has no bearing on this case. *Knick* addresses *when* a property owner has a complete claim under the Takings Clause. The split of authority over the

question presented in this case asks *whether* property owners may bring complete Takings Clause claims at all in the absence of a legislatively created remedy. The panel below says property owners cannot—that there is no federal right to bring a Takings Claim, in state or federal court, except through Section 1983. But many courts nationwide disagree. Nothing in *Knick* is likely to eliminate or illuminate that split of authority. The petition should therefore be granted.

B. Respondent identifies no barrier to answering the question presented.

In the alternative, the brief in opposition suggests that this Court should deny the petition because Texas will (it says) inevitably prevail in this case based on other legal arguments—all of which were rejected by the district court and none of which were addressed by the Fifth Circuit. BIO 10–15. This, too, presents no barrier to this Court's review.

Indeed, while Texas frames these arguments as a "vehicle" problem, BIO 10, it does not actually contend that any of them is a barrier to review. Texas does not argue (nor could it) that arguments are jurisdictional or that any of them is logically prior to the question presented. At bottom, Texas's argument is that it has other legal arguments that it believes are meritorious. Perhaps. But Texas is hardly the first litigant in this Court to believe it will have good alternative arguments on remand. That belief is no barrier to reviewing the decision below because none of Texas's other arguments (each of which was rejected by the district court) was addressed by the appellate court below. Since this Court is "a court of review, not of first view[,]" it can (as it regularly does) "leave it to the [Fifth] Circuit to address [these]

alternative arguments on remand." *Brownback* v. *King*, 141 S. Ct. 740, 747 n.4 (2021) (quotation marks omitted).

But Texas's alternative arguments are also wrong. For example, the brief in opposition argues that, even though Texas waived its immunity from suit by removing this case, its immunity from *damages* means any recovery here would be barred by sovereign immunity. BIO 11–13. But Texas's argument does not cite a single case from the takings context. *Ibid.* That omission matters because it was the basis on which Texas lost on this point in the district court, which specifically held (among other things) that Texas has waived its immunity for both state and federal takings claims. Pet. App. 20a–22a. The Texas Supreme Court bolstered the district court's reasoning in a subsequent opinion, reaffirming that the takings provisions of both the Texas and United States Constitutions "waive[] the government's immunity from lawsuits—immunity that otherwise often insulates the public treasury from claims for damages." *City of Baytown* v. *Schrock*, 645 S.W.3d 174, 176 (Tex. 2022). This Court may, of course, one day wish to address the apparent "tension" between the Takings Clause's guarantee of compensation and a State's assertion of sovereign immunity. *Cf. Zito* v. *N.C. Coastal Resources Comm'n*, 8 F.4th 281, 285–86 (4th Cir.), *cert. denied*, 142 S. Ct. 465 (2021); see also Pet. App.22a–23a (suggesting that the claims here should go forward even if Texas had not waived its sovereign immunity). But that question is not presented here for the simple reason that no court has ever held (or is ever likely to hold)

that Texas's sovereign immunity is a barrier to Petitioners' claims.

And Texas fares no better with its second alternative argument, which is that the district court used the wrong statute of limitations. BIO 13–15. Even if Texas were right that this inverse-condemnation action should be governed by personal-injury rather than inverse-condemnation principles, *ibid.*, that would only mean that some, not all, of Petitioners' damages are outside the statute. Since even Texas does not contend this argument is dispositive, it is hard to see how it would hinder this Court's review of the question presented.

Simply put, the Fifth Circuit below answered a single legal question—the question presented. This Court can and should answer that same question, even though Texas may have other arguments it wishes to raise on remand. The petition should therefore be granted.

C. The holding below is wrong.

Finally, Texas devotes most of its brief to the proposition that the decision below was correct. BIO 15–24. But this, too, is no reason to deny the petition. If Texas is right—if the decision below is correct and the "self-executing" remedy promised by the Takings Clause does not give property owners the right to sue in inverse condemnation—then courts nationwide are wrongly granting property owners rights that should be withheld. See Pet. 10–14 (collecting cases). If Texas is wrong, though—if property owners are entitled to vindicate their right to just compensation without statutory authorization—then the opinion below wrongly "reduces the Takings Clause to nothing"

throughout the Fifth Circuit. Pet. Supp. App. 78a. Either way, the petition should be granted.

Moreover, Texas (like the opinion below) is incorrect. The crux of Texas's argument is that something can be "self-executing" without necessarily creating a private right of action to enforce it. BIO 17–21 (exploring various contexts in which this Court has used the phrase "self-executing"). Maybe so—perhaps not every self-executing right comes with a self-executing remedy.

The problem with this argument, though, is that the Takings Clause *does* come with a remedy. *Cf. McKesson Corp.* v. *Islamic Republic of Iran*, 539 F.3d 485 (D.C. Cir. 2008) (distinguishing between the Takings Clause, which comes with an inferred cause of action, and the Treaty of Amity, which does not). This "Court has frequently repeated the view that, in the event of a taking, the compensation remedy is required by the Constitution." *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 316 (1987) (collecting cases). The Takings Clause in not just a self-executing *provision* of the Constitution. It provides a self-executing constitutional *remedy*.

In resisting this conclusion, Texas simply ignores the text of the relevant cases. In Texas's view, this Court's plain statements of the rule in *First English* are simply discussing "the measure of relief." BIO 19. That discussion, according to Texas, says "nothing about what cause of action a property owner could use to obtain that compensation." *Ibid.*

But this is irreconcilable with the plain text of *First English*, which answers that question quite

directly. The Court's opinion explains that "a landowner is entitled to bring an action in inverse condemnation as a result of 'the self-executing character of the constitutional provision with respect to compensation[.]'" *First English*, 482 U.S. at 315; see also *ibid.* ("Statutory recognition was not necessary." (citation omitted)). The claim here—the claim that the Fifth Circuit held was not cognizable without statutory recognition—is an action in inverse condemnation. Pet. App. 11a. *First English* squarely asserts that landowners like Petitioners are "entitled to bring an action in inverse condemnation" under the Fifth Amendment, and the decision below was wrong to hold otherwise.

And this Court's repeated insistence that the Fifth Amendment guarantees a remedy (and, concomitantly, the right to enforce that remedy) is no accident. It is a direct outgrowth of centuries of Anglo-American law that place the right to receive payment for property—not just to have a legal right to compensation but to actually be paid—at the center of our legal order. Indeed, the compensation requirement is "a principle that lies at the very foundation of civilized society as we know it." *Burrows* v. *Keene*, 432 A.2d 15, 18 (N.H. 1981). The power of government to take property for public use is undisputed, but at least since the signing of Magna Carta in 1215, that power has been conditioned on the immediate payment of compensation. See *Horne* v. *Dep't of Agric.*, 576 U.S. 350, 358 (2015) (citing Magna Carta, cl. 28 (1215), in William Sharp McKechnie,

Magna Carta: A Commentary on the Great Charter of King John 329 (2d ed. 1914)).[*]

That concern with immediate, actual compensation carried over into the text of the Fifth Amendment itself. In one of the earliest commentaries on that Amendment, St. George Tucker wrote that the Just Compensation Clause "was probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army . . . as was too frequently [practiced] during the revolutionary war, without any compensation whatever." 1 *Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* 305–06 (1803).

And this Court has long interpreted the Takings Clause in light of these long-standing principles. The Takings Clause, like Magna Carta before it, "does not prohibit the taking of private

---

[*] Magna Carta's innovation was not in requiring compensation—there was no dispute at the time that the King's exercise of what was then called "purveyance" required compensation for private property taken by the crown. McKechnie, *Magna Carta* 329–30. The significant change wrought by Magna Carta was its demand for *immediate* compensation. Controversy over purveyance arose because payment was often delayed or made in "exchequer tallies"—a sort of IOU used primarily to offset future tax debts. *Id.* at 330; see also Christine Desan, *Making Money: Coin, Currency, and the Coming of Capitalism* 175–85 (2014). Magna Carta thus reflects the same concern as the one animating this Court's Takings Clause jurisprudence: a worry that an abstract legal right to compensation is insufficient if the property owner is not, in fact, compensated. That concern explains why the Takings Clause guarantees a practical remedy rather than an abstract right.

property, but instead places a condition on the exercise of that power." *First English*, 482 U.S. at 314. That condition, this Court has consistently held, is mandatory. See Pet. 9–10. The panel below holds that it is instead discretionary, transforming it from a fundamental promise of Anglo-American law to a "dead letter" contingent entirely on legislative largesse. Pet. Supp. App. 78a. Texas's arguments in defense of that decision are wrong, and the petition should therefore be granted.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

DANIEL H. CHAREST
E. LAWRENCE VINCENT
BURNS CHAREST LLP
900 Jackson Street,
Suite 500
Dallas, TX 75202
469-904-4550
dcharest@burnscharest.com
lvincent@burnscharest.com

ROBERT J. MCNAMARA
Counsel of Record
TRACE MITCHELL
INSTITUTE FOR JUSTICE
901 N. Glebe Rd.,
Suite 900
Arlington, VA 22203
(703) 682-9320
rmcnamara@ij.org
tmitchell@ij.org

CHARLES IRVINE
IRVINE & CONNER PLLC
4709 Austin Street
Houston, Texas 77004
713-533-1704
charles@irvineconner.com

Counsel for Petitioners

JUNE 23, 2023