

No. 22-913

IN THE
Supreme Court of the United States

RICHARD DEVILLIER, *et al.*,

Petitioners,

v.

TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

**BRIEF OF ATLANTIC LEGAL FOUNDATION
AS *AMICUS CURIAE* IN SUPPORT
OF PETITIONERS**

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INTEREST OF THE *AMICUS CURIAE*¹

Established in 1977, the Atlantic Legal Foundation (ALF) is a national, nonprofit, nonpartisan, public interest law firm. Its mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and responsible government, sound science in judicial and regulatory proceedings, and effective education, including parental rights and school choice. With the benefit of guidance from distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, ALF pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts. See atlanticlegal.org.

The Fifth Amendment's Just Compensation Clause (also known as the Takings Clause), applicable to each State and its political subdivisions through the Fourteenth Amendment, recognizes that private property ownership secures our economic liberty and is intrinsic to our heritage of freedom and individual liberty. ALF's mission includes the vigorous protection of private property rights considered essential by the framers of the Constitution and is woven into our nation's social fabric. ALF has participated as *amicus*

¹ No counsel for a party authored this brief in whole or part, and no party or counsel other than the *amicus curiae* and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

curiae in many cases where, as here, overly aggressive and confiscatory governmental actions raise serious taking concerns.²

The physical taking at issue here results from actions taken by the State of Texas, resulting in the flooding of privately owned land. The question presented here—may a person whose property is taken without just compensation seek redress under the self-executing Just Compensation Clause even if the state legislature has not affirmatively provided them with a cause of action—falls squarely within ALF’s mission of vigorously protecting private property rights from unjust and uncompensated governmental takings.

INTRODUCTION

This case presents a classic Catch-22, as U.S. Magistrate Judge Andrew Edison put it, because, according to the Fifth Circuit, takings claims against the State of Texas must be brought under 42 U.S.C. § 1983 (civil action for deprivation of rights), and because States cannot be sued under § 1983, those takings claims are “dead on arrival.”³

This nifty procedural trick was employed by the State of Texas to defeat Petitioners’ taking claims. After being sued in state court for a physical taking of private property resulting from actions that flooded

² See, e.g., Br. of Atl. Legal Found. as *Amicus Curiae* in Support of Petitioner, *Tyler v. Hennepin County, Minnesota*, No. 22-166 (U.S. filed Mar. 3, 2023).

³ App. 13a.

Petitioners' private property, the State of Texas removed the case to federal court. Once there, the State moved to dismiss the case because § 1983 does not apply to States.

The State encountered one hiccup when the district court denied the motion to dismiss, but its plan was rescued on appeal by the Fifth Circuit, which vacated the decision denying the dismissal and remanded it back to the district court.

In a remarkably succinct decision, the three-judge Fifth Circuit panel explained that because (1) § 1983 does not provide a cause of action against a State and (2) the Fifth Amendment does not provide a direct right of action against a State,⁴ Petitioners' takings claims could not proceed in federal court.⁵

The Fifth Circuit's decision provides States with a blueprint for avoiding Fifth Amendment takings liability: Simply remove a Fifth Amendment taking claim filed in state court under § 1983 to federal court, and once there, move for dismissal, leaving the taking plaintiff with *no remedy* for the taking of private property.

SUMMARY OF ARGUMENT

Rarely do cases present such a palpable constitutional wrong requiring reversal as this case does. As the Magistrate Judge concluded, the State's argument, approved by the Fifth Circuit, "eviscerates"

⁴ See *Hernandez v. Mesa*, 140 S. Ct. 735, 742 (2020).

⁵ Because the State had removed the case to federal court, the district court found that the Eleventh Amendment did not bar the State from being sued in federal court. See App. 4a–32a.

hundreds of years of constitutional law in “one fell swoop.”⁶

As five Fifth Circuit judges stated in their dissent from the denial of rehearing en banc, the panel decision is an “insuperable obstacle”⁷ to any plaintiff asserting any federal takings claim against any State in federal or state court. “If this case is not [en banc worthy], then it’s unclear how any case ever will be.”⁸

Describing the panel decision as a “one-paragraph decision with one sentence of analysis,”⁹ the dissenting circuit judges noted that the panel decision relied on two sources for its “remarkable holding[,] [a] *Bivens* case and a 1992 Ninth Circuit decision.”¹⁰

Neither case supports a holding that there is no direct cause of action under the Fifth Amendment. The *Bivens* case, *Hernandez v. Mesa*,¹¹ did not involve a Fifth Amendment taking claim and says nothing about whether there can be direct causes of action under the Fifth Amendment. Instead, the case involved a fatal shooting, a U.S. Border Patrol agent, and the Court’s reluctance to extend *Bivens*’ actions.

⁶ App. 15a.

⁷ *De villier v. Texas*, 63 F.4th 416, 426 (5th Cir. 2023) (Oldham, J., dissenting).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Hernandez v. Mesa*, 140 S. Ct. 735 (2020).

The Ninth Circuit case, *Azul-Pacifico, Inc. v. City of Los Angeles*,¹² is also not instructive here. That case involved a taking claim challenging a mobile home rent control ordinance’s vacancy control provision. Although the Ninth Circuit ostensibly held that the taking claim must be brought under § 1983, the court did not decide whether the taking claim could have been brought directly under the Fifth Amendment because that claim was time-barred. And Ninth Circuit Judge Kozinski disagreed in his separate opinion that the taking claim under the Fifth Amendment claim was actually time-barred.¹³

More to the point, however, this Court has flatly rejected the argument, made here by the State of Texas and adopted by the Fifth Circuit, that the Fifth Amendment does not provide a direct cause of action against the state government for unconstitutional takings of private property.¹⁴

Noting that taking claims may arise in various factual and jurisdictional settings, the *First English* court¹⁵ stated that “it is the *Constitution* that dictates

¹² *Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704 (9th Cir. 1992).

¹³ *Id.* at 705 (Kozinski, J., concurring and dissenting).

¹⁴ App. 15a (citing *Manning v. Mining & Minerals Div. of Energy, Minerals & Nat. Res. Dep’t*, 144 P.3d 87, 90 (N.M. 2006); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Plan. Agency*, 535 U.S. 302, 306–09 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606, 614–15 (2001); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027–30 (1992)).

¹⁵ *First Eng. Evangelical Lutheran Church of Glendale v. Los Angeles Cnty., Cal.*, 482 U.S. 304 (1987).

the remedy for interference with property rights amounting to a taking.”¹⁶

The Constitution entitles a property owner to bring a taking claim “as a result of the self-executing character of the constitutional provision with respect to compensation.”¹⁷ “The claim traces back to the prohibition of the Fifth Amendment. . . .”¹⁸ As the Supreme Court has explained, suits for just compensation arise from the Constitution:

[T]hat condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the amendment. The suits were thus founded upon the Constitution of the United States.¹⁹

As the Magistrate Judge also stated, because the Fifth Amendment is self-executing, the substantive

¹⁶ *Id.* at 316 n.9 (emphasis added).

¹⁷ *Id.* at 315 (internal citations and quotations omitted).

¹⁸ *United States v. Dickinson*, 331 U.S. 745, 748 (1947).

¹⁹ *Jacobs v. United States*, 290 U.S. 13, 16 (1933).

right to just compensation “*springs to life* when the [federal] government takes private property.”²⁰

Further contrary to the Fifth Circuit’s holding, taking claims against the United States are brought under the Tucker Act²¹ in the U.S. Court of Federal Claims directly under the Fifth Amendment.

As the *Knick*²² court stated,

the Tucker Act, which provides the standard procedure for bringing such claims, gives the Court of Federal Claims jurisdiction to “render judgment upon any claim against the United States founded either upon the Constitution” or any federal law or contract for damages “in cases not sounding in tort.” 28 U.S.C. § 1491(a)(1). We have held that “[i]f there is a taking, the claim is ‘founded upon the Constitution’ and within the jurisdiction of the Court of Claims to hear and determine.”²³

ARGUMENT

This Court has flatly rejected the Fifth Circuit’s holding that the “Constitution does not, of its own

²⁰ App. 15a (citing *First English*, 482 U.S. at 315) (emphasis added).

²¹ 28 U.S.C. § 1491(a)(1).

²² *Knick v. Twp. of Scott, Pa.*, 139 S. Ct. 2162 (2019).

²³ *Id.* at 2170 (quoting 28 U.S.C. § 1491(a)(1); *United States v. Causby*, 328 U.S. 256, 267 (1946)).

force, furnish a basis for a court to award money damages against the government.”²⁴

Although the federal Civil Rights Act²⁵ creates a federal cause of action for the denial of constitutional rights (including Fifth Amendment takings), the Act is limited to claims against local governments and their officials, not States.²⁶ No comparable statute authorizes just compensation claims against the federal government.

This Court has held that the Fifth Amendment itself creates the cause of action: “If there is a taking, the claim is *founded upon the Constitution*.”²⁷ Because the Fifth Amendment applies to the States through the Fourteenth Amendment,²⁸ the Constitution itself creates a just compensation claim against the States, just as it does against the federal government, without the necessity of any other statutory authorization.²⁹

²⁴ *First English*, 482 U.S. at 316 n.9.

²⁵ 42 U.S.C. § 1983.

²⁶ *Id.*; see also *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 (1989) (“We hold that neither a State nor its officials acting in their official capacities are ‘persons’ under § 1983.”).

²⁷ *Knick*, 139 S. Ct. at 2170 (quoting *Causby*, 328 U.S. at 267) (emphasis added).

²⁸ *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 243 (1897).

²⁹ *United States v. Clarke*, 445 U.S. 253, 257 (1980) (“A landowner is entitled to bring [an inverse condemnation] action as a result of ‘the self-executing character of the constitutional provision with respect to compensation’”).

Here, as in *Jacobs v. United States*,³⁰ the property owner's just compensation claim was not based on any statute but on the money-mandating, self-executing Fifth Amendment of the Constitution. These claims rested upon the Fifth Amendment, and statutory recognition was unnecessary. "The suits were thus founded upon the Constitution of the United States."³¹ And in *First English*, the Court noted that "*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."³²

In *United States v. Clarke*,³³ the Court stated that "[t]o accomplish a taking by seizure, on the other hand, a condemning authority need only occupy the land in question. Such a taking thus shifts to the landowner the burden to discover the encroachment and to take affirmative action to recover just compensation."³⁴

If a statute were necessary to provide just compensation claims against the United States (or the individual States, as the Fifth Circuit held), there would be no taking claims against the federal government because Congress has never enacted a

³⁰ *Jacobs v. United States*, 290 U.S. 13 (1933).

³¹ *Id.* at 16.

³² *First English*, 482 U.S. at 316.

³³ *Clarke*, 445 U.S. 253.

³⁴ *Id.* at 257.

statute authorizing taking claims. Likewise, a State could defeat a property owner’s constitutional right to just compensation by simply failing to authorize the claim. State and federal governments would then be free to appropriate private property for public use whenever they wished, yet pay for the property only when a statute required payment—rendering the Just Compensation Clause a dead letter.

A. Takings claims against the United States arise directly from the Fifth Amendment, not a federal statute

The Fifth Amendment is designed to require compensation if the Government takes private property for public use. Government action that works a taking of property rights for confiscatory actions triggers the “constitutional obligation to pay just compensation.”³⁵

In *Knick*,³⁶ this Court recently overruled its prior *Williamson County*³⁷ decision that had effectively barred property owners from bringing any just compensation claim in federal court³⁸ because a taking without compensation “violates the self-executing Fifth Amendment.”³⁹ Rejecting the Third Circuit’s

³⁵ *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

³⁶ *Knick*, 139 S. Ct. 2162.

³⁷ *Williamson Cnty. Reg’l Plan. Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

³⁸ See, e.g., *San Remo Hotel, L. P. v. City & County of San Francisco, Cal.*, 545 U.S. 323 (2005).

³⁹ *Knick*, 139 S. Ct. at 2172.

holding that a taking claimant must first exhaust his or her compensation remedies in state court, the Court held that the claim arises under the Fifth Amendment, and the property owner may sue in federal court as soon as they are denied just compensation:

[A] property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it. The Clause provides: “[N]or shall private property be taken for public use, without just compensation.” It does not say: “Nor shall private property be taken for public use, without an available procedure that will result in compensation.”⁴⁰

Similarly, as the Court explained in *Knick*, if a local government takes private property without paying for it, that government has violated the Fifth Amendment “without regard to subsequent state court proceedings.”⁴¹ The *Knick* Court analyzed taking claims against the federal government, noting that the Tucker Act

gives the Court of Federal Claims jurisdiction to “render judgment upon any claim against the United States founded [] upon the Constitution” . . . “in cases not sounding in tort.” 28 U.S.C. § 1491(a)(1).

⁴⁰ *Id.* at 2170 (internal citations omitted).

⁴¹ *Id.*

We have held that “[i]f there is a taking, the claim is ‘founded upon the Constitution’ and within the jurisdiction of the Court of Claims to hear and determine.”⁴²

The Tucker Act, which provides the United States Court of Federal Claims jurisdiction over “actions brought pursuant to money-mandating . . . constitutional provisions,”⁴³ is jurisdictional only; the Act “does not create a substantive cause of action.”⁴⁴

There is no money-mandating statute creating a just compensation cause of action for federal takings. The money-mandating provision is the Just Compensation provision of the Fifth Amendment,⁴⁵ requiring the Court of Federal Claims to determine whether the acts constituted an unconstitutional taking.

Numerous decisions have reflected the self-executing nature of a taking claim under the Tucker Act. “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

⁴² *Id.* (quoting *Causby*, 328 U.S. at 267).

⁴³ *Roth v. United States*, 378 F.3d 1371, 1384 (Fed. Cir. 2004) (citing 28 U.S.C. § 1491(a)(1)).

⁴⁴ *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005) (en banc).

⁴⁵ *Jan’s Helicopter Serv., Inc. v. FAA*, 525 F.3d 1299 (Fed. Cir. 2008); *Moden v. United States*, 404 F.3d 1335 (Fed. Cir. 2005).

to compensation.”⁴⁶ “The claim traces back to the prohibition of the Fifth Amendment. . . .”⁴⁷

In *Dickinson*,⁴⁸ this Court provided some context for these holdings:

The Constitution is “intended to preserve practical and substantial rights, not to maintain theories.” *Davis v. Mills*, 194 U.S. 451, 457 [1904]. One of the most theory-ridden of legal concepts is a “cause of action.” . . . The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding “causes of action[.]”⁴⁹

B. A Fifth Amendment taking claim against a State also arises directly from the Constitution

Similar to federal taking claims brought against the United States, a statutory right is not needed to sue a State for a taking because a self-executing cause of action exists in the Constitution—the Fifth Amendment. In finding the opposite, the Fifth Circuit nullified the constitutionally created right to seek just compensation when the government—either state,

⁴⁶ *First English*, 482 U.S. at 315 (internal citations and quotations omitted).

⁴⁷ *United States v. Dickinson*, 331 U.S. 745, 748 (1947).

⁴⁸ *Dickinson*, 331 U.S. 745.

⁴⁹ *Id.* at 748.

local, or federal—takes private property. This Court has held that takings claims are “founded upon the Constitution”⁵⁰ and that the Constitution “dictates the remedy for interference with property rights amounting to a taking.”⁵¹

This Court has often recognized that the Constitution applies to States: “The constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law. The States and their officers are bound by obligations imposed by the Constitution.”⁵²

Four federal circuit courts—the First, Fourth, Seventh, and D.C. Circuit—have also recognized that the Just Compensation Clause of the Fifth Amendment is self-executing.⁵³ In addition to federal

⁵⁰ *United States v. Causby*, 328 U.S. 256, 256, 267 (1946).

⁵¹ *First English*, 482 U.S. at 316 n.9.

⁵² *Alden v. Maine*, 527 U.S. 706, 754–755 (1999).

⁵³ See, e.g., *In re Fin. Oversight & Mgmt. Bd.*, 41 F.4th 29, 46 (1st Cir. 2022) (“[A] claim under the Takings Clause is different in kind from actions under [] section 1983. . . .”); *McKesson Corp. v. Islamic Rep. of Iran*, 539 F.3d 485, 490 (D.C. Cir. 2008); *Lawyer v. Hilton Head Pub. Serv. Dist. No. 1*, 220 F.3d 298, 302 (4th Cir. 2000); *Wis. Cent. Ltd. v. Pub. Serv. Comm’n of Wis.*, 95 F.3d 1359, 1368 (7th Cir. 1996) (“When the state effects a taking of private property for public use, the Takings Clause requires that the person deprived of that property be paid just compensation. The just compensation requirement of the Takings Clause places takings in a class by themselves because, unlike other constitutional deprivations, the Takings Clause provides both the cause of action and the remedy.”).

courts, several state courts and federal courts applying state law have held that the Fifth Amendment is self-executing and that no statutory right is necessary for a plaintiff to bring a taking claim against the State:

- In *Manning v. New Mexico Energy, Minerals and Natural Resources Department*,⁵⁴ the Supreme Court of New Mexico held that a statute cannot insulate the state from providing just compensation: “[L]egislation cannot insulate the state from providing just compensation. . . . Holding otherwise would expose more citizens to takings without adequate compensation, contrary to the protections our Constitution provides. When a taking occurs, just compensation is required by the Constitution, regardless of state statute.”⁵⁵ Further, the Supreme Court of New Mexico rejected the State’s argument that the Fifth Amendment was not self-executing: “In our view, the Fifth Amendment is self-executing. Requiring further governmental action when the Government has effected the taking is contrary to the very reason for the Fifth Amendment: a check against abusive governmental power.”⁵⁶

- Nebraska’s highest court has also ruled that “[a] landowner is entitled to bring an action in inverse condemnation as a result of the self-executing

⁵⁴ *Manning*, 144 P.3d 87 (N.M. 2006).

⁵⁵ *Id.* at 91–92.

⁵⁶ *Id.* at 97.

character of the takings clauses of the U.S. and Nebraska Constitutions.”⁵⁷

- The Supreme Court of South Dakota has recognized that the Just Compensation Clause is self-executing.⁵⁸

- Virginia’s Supreme Court has also held that Virginia’s version of the Fifth Amendment, which “provides that private property shall not be taken or damaged for public use without just compensation,”⁵⁹ is “self-executing and permits a property owner to enforce his constitutional right to just compensation in a common law action.”⁶⁰

- The Court of Appeals of Oregon, adopting *First Lutheran*⁶¹ and *Alden*,⁶² held that “because of the self-executing nature of the Fifth Amendment, as applied to the states through the Fourteenth Amendment, a

⁵⁷ *Henderson v. City of Columbus*, 827 N.W.2d 486, 493 (Neb. 2013).

⁵⁸ *SDDS, Inc. v. State*, 650 N.W.2d 1, 9 (S.D. 2002).

⁵⁹ *Kitchen v. City of Newport News*, 657 S.E.2d 132, 140 (Va. 2008).

⁶⁰ *Id.*; see also *Swift & Co. v. City of Newport News*, 52 S.E. 821, 824 (Va. 1906).

⁶¹ *First English*, 482 U.S. 304.

⁶² *Alden v. Maine*, 527 U.S. 706 (1999).

state may be sued in state court for takings in violation of the federal constitution.”⁶³

- The Supreme Courts of Illinois,⁶⁴ New Jersey,⁶⁵ Utah,⁶⁶ Wyoming,⁶⁷ and Washington⁶⁸ consider the Just Compensation Clause self-executing.

CONCLUSION

The State of Texas thought it had found a loophole to immunize itself from Fifth Amendment takings liability: remove the taking claim filed in state court under § 1983 to federal court and then move for dismissal. The Fifth Circuit endorsed the tactic, leaving Petitioners with no constitutional remedy.

⁶³ *Boise Cascade Corp v. State ex rel. Oregon State Bd. of Forestry*, 991 P.2d 563, 569 (Or. Ct. App. 1999).

⁶⁴ *People ex rel. Decatur & S.L Ry. Co. v. McRoberts*, 62 Ill. 38, 41 (1871) (“It would be the merest delusion to declare a subsisting right as essential to the acquisition and protection of property and make its enjoyment dependent upon legislative will or judicial interpretation.”).

⁶⁵ *Greenway Dev. Co. v. Borough of Paramus*, 750 A.2d 764, 770 (N.J. 2000) (“That constitutional prohibition against unconstitutional takings is self-executing. . .”).

⁶⁶ *Colman v. Utah State Land Bd.*, 795 P.2d 622, 630 (Utah 1990) (“We now reaffirm that article I, section 22 is self-executing.”).

⁶⁷ *State Hwy. Comm’n v. Peters*, 416 P.2d 390, 395 (Wyo. 1966) (“However, the legislature cannot infringe upon or take from property owners the right to be compensated.”).

⁶⁸ *Kincaid v. City of Seattle*, 134 P. 504, 506 (Wash. 1913) (“The city is bound to make compensation . . . it cannot defeat this constitutional right by a charter provision or an ordinance.”).

This Court should close this unconstitutional loophole, thereby reaffirming that the Fifth Amendment is explicit and self-executing, and reverse the Fifth Circuit's erroneous decision.

Respectfully submitted,

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