No. 22-913

In The
Supreme Court of the United States

RICHARD DEVILLIER, ET AL.,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

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

BRIEF *AMICUS CURIAE* OF AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

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?

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INTERESTS OF *AMICUS CURIAE*[1]

Amicus curiae American Farm Bureau Federation (AFBF) was formed in 1919 and is the largest non-profit general farm organization in the United States. Representing about six-million member families in all 50 States and Puerto Rico, AFBF's members grow and raise every type of agricultural crop and commodity produced in the United States. Its mission is to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. To that end, AFBF regularly participates in litigation, including as an amicus in this Court on important federal takings issues. *See e.g.*, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2075-76 (2021); *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019); *Kelo v. City of New London*, 545 U.S. 469 (2005); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

AFBF's members own or lease substantial amounts of land, on which they depend for their livelihoods and on which all Americans depend for the supply of high quality, affordable food, fiber, and other basic necessities. Because that land is subject to

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[1] All counsel of record for the parties in this case received timely notice of, and provided written consent to, the filing of this brief. No party or counsel for any party authored this brief in whole or in part, and no party or counsel for any party made a monetary contribution towards the preparation or submission. No person other than amici, their members or counsel made a monetary contribution towards the preparation or submission of this brief.

increasingly onerous regulation, particularly by States and local governments, AFBF and its members are vitally interested in ensuring their property interests are not taken without just compensation, as required by the Fifth Amendment to the United States Constitution. American farmers and ranchers need the protection of the Takings Clause if they are to find economically feasible ways to remain in the agriculture business—the business of feeding the American people.

At stake in this case is the ability of farmers and other landowners in the Fifth Circuit to have their takings claims for just compensation against a State heard in federal and even state courts. *Devillier v. Texas*, 63 F.4th 416 (5th Cir. 2023) (Oldham, J., dissenting from denial of *en banc* rehearing) (observing that the panel decision ensures that "property owners in our circuit can no longer litigate Takings Clause claims in any forum, state or federal"). Unless reversed, the decision below will deprive AFBF's members of their fundamental right to compensation where the State has taken their property.

Given its considerable interest in this case, AFBF seeks to supplement the petitioner's brief by emphasizing two key points: (1) the Eleventh Amendment should not shield Texas—or any other State—from takings claims for compensation, and (2) federal courts are just as equipped as state courts to adjudicate federal takings claims for compensation.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

AFBF anticipates that Texas will argue, as it did below, that the Eleventh Amendment gives it blanket immunity against petitioners' takings claims. Further, Texas likely will argue that takings claims for compensation against States belong in the state-court system, because state courts are somehow better positioned to decide takings claims, which purportedly turn on state-law definitions of property rights. If Texas makes these arguments, and the Court reaches them, the Court should reject them out-of-hand.

First, Texas's sovereign immunity does not bar petitioner's federal takings claim for just compensation. The Fifth and Fourteenth Amendments provide a property owner with a self-executing and automatic right to compensation for a taking of his private property for a public use—irrespective of the particular government entity committing the taking. The Amendments bind the Federal, State, and local governments. In ratifying those Amendments, the people carved out an exception to common-law and constitutionally-based sovereign immunity principles, in order to allow owners to vindicate the express right granted to them (just compensation) by the Constitution. To shut the lower-federal courthouse doors to such claims for compensation, simply because they are brought against a State, would be to arbitrarily put the Takings Clause on an unequal footing with other enumerated rights, such as the First, Second, and Fourth Amendments. The Bill of Rights does not

countenance such different treatment among express constitutional rights.

Second, there is no merit to the claim that state courts are better equipped than federal courts to adjudicate federal takings claims for compensation. While it is true that state law generally determines whether the object of an alleged taking is "property" for purposes of the Takings Clause, the vast majority of claims do not turn on that issue. Rather, takings claims for compensation generally turn on *federal-law* determinations of whether a taking has occurred and whether the taking serves a public purpose. In any event, federal courts can and regularly do decide state-law questions. There is no discernible policy reason for abandoning federal takings claims against States to the state-court system. Indeed, federal courts are equally able, if not better positioned, to adjudicate such federal claims.

For these reasons, the Court should reverse the Fifth Circuit's decision.

ARGUMENT

I. Texas's Sovereign Immunity Does Not Preclude a Federal Takings Claim for Just Compensation Against a State

Texas argued below that its sovereign immunity precluded the owners' federal takings claims—even after Texas chose to remove them to federal court and affirmatively elected to submit itself to federal-court jurisdiction. *Devillier*, 63 F.4th at 429 (denial of hearing *en banc*) (Oldham, J., dissenting). Clearly, Texas waived any purported claim to

sovereign immunity when it voluntarily invoked—and voluntarily submitted to—the federal district's jurisdiction upon removal. *See, e.g.*, *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 618, 624 (2002) ("A State remains free to waive its Eleventh Amendment immunity from suit in a federal court."). Accordingly, given the procedural fact of Texas's removal, the Court should find no "sovereign immunity" bar to the owners' takings claim.

However, if the Court finds no waiver and reaches the substantive issue of the intersection of the Eleventh Amendment and the Fifth Amendment's Takings Clause, the Court should hold that the former gives way to the latter. The Takings Clause provides a self-executing damages remedy to owners whose private property a State has taken for a public use. *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 315-16 (1987). As such, owners may sue a State for takings damages—i.e., just compensation—in federal court.

The Eleventh Amendment states: "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const., amend. XI. As construed by this Court, "[t]he Eleventh Amendment grants a State immunity from suit in federal court by citizens of other States, U.S. Const., Amdt. 11, and by its own citizens as well, *Hans v. Louisiana*, 134 U.S. 1 (1890)." *Lapides*, 535 U.S. at 616. Generally, "the Eleventh Amendment bars federal courts from adjudicating claims against a

State, as well as its agencies and agents." *74 Pinehurst LLC v. New York*, 59 F.4th 557, 570 (2d Cir. 2023) (citing *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989)). As the Second Circuit recently summarized it, "[t]he Eleventh Amendment's so-called 'jurisdictional bar' applies 'regardless of the nature of the relief sought,'" but with an "exception . . . for claims for prospective relief against state officials in their official capacities." *74 Pinehurst*, 59 F.4th at 570 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) (citing *Ex parte Young*, 209 U.S. 123, 159-60 (1908)). Further, the Eleventh Amendment has been construed—atextually—to bar a State's own citizens from suing the State in federal court. *Hans*, 134 U.S. 1.

While this Court never has squarely decided the issue, lower courts have held that the Eleventh Amendment bars even federal takings claims for damages against nonconsenting States. *74 Pinehurst*, 59 F.4th at 570; *see also Hutto v. South Carolina Ret. Sys.*, 773 F.3d 536, 552 (4th Cir. 2014) (holding "that the Eleventh Amendment bars Fifth Amendment taking claims against States in federal court when the State's courts remain open to adjudicate such claims"); *Bay Point Props., Inc. v. Mississippi Transp. Comm'n*, 937 F.3d 454, 456-57 (5th Cir. 2019) (same); *Ladd v. Marchbanks*, 971 F.3d 574, 579-80 (6th Cir. 2020) (same); *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 956 (9th Cir. 2008) (same); *Williams v. Utah Dep't of Corr.*, 928 F.3d 1209, 1213-14 (10th Cir. 2019) (same); *Harbert Int'l, Inc. v. James*, 157 F.3d 1271, 1277 (11th Cir. 1998) (same); *see also Citadel Corp. v. Puerto Rico Highway Auth.*, 695 F.2d 31, 34

(1st Cir. 1982) (holding that federal courts may not award monetary relief for a State taking); *Garrett v. Illinois*, 612 F.2d 1038, 1040 (7th Cir. 1980) (same).

Construing the Eleventh Amendment to immunize any State, like Texas, from just-compensation claims under the Fifth Amendment is in strong tension with the text and purpose of the Takings Clause remedy, as well as this Court's takings precedents.

The Takings Clause prohibits "private property" from being "taken for public use, without just compensation." U.S. Const., amends. X; XIV (incorporated against the States). The purpose of the compensation requirement is to ensure that that government does not unconstitutionally require property owners to foot a bill that the general public should pay. As the Court has explained, "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstong v. United States*, 364 U.S. 40, 49 (1960).

This Court has made clear that the right to just compensation is self-executing and automatic. Thus, the moment a taking for a public use occurs, compensation is due from the government. As the Court explained in *First English*:

> We have recognized 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 ....' As noted in JUSTICE BRENNAN's dissent in *San Diego Gas & Electric Co. [v. San Diego]*, 450 U.S. [621,] 654-655 [1981], it has been established at least since *Jacobs v. United States*, 290 U.S. 13 (1933), that claims for just compensation are grounded in the Constitution itself ....

First English, 482 U.S. at 315 (internal citations omitted). More recently, the Court affirmed that same principle articulated in *First English*, concluding that "[b]ecause 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 v. Twp. of Scott*, 139 S. Ct. 2162, 2171 (2019) (emphasis added) (quoting *First English*, 482 U.S. at 315).

Of course, when the Fifth Amendment was ratified, it applied only to the Federal Government. But that changed with ratification of the Fourteenth Amendment, which ensured that the Fifth Amendment—and, with it, the Takings Clause's "just compensation" remedy—would be applied against the States, as well. *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 239-41 (1897) (Fourteenth Amendment's Due Process Clause incorporates Takings Clause against the States); *see also Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 306 n.1 (2002) (The "'Just Compensation Clause' . . . applies to the States

as well as the Federal Government."). With the Takings Clause's self-executing damages remedy applying to the States, the question became: Can a takings claimant sue a State in federal court, for just compensation—despite the fact that the Eleventh Amendment seems to suggest that the States have sovereign immunity against such a suit? The answer is an unequivocal "yes."

In the context of *congressional enforcement* of the rights that the Fourteenth Amendment protects, the Court has been clear that the Amendment's ratification displaced part of the States' sovereign immunity. *See* U.S. Const. amend. XIV, § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."). In *Alden v. Maine*, 527 U.S. 706 (1999), the Court held that, "in adopting the Fourteenth Amendment, the people required the States to *surrender a portion of the sovereignty* that had been preserved to them by the original Constitution, so that Congress may authorize private suits against nonconsenting States pursuant to its § 5 enforcement power." *Id.* at 756 (emphasis added). "By imposing explicit limits on the powers of the States and granting Congress the power to enforce them, the Amendment 'fundamentally altered the balance of state and federal power struck by the Constitution.'" *Id.* (quoting *Seminole Tribe v. Florida*, 517 U.S. 44, 59 (1996)). As the Court in *Alden* explained, "[w]hen Congress enacts appropriate legislation to enforce this Amendment, federal interests are paramount, and Congress may assert an authority over the States which would be otherwise unauthorized by the Constitution." *Alden*, 527 U.S. at 756.

The Court's reasoning applies with equal, if not greater, force to the Takings Clause and its effect on state sovereign immunity. As noted above, when the State takes private property for a public use, the Takings Clause automatically requires just compensation. U.S. Const., amend. V; XIV; *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." (internal citation omitted)). No congressional or other "authorization" is necessary to make that remedy immediately available to property owners and to thereby instantly ripen a cause of action for compensation. "[T]he right to recover just compensation for property taken" is "guaranteed by the Constitution" and "rest[s] upon the Fifth Amendment," such that neither "[s]tatutory recognition" nor any other outside mechanism is "necessary" to create a cause of action therefor. *Jacobs v. United States*, 290 U.S. 13, 16 (1933)[2]; *see also Knick*, 139 S. Ct. at 2171 ("Although *Jacobs* concerned a taking by the Federal Government, the same reasoning applies to takings by the State.").[3] In other

[2] *Jacobs* "does not stand alone, for the Court has frequently repeated the view that, in the event of a taking, the compensation remedy is required by the Constitution." *First English*, 482 U.S. at 316 (citing, *inter alia*, *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 5 (1984); *United States v. Causby*, 328 U.S. 256, 267 (1946); and *Seaboard Air Line R. Co. v. United States*, 261 U.S. 299, 304-306 (1923).

[3] The Court in *Knick* was adamant that the compensation remedy guaranteed by the United States Constitution was self-executing and independent of any other remedy the *State* may

words, the "just compensation" right is readily enforceable against any government entity—including the States—by the owner whose property has been taken. Following *Alden*'s reasoning, in adopting the Fifth Amendment's Takings Clause, "the people required the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution, so that . . . private suits against nonconsenting States" may be instituted *Alden*, 527 U.S. at 756; *see also* Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 Wash. & Lee L. Rev. 493, 498 (2006) (arguing that the Takings Clause "trump[s] state sovereign immunity by automatically abrogating—or stripping—the immunity that states usually enjoy in actions at law").

That the Takings Clause's self-executing remedy displaces state sovereign immunity finds support in this Court's treatment of the issue in *First English*. There, the United States, as *amicus curiae* in support of the county appellee, argued that both federal and state sovereign immunity from damages claims (absent waiver) established that "there is no self-effectuating damage remedy available under the Fifth Amendment." Brief for the United States As

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provide: "The availability of any particular compensation remedy, such as an inverse condemnation claim under state law, cannot infringe or restrict the property owner's federal constitutional claim—just as the existence of a state action for battery does not bar a Fourth Amendment claim of excessive force. The fact that the State has provided a property owner with a procedure that may subsequently result in just compensation cannot deprive the owner of his Fifth Amendment right to compensation under the Constitution, leaving only the state law right." *Knick*, 139 S. Ct. at 2171.

Amicus Curiae Supporting Appellee, (hereinafter, "Brief for the United States"), *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, No. 85-1199, 1986 U.S. S. Ct. Briefs LEXIS 107, **30-31 (U.S. Nov. 4, 1986). The Solicitor General quoted the Federalist Papers for the proposition that sovereign immunity "'is now enjoyed by the government of every State in the Union,'" as well as "the Government of the United States." *Id.*, **31-32. The Court rejected the United States' "sovereign immunity" argument:

> The Solicitor General urges that the prohibitory nature of the Fifth Amendment, . . . *combined with principles of sovereign immunity*, establishes that the Amendment itself is only a limitation on the power of the Government to act, not a remedial provision. The cases cited in the text, we think, refute the argument of the United States that 'the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government.' Though arising in various factual and jurisdictional settings, these cases make clear that it is the Constitution that dictates the remedy for interference with property rights amounting to a taking.

First English, 482 U.S. at 316 n.9 (emphasis added) (quoting Brief of United States, *supra*).

Subsequent decisions of this Court indicate that States do not enjoy sovereign immunity from federal takings claims for just compensation. For example, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), a property owner sued a South Carolina agency for compensation, alleging a state law effected a taking of his property. *Id.* at 1009. The trial court sided with the owner, ordering the State to "pay 'just compensation' in the amount of $1,232,387.50." *Id.* After the South Carolina Supreme Court reversed, the owner sought review from this Court. At no point in the litigation, including in this Court, did South Carolina raise a "sovereign immunity" defense. *See, e.g.*, Respondent's Brief on the Merits, *Lucas v. South Carolina Coastal Council*, No. 91-453, 1992 U.S. S. Ct. Briefs LEXIS 83 (S.C. Jan. 31, 1992) (no mention of sovereign immunity). Nevertheless, the Court had no trouble proceeding to the merits of the owner's claim. The Court ultimately reversed the South Carolina Supreme Court with instructions to reconsider the owner's claim in light of the Court's "total taking" test. *Lucas*, 505 U.S. at 1030-31.

In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), the property owner sued Rhode Island, arguing "the State's wetlands regulations," as applied by a state agency to his parcel "had taken the property without compensation in violation of the Fifth and Fourteenth Amendments" and seeking just-compensation "damages . . . in the amount of $3,150,000." *Palazzolo*, 533 U.S. at 615-16. Yet the Court reviewed the claim without regard to Eleventh Amendment, finding that the owner's claim was ripe and stated a takings claim under *Penn Central*

Transp. Co. v. New York City, 438 U.S. 104 (1978). *Palazzolo*, 533 U.S. at 632. This, despite the fact that the "sovereign immunity" issue was raised, albeit not by the parties.[4] An amicus brief filed by a Colorado county in support of Rhode Island urged the Court to hold that Rhode Island's sovereign immunity barred the petitioner's claim for damages, arguing: "While the Takings Clause, of its own force, creates a federal right of action seeking 'just compensation,' it is well established that the United States is immune from liability under the Takings Clause absent a specific waiver of its immunity." Amicus Brief of the Board of County Commissioners of the County of La Plata, Colorado, in Support of the Respondents State of Rhode Island, et al., *Palazzolo v. Rhode Island*, No. 99-2047, 2001 U.S. S. Ct. Briefs LEXIS 265 (U.S. Jan. 3, 2021), **31-32. But the Court declined to answer, instead proceeding to substantively review the claim.

Acknowledging that takings claimants can sue nonconsenting States in federal court ensures that the "just compensation" right is treated no differently than any other right enshrined in the Bill of Rights. Consider that the Eleventh Amendment doesn't preclude claims against States, in federal court, for violations of free speech, free exercise, due process, or Second Amendment rights. *Ex parte Young*, 209 U.S. 123 (exempting from Eleventh Amendment federal-court claims for equitable relief against state officers).

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[4] Despite Rhode Island's not having raised a "sovereign immunity" defense, this Court could have considered it and held that it barred the takings claim there. "A sovereign can assert immunity at any time during judicial proceedings," and the courts "have occasionally considered the issue *sua sponte*." *Cook v. AVI Casino Enters.*, 548 F.3d 718, 724 (9th Cir. 2008).

But if it's true that the Eleventh Amendment bars a federal-court claim that seeks to vindicate the "just compensation" right against a State, it will be the *only* right among the Bill of Rights whose violation cannot be remedied with an action originating in federal court. With the rare exception of this Court's review of a state-court decision, the federal courthouse doors will be closed to just-compensation claims against States. That simply cannot be. And it is contrary to this Court's admonition that there is "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances." *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

The Court has not definitively resolved the apparent conflict between the Eleventh Amendment and property owners' right to compensation under the Takings Clause. One commentator recently wondered, "[D]o the Eleventh Amendment and state sovereign immunity doctrines override the Takings Clause?" Byron Ruby, *Would the Eleventh Amendment Survive on Mars?*, 49 S.U. L. Rev. 1, 14 (2021). Another commentator explored the unanswered "paradoxes arising from the collision of the Court's recent takings and statute sovereign immunity doctrines"—specifically, whether the Takings Clause's self-executing nature "can, by its own force, abrogate—or strip—the state of the sovereign immunity it would otherwise enjoy in actions for damages." Berger, *supra*, at 497-98. This case may present an opportunity to resolve "fundamentally incompatible" provisions of the Constitution as construed by the Court. *Id.* at 494.

In summary, if the Court reaches the substance of Texas's "sovereign immunity" defense, it should make explicit what its precedents have made implicit—and what the logic of the self-executing "just compensation" remedy of the Takings Clause requires: Sovereign immunity does not excuse States like Texas from having to account for federal takings without compensation.

II. Federal Courts Are Just As Equipped As State Courts To Adjudicate Federal Takings Claims for Compensation

Texas advocates for a rule that would shut the lower federal courthouse doors to any takings claim against a State for just compensation. To justify its rule, Texas likely will claim that state courts are better equipped than lower federal courts to adjudicate such claims, because state law defines property rights. *See, e.g.*, *Devillier*, 63 F.4th at 419 (Higginbotham, J., concurring in denial of *en banc* rehearing) (arguing for allowing only state courts to adjudicate such claims because it "brings the well-equipped eyes of those dealing with state property interests on a daily basis, as they have done all these many years"); *see also Murr v. Wisconsin*, 137 S. Ct. 1933, 1950 (2017) (Roberts, C.J. dissenting) ("Our decisions have, time and again, declared that the Takings Clause protects private property rights as state law creates and defines them."). But there is no evidence that lower federal courts are somehow less capable than their state counterparts to handle federal takings claims. Quite the contrary.

The lower federal courts can and do regularly apply state law in adjudicating federal claims—including when a federal district court has diversity jurisdiction and *must* decide state-law questions.[5] *Cuevas v. BAC Home Loans Servicing, LP*, 648 F.3d 242, 250 (5th Cir. 2011) ("When the district court has original subject matter jurisdiction over state law claims, the exercise of that jurisdiction is mandatory."). The federal district courts are the first to say so. "[F]ederal courts are frequently called upon to interpret the laws of the several States." *Sloan v. GM, LLC*, 287 F. Supp. 3d 840, 862 (N.D. Cal. 2018) (concerning state law on fraud, consumer protection, and implied warranty). Indeed, "[d]istrict courts regularly apply the law of states *other than the forum state*." *Turrett Steel Corp. v. Manuel Int'l, Inc.*, 612 F. Supp. 387, 390 (W.D. Pa. 1985) (emphasis added) (concerning state contract law).

Further, "[a]s a general matter, it is true that the property rights protected by the Takings Clause are creatures of state law." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2075-76 (2021).[6] But claims for just compensation almost always turn, not on whether the object of the alleged taking is "property," but on whether a *taking* of such property has occurred,

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[5] In a diversity case, the federal court will apply the same substantive standards that state courts would apply; it will, however, apply the Federal Rules to any procedural issues. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 751 (1980) (discussing *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)).

[6] While state law may define the historic contours of "property," state law is not be-all and end-all. "[A] State, by *ipse dixit*, may not transform private property into public property without compensation." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U. S. 155 (1980).

or whether the taking serves a "public use." *Kelo v. City of New London*, 545 U.S. 469 (2005) (considering whether a taking was for a "public use"); *Pakdel v. City & Cnty. of San Francisco*, 636 F. Supp. 3d 1065 (N.D. Cal. 2022) (evaluating takings claims for whether a taking occurred under various federal legal tests); *Fazzino v. Roe*, 2021 U.S. Dist. LEXIS 258123 (W.D. Tex. Aug. 23, 2021) (same). Those are questions of federal constitutional law that, of course, the lower federal courts are fully equipped to answer—and *have* answered, including with respect to claims against the Federal Government. *Estate of Hage v. United States*, 687 F.3d 1281 (Fed. Cir. 2012) (reversing Court of Federal Claims' award of compensation on a takings claim); *Loveladies Harbor v. United States*, 28 F.3d 1171, 1883 (Fed Cir. 1994) (affirming trial court's determination that Federal Government's denial of permit effected a compensable taking); *Florida Rock Indus. v. United States*, 18 F.3d 1560, 1562 (Fed. Cir. 1994) (considering whether federal agency's denial of permit "effected a regulatory taking, thus requiring the Government to pay just compensation"—a question that "depends on the impact the regulatory imposition had on the economic use, and hence value, of the property").

In short, the role of state law in a federal "just compensation" action against a State is overstated. And even if its role were significant, federal courts have no trouble deciding them—and routinely do. Certainly, any advantage the state courts may have over federal courts would be woefully insufficient to justify closing the lower-federal courthouse doors to property owners when the State takes their property without compensation.

CONCLUSION

For the reasons stated in the petition and in this brief, the Court should reverse the Fifth Circuit's decision and hold that petitioner's takings claims are justiciable.

Dated: Nov. 17, 2023 Respectfully submitted,

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