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 OF PROFESSOR ERNEST A. YOUNG AS *AMICUS CURIAE* SUPPORTING PETITIONERS

Joshua R. Zuckerman
Hayley N. Lawrence
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue N.W.
Washington, D.C. 20036

Arjun P. Ogale
GIBSON, DUNN & CRUTCHER LLP
2001 Ross Avenue, Suite 2000
Dallas, TX 75201
(214) 698-31000

Gregg J. Costa
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
811 Main Street
Suite 3000
Houston, TX 77002-6117
346.718.6600
GCosta@gibsondunn.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Constitutional Provisions

Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Ernest A. Young is the Alston & Bird Distinguished Professor of Law at Duke Law School. He has taught Federal Courts and Constitutional Law for 25 years at Duke, the University of Texas School of Law, the University of Chicago Law School, Harvard Law School, and Villanova University School of Law. Professor Young's scholarship focuses on federalism, federal jurisdiction, and constitutional history. His most relevant work to this appeal includes *State Sovereign Immunity After the Revolution*, 102 Tex. L. Rev. (forthcoming June 2024) (available at https://ssrn.com/abstract=4350164) (discussing takings claims against state governments), *Standing, Equity, and Injury in Fact*, 97 Notre Dame L. Rev. 1885–1910 (2022), *Unpacking Third-Party Standing*, 131 Yale L.J. 1 (2021) (with Curtis A. Bradley) (both discussing the role of the cause of action in federal jurisdiction), and *Federal Suits and General Laws: A Comment on Judge Fletcher's Reading of* Sosa v. Alvarez-Machain, 93 Va. L. Rev. In Brief 33 (2007) (discussing the need to translate between modern and Founding-era conceptions of rights to sue). He has filed numerous amicus briefs before this Court, including in *Allen* v. *Cooper* 140 S. Ct. 994 (2020); *Bank Markazi* v. *Peterson*, 578 U.S. 212 (2016); *United States* v. *Windsor* 570 U.S. 744, 773 (2013) (citing Brief of Federalism Scholars); *Medellin* v. *Texas*, 552

---

[1] No counsel for any party authored this *amicus* brief in whole or in part, and no person or entity, other than *amicus* or his counsel, made any monetary contribution to the preparation or submission of this brief.

U.S. 491 (2008); and *Gonzales* v. *Raich*, 545 U.S. 1 (2005).

Professor Young files this brief because the question presented falls within his area of teaching and research interest, and because he believes that legal scholarship should be concerned with and made useful to the decision of issues presently before the courts.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court recently reaffirmed that the Takings Clause is "self-executing." *Knick* v. *Township of Scott*, 139 S. Ct. 2162, 2172 (2019). Texas now argues that this self-executing remedy is unenforceable because there is no separate federal right of action for a takings claim against the state. Text and history say otherwise. Both recognize a vital role for federal courts in ensuring that no "private property be taken for public use, without just compensation." U.S. Const. amend. V.

The Fifth Circuit erred in viewing this case through an ahistoric lens that searched for either an express statutory grant or an "implied" right of action to support a takings claim. That framing is improper. First, the text of the Takings Clause compels a remedy. And second, as early takings jurisprudence shows, the Framers had a different conception of rights to sue that allowed enforcement in federal court without a separate enabling statute. It is anachronistic to superimpose modern expectations about federal rights of action upon a constitutional provision ratified in the days of the common law forms of action.

Nor should a federal right to enforce the federal Takings Clause in federal court be denied in favor of a "pathway" relying on state courts. The Fourteenth Amendment and the 1875 statute providing for general federal question jurisdiction were meant to ensure that basic federal rights could be enforced in a federal forum if the rightholder so chose. The Fifth Circuit's action here would allow states to circumvent the Takings Clause altogether by removing to federal court and then moving to dismiss. The more fundamental problem, however, is that the denial of a federal right to sue would arbitrarily exclude takings claims from the ordinary process of federal rights enforcement.

This Court should reverse the Fifth Circuit and hold that the Takings Clause provides a self-executing remedy that is enforceable against the states and justiciable in federal court.

ARGUMENT

I. TAKINGS PLAINTIFFS REQUIRE NEITHER A STATUTORY NOR AN IMPLIED RIGHT OF ACTION TO SEEK JUST COMPENSATION FROM A STATE GOVERNMENT

Suits to enforce the Takings Clause require neither an express statutory grant nor an implied "cause of action." Unlike most constitutional provisions, the Takings Clause prescribes a remedy—just compensation—and in so doing, makes clear that the remedy should be enforced in federal courts. As federal courts have long recognized, "claims for just compensation are grounded in the Constitution itself." *First English Evangelical Lutheran Church of Glendale* v. *Los Angeles County*, 482 U.S. 304, 315

(1987) (citing *Jacobs* v. *United States*, 290 U.S. 13, 16 (1933)). There is no need to shoehorn constitutional text into modern "cause of action" jurisprudence in order to recognize that the Fifth Amendment in fact guarantees "just compensation."

A. The Takings Clause's Text Has Long Been Understood To Compel A Remedy.

The Takings Clause imposes an affirmative obligation on the government. *First English*, 482 U.S. at 314–15. Courts have long understood the Takings Clause to require monetary compensation. *Knick*, 139 S. Ct. at 2175–76. James Madison modeled the Takings Clause after contemporaneous state constitutions that "provided for an affirmative right to compensation once property was taken." Douglas W. Kmiec, *The Original Understanding of the Taking Clause Is Neither Weak Nor Obtuse*, 88 Colum. L. Rev. 1630, 1661 n.161 (1988). Vermont's constitution, for example, provided that "whenever any particular man's property is taken for the use of the public, the owner o*ught to receive an equivalent in money*." Vt. Const. of 1777, ch. 1, cl. II (emphasis added). Madison's personal writings show that he designed the Fifth Amendment's Takings Clause to have the same purpose and effect. See James Madison, *Property*, National Gazette (Mar. 27, 1792), reprinted in 14 *The Papers of James Madison* 266, 266–68 (Robert A. Rutland & Thomas A. Mason eds., 1983), https://founders.archives.gov/documents/Madison/01-14-02-0238 ("If there be a government then which prides itself in maintaining the inviolability of property * * * which *indirectly* violates [its constituents'] property * * * such a government is not a pattern for the United States.").

This Court has repeatedly recognized that the Takings Clause's remedy is inherent in its text. *Jacobs* holds that the just compensation remedy was "guaranteed by" and "founded upon" the Constitution's plain text. 290 U.S. at 16. The self-executing nature of the Takings Clause's remedy discourages legislative interference with private property rights: indeed, the remedy compelled by the Fifth Amendment "cannot be taken away by statute." *Seaboard Air Line Railway Co.* v. *United States*, 261 U.S. 299, 304 (1923). And the express prescription of a remedy eliminates the need for an express or implied right of action to vindicate such rights.

B. Treating This Case As Involving An Implied Right Of Action Is Mistaken.

In the court of appeals, Judge Higginson saw this case through the lens of this Court's jurisprudence concerning implied rights of action under statutes and constitutional provisions. *Devillier v. State*, 63 F.4th 416, 420 (5th Cir. 2023) (Higginson, J., concurring in denial of rehearing en banc). The analogy is misplaced for several reasons. First, the Takings Clause mandates a compensatory remedy *in its text*. This Court held as much in *First English*.

To be sure, the Fifth Amendment does not set out the metes and bounds of a cause of action in the same detail as many modern statutes creating federal rights to sue. But this Court has never expected the Constitution to include the same level of detail as statutes. See, e.g., *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) ("[W]e must never forget that it is a *constitution* we are expounding."). Nor would the Founding generation have thought of the "cause of

action" issue raised by this case in those terms. As Professor A.J. Bellia has observed, "conceptions of the cause of action are historically contingent." Anthony J. Bellia, Jr., *Article III and the Cause of Action*, 89 Iowa L. Rev. 777, 780 (2004). "When courts plug modern conceptions of the cause of action into old doctrinal formulations, they transform judicial power from what courts originally conceived it to be into something altogether different." *Id*.

At the Founding, "the question whether a plaintiff had a cause of action was generally inseparable from the question whether the forms of proceeding at law and in equity afforded the plaintiff a remedy for an asserted grievance." *Id.* at 783. Rights to sue depended not on the particular substantive right at issue, but rather on the type of harm incurred or remedy sought. To determine whether a right of action was available to remedy a certain harm, one looked to local law for "a form of proceeding"—that is, whether a writ "capable of redressing the [type of] harm in question" existed under local law. Anthony J. Bellia Jr. & Bradford R. Clark, *The Original Source of the Cause of Action in Federal Courts: The Example of the Alien Tort Statute*, 101 Va. L. Rev. 609, 631 (2015). "If a plaintiff could fit his injury into a particular form of proceeding designated by a writ, the plaintiff was said to have a 'cause' or a 'cause of action.'" *Id.* at 634.

Those writs could be used to assert federal claims in federal court. The Judiciary Act of 1789 "provided federal courts with general authority to adjudicate traditional common law causes of action." *Id.* at 641. Shortly thereafter, Congress passed the Process Acts of 1789 and 1792, which required that in actions at

law, federal courts were to apply state forms of proceeding, which consisted in turn of writs that the newly formed states had inherited and adopted from the English common law.[2]

The Process Acts illustrate how the Founding Generation conceived of a right of action: that is, state forms of proceeding created "causes of action" that allowed citizens to enforce substantive statutory rights and associated remedies. See *ibid.* The writs operated without regard to the identity of the defendant; hence, they could provide relief against government officials for unlawful actions.[3]

One of the common law writs that could be brought in federal court under the Process Acts—the writ of trespass—authorized damages for physical interference with one's property. The writ of trespass is analogous to a modern takings claim. Indeed, the writ of trespass allowed property owners to pursue just compensation in the early years of the Republic. *Knick*, 139 S. Ct. at 2176 (explaining that starting in the 1870s "state courts began to recognize implied

---

[2] See Bellia, *supra*, at 787 n.23 (citing the Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93 (repealed 1792) and Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276 (repealed 1872)).

[3] See Anya Bernstein, *Congressional Will and the Role of the Executive in* Bivens *Actions: What Is Special About Special Factors?*, 45 Ind. L. Rev. 719, 726 (2012) ("At the time the U.S. Constitution was written, a common law cause of action was simply presumed to exist, and for at least a century after the Constitution was framed, individuals could sue public officials who had violated their constitutional rights for damages."); Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations*, 1787-1801, 115 Yale L.J. 1256, 1319–30 (2006) (discussing use of the writs to challenge official action).

rights of action under the state equivalents of the Taking Clause"). As this Court has explained, "the typical recourse of a property owner who had suffered an uncompensated taking was to bring a common law trespass action against the responsible * * * government official[,]" who would "then raise the defense that his trespass was lawful because it was authorized by statute or ordinance." *Ibid.* "[T]he plaintiff would respond that the law was unconstitutional because it provided for a taking without just compensation." *Ibid.*

Now, of course, the forms of action are abolished, and the modern conception of a cause of action incorporates a substantive right, prescribes the available remedy, and defines the mode and procedure to enforce that right. See Bellia & Clark, *supra*, at 612–13. For instance, think of Title VII of the Civil Rights Act of 1964, which creates the substantive right (antidiscrimination), provides the procedure for bringing suit (requiring administrative exhaustion for example), and defines the remedy (damages). See 42 U.S.C. §§ 2000e–2000e17 (as amended). But one should not look to the Fifth Amendment—ratified in 1791 in the heyday of the writ system—to provide a full-service modern cause of action in this way.

Sosa v. *Alvarez-Machain*, 542 U.S. 692 (2004), recognized that Founding-era substantive rights arose from a source of law separate from the common law forms enabling suit—and that it would be anachronistic to expect the Alien Tort Statute, a statute from that era, to create a "cause of action" to enforce preexisting principles of the law of nations. Nonetheless, the Court thought that "the First

Congress understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations." *Id*. at 724. In order to translate that understanding into modern jurisprudential categories, *Sosa* recognized an implied right of action to enforce certain aspects of the law of nations under federal common law. *Id.* at 731.

This is a considerably easier case than *Sosa*. Unlike the Alien Tort Statute, the text of the Fifth Amendment explicitly mandates a remedy of just compensation. Although the Founders might have expected that remedy to go through a common law trespass action, subsequent abolition of the common law forms simply allows that remedy to proceed more directly. The important point is that neither the states that ratified the Fifth Amendment nor the enactors of the Judiciary Act would have understood any *further* legislation to be necessary to vindicate Takings Clause claims, at least in cases in which a statute conferred jurisdiction over the dispute.[4] Unlike in *Sosa*, one need not speak of implied rights here. And the practice of bringing takings claims against state and local governments under general jurisdictional statutes, without reference to a specific statutory cause of action like 42 U.S.C. § 1983, is far more extensive and longstanding than the history of Alien Tort litigation at issue in *Sosa*. See generally Ann Woolhandler & Julia D. Mahoney, *Federal Courts and Takings Litigation*, 97 Notre Dame L. Rev. 679,

---

[4] Because the Fifth Amendment did not apply to the states until its incorporation into the Fourteenth, it is not surprising that federal law provided no broad jurisdictional statute covering takings claims against states.

684–86, 691–94 (2022).

Sosa recognizes that Founding-era law must be translated into modern form to evaluate whether a plaintiff may sue to enforce a Founding-era right in federal court today. Such a translation demonstrates why Petitioners need not identify a statute that either expressly or impliedly creates a cause of action for a takings claim against the state. This Court has recognized as much with respect to claims for injunctive relief, holding that plaintiffs may seek an injunction against unconstitutional conduct without regard to § 1983 or any other statutory cause of action.[5] The question would then be, as Justice Harlan asked in *Bivens*, why federal law should permit injunctive but not damages relief. See *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 400, 404 (1971) (Harlan, J., concurring in the judgment). But this is also a much easier case than *Bivens* because the text of the Constitution explicitly mandates monetary compensation.

Finally, this Court's cases construing statutory mandates to pay monies as creating private rights to sue confirms that the Takings Clause requires no

---

[5] See, e.g., *Axon Enterprise, Inc.* v. *FTC*, 598 U.S. 175, 196 (2023) (recognizing that a statutory review scheme did not foreclose a regulated party's baseline right to sue for an injunction on the ground that the regulatory scheme is unconstitutional); *Armstrong* v. *Exceptional Child Center, Inc.*, 575 U.S. 320, 324–25, 326 (2015) (stating that although the Supremacy Clause does not create a cause of action, equitable principles permit suit for an injunction against unlawful state action); *Ex parte Young*, 209 U.S. 123, 155–56 (1908) (holding that a plaintiff subject to allegedly unconstitutional state action may sue to enjoin it).

implied right of action. For example, *Maine Community Health Options* v. *United States*, 140 S. Ct. 1308, 1327 (2020), construed the Tucker Act as not itself creating a federal cause of action against the United States. A claimant may file a claim under the Act, whenever a federal act "'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" *Id.* at 1327.[6] The dissent in *Maine Community Health* invoked the same implied-right-of-action jurisprudence that Judge Higginson did here, see *id.* at 1331–32, 1333–35 & n.5 (Alito, J., dissenting) (citing, *inter alia*, *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001)). The key language in *Sandoval* insisted that, to create a federal right to sue, the law must "display[] an intent to create not just a private right but also a private remedy." 532 U.S. at 286. The *Maine Community Health* majority explained that "[t]hat is precisely what the money-mandating inquiry does: It provides a framework for determining when Congress has authorized a claim against the Government." 140 S. Ct. at 1328 n.12. The Court thus concluded that insurers to whom the Affordable Care Act mandated payments had a federal right to sue the Government for those payments. See *id.* at 1331.

Again, this is an easier case. If the Takings Clause does not meet the "mandating compensation" standard, then nothing does. This Court has held over and over that the Takings Clause mandates a

---

[6] See also *United States* v. *Navajo Nation*, 556 U.S. 287, 289 (2009) ("The other source of law need not *explicitly* provide that the right or duty it creates is enforceable through a suit for damages.") (emphasis in original).

compensatory remedy. See *Knick*, 139 S. Ct. at 2175–76; *First English*, 482 U.S. at 314–15. And *Maine Community Health* used the Takings Clause as its best of example of how a mandate to provide compensation is sufficient to create a federal right to sue. "Although there is no express cause of action under the Takings Clause" in the modern sense, the Court said, "aggrieved owners can sue through the Tucker Act under our case law." *Id.* at 1328 n.12. But the Court had already acknowledged that "[t]he Tucker Act * * * does not create 'substantive rights.'" *Id.* at 1327 (quoting *Navajo Nation*, 556 U.S. at 290). This discussion only makes sense if the Court viewed the Takings Clause as self-executing and requiring no further statutory right to sue.

C. State Inverse Condemnation Claims Provide An Alternative Mechanism For Enforcing The Federal Right To Just Compensation.

Even if this Court is not prepared to recognize a federal right of action under the Takings Clause, it should make clear that takings plaintiffs may employ *state* causes of action for inverse condemnation as a vehicle for their federal claims—and that they may do so in federal court. State courts routinely hear both state *and federal* takings claims under inverse condemnation causes of action. Often these causes of action rest on the same principle that this Court established in *First English*: that "[s]tatutory recognition was not necessary" for such claims because they "are grounded in the Constitution itself." 482 U.S. at 315 (first quotation quoting *Jacobs*, 290 U.S. at 16). Texas, for example, has no inverse condemnation *statute*, and such claims in state court

necessarily derive from the respective state and federal constitutions themselves. This widespread practice provides further evidence that Plaintiffs' understanding of the Fifth and Fourteenth Amendments is correct. But even if this Court is unwilling to recognize a federal right of action under the federal constitution, states remain free to provide their own remedies.[7] A state inverse condemnation suit based on the federal Takings Clause arises under federal law. That is, federal courts can hear federal takings claims based on *state* forms of proceeding without any independent federal right of action. A state's inverse condemnation claim could therefore function as the source of a takings claim's right of action while the Fifth Amendment secures federal jurisdiction by "provid[ing] the underlying right to be enforced." Bellia & Clark, *supra*, at 642 n.151.[8]

The argument against employing a state inverse cause of action to bring a federal takings claim in

---

[7] If a holding that the Fifth and Fourteenth Amendments do not provide a remedy for federal takings plaintiffs were understood also to *foreclose* state recognition of remedies for violations of those provisions in the absence of statute, then many plaintiffs would lack *any* means to bring federal takings claims in state court. Judge Higginbotham's "preferred route" for processing such claims initially through the state courts followed by direct appeal to this Court would thus be illusory for many plaintiffs—including plaintiffs here. *Devillier*, 63 F.4th at 417 (Higginbotham, J., concurring in denial of rehearing en banc).

[8] See also Ernest A. Young, *Federal Suits and General Laws: A Comment on Judge Fletcher's Reading of* Sosa v. Alvarez-Machain, 93 Va. L. Rev. In Brief 33, 34–35 (2007) ("It is crucial to distinguish between the law that provides the substantive rule of decision in a case and the law that confers a right upon the plaintiff to bring the lawsuit.").

federal court would begin with the Holmes Rule, which holds that "[a] suit arises under the law that creates the cause of action." *American Well Works Co.* v. *Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) (Holmes, J.). But the generation that drafted the Fifth Amendment and the Judiciary Act of 1789 would not have focused on the provenance of the plaintiffs' right to sue in this way, because they had neither developed our modern concept of the cause of action nor enacted a general federal question statute. They did have to consider the meaning of "arising under" federal law for purposes of construing the Supreme Court's appellate jurisdiction, however. In that context—the only one that mattered before 1875—the Founding-era Congress understood "arising under" jurisdiction to include claims using state forms to vindicate federal rights. So common law trespass cases invoking the Fifth Amendment would arise under federal law because the Constitution "created the underlying right to be enforced" through the state form of proceeding. Bellia & Clark, *supra*, at 642 n.151. Conversely, a common law trespass claim that did not invoke the Fifth Amendment would not "arise under" federal law because no federal right or title "form[ed] an ingredient of the cause of action." *Ibid.*

Even after development of modern rights to sue and the enactment of a general federal question statute, federal courts generally did not view a federal cause of action as a necessary condition for "arising under" jurisdiction. See, e.g., *Smith* v. *Kansas City Title & Trust Co.*, 255 U.S. 180, 199 (1921) (upholding federal jurisdiction over a state law cause of action

incorporating an element of federal law).[9] Leading scholars have noted a widespread and longstanding practice of bringing takings claims in federal court *without* invoking 42 U.S.C. § 1983. See Woolhandler & Mahoney, *supra*, at 712 (observing that the "historical home" of takings claims is "as diversity actions or as constitutionally-based actions brought under § 1331"). This practice can be explained in two ways: either the Takings Clause creates its own federal cause of action, or plaintiffs were allowed to use state remedial vehicles to pursue federal takings claims, and those cases were understood to arise under federal law for purposes of *both* Article III and § 1331.

Either understanding satisfies this Court's recent "arising under" caselaw. This Court has reaffirmed that a "federal cause of action" is a "sufficient condition," but not a "necessary one" for the exercise of federal question jurisdiction under § 1331. *Grable & Sons Metal Products, Inc.* v. *Darue Engineering & Manufacturing*, 545 U.S. 308, 317 (2005). When state law creates the right of action, federal question jurisdiction exists if "a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by

---

[9] See also *T.B. Harms Co.* v. *Eliscu*, 339 F.2d 823, 827 (2d Cir. 1964) (Friendly, J.) ("Justice Holmes' formula is more useful for inclusion than for the exclusion for which it was intended."); Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer, & David L. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* 817 (7th ed. 2015) ("The 'cause of action' test that Justice Holmes announced should not be viewed as a canonical statement of the reach of § 1331.").

Congress." *Gunn* v. *Minton*, 568 U.S. 251, 258 (2013). This test works to preserve jurisdiction when the case raises a "'serious federal interest in claiming the advantages thought to be inherent in a federal forum,' which can be vindicated without disrupting Congress's intended division of labor between state and federal courts." *Ibid.* (quoting *Grable*, 545 U.S. at 313–14).

A federal Takings Clause claim brought by way of a state inverse condemnation cause of action checks all of *Grable*'s and *Gunn*'s boxes. The claim necessarily raises the scope and power of the Fifth Amendment's Takings Clause. The federal issue—whether the state was obligated to or has provided just compensation—is actually disputed. See *Knick*, 139 S. Ct. at 2176. Most important, such cases plainly raise "a serious federal interest." *Grable*, 545 U.S. at 313. No case in this Court's "arising under" jurisprudence denies jurisdiction under § 1331 when the plaintiff's case includes a well-pleaded federal issue. The one case involving such an issue—*Smith*—upheld such jurisdiction.[10] Moreover, if this Court holds that no cause of action against a state exists for a taking in violation of the Fifth and Fourteenth Amendments, then state inverse condemnation suits would be the *only* vehicle for enforcing those fundamental constitutional principles against state governments. As discussed in the next Part, bedrock federal interests support hearing claims for a breach of the Fourteenth Amendment in federal court.

---

[10] See 255 U.S. at 201 (upholding federal jurisdiction because "the controversy concerns the constitutional validity of an act of Congress which is directly drawn in question").

Finally, hearing takings claims against state governments would not disrupt the federal-state balance. After all, federal courts have long heard takings claims asserted without a statutory federal right of action. Prior to 1875, these claims came in under the diversity statute and more limited grants of federal question jurisdiction. Bellia & Clark, *supra*, at 642 n.151; Woolhandler & Mahoney, *supra*, at 684 (citing federal cases hearing takings claims on diversity grounds and under other jurisdictional bases before enactment of the general federal question jurisdiction statute). But once there was general federal question jurisdiction, federal courts frequently entertained takings suits against all levels of state government without recourse to 42 U.S.C. § 1983. See Woolhandler & Mahoney, *supra*, at 691–94. After all, this Court did not hold that local governments were suable under § 1983 until the *Monell* decision in 1978. *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978). In any event, takings claims against cities and counties—as opposed to state governments—"provide the central arena through which constitutional property frictions are resolved." Nestor M. Davidson & Timothy M. Mulvaney, *Takings Localism*, 121 Colum. L. Rev. 215, 231–34 (2021). Hence, as in *Grable*, recognizing federal jurisdiction over state inverse condemnation claims alleging a federal taking would not "herald[] a potentially enormous shift of traditionally state cases into federal courts." 545 U.S. at 319.

State inverse condemnation claims are not a panacea, and this brief does not maintain they are an adequate substitute for a federal right of action in all circumstances. States that provide an inverse

condemnation vehicle may choose to repeal or limit them—especially if this Court holds that doing so would free the states from the threat of federal takings claims. In that event, this Court would face difficult questions concerning the obligation of state courts to provide remedies for federal constitutional violations. *Cf. Montgomery v. Louisiana*, 577 U.S. 190 (2016) (concerning the extent to which state courts must provide remedies under state law when new rules of federal constitutional law have retroactive effect). Moreover, this Court's capacity to police the adequacy of state remedies—and the state courts' interpretation of federal takings law—is limited by other pressures on the Court's docket. Such concerns have long motivated this Court's insistence that plaintiffs alleging state violations of rights under the Fourteenth Amendment ordinarily must have a *federal* remedy and the option of pursuing it in federal court. See cases cited *supra*. But if this Court is not ready to recognize a federal right to sue under the Takings Clause, it should at a minimum make clear that federal takings plaintiffs may use state-law vehicles to pursue their federal claims in federal court.

II. STATE COURT IS NOT THE PREFERRED FORUM FOR FEDERAL TAKINGS CLAIMS

The availability of a state court forum for federal takings claims does not override the textual, historical, and doctrinal basis for a federal forum. Judge Higginbotham's assertion that "[t]he pathway for enforcement in takings by the state is rather through the state courts to the Supreme Court," would make the Takings Clause an aberration in federal rights enforcement. *Devillier*, 63 F.4th at 417

(Higginbotham, J., concurring in denial of rehearing en banc). The procedural history of this case illustrates one pitfall with exclusive reliance on a state court "pathway"—it can be readily derailed by removal to federal court, where the claim then fails for want of a federal cause of action.

The answer, however, is not to construe the jurisdictional rules to make it easier to stay in federal court. The Fourteenth Amendment has long been understood as not simply expanding the substance of federal rights, but also as permitting federal rights-holders a right to litigate those rights in a federal forum, in conjunction with 42 U.S.C. § 1983 and the 1875 Judiciary Act's provision for general federal question jurisdiction. See, e.g., Hart & Wechsler, *supra*, at 28. That situation does not change simply because the self-executing Takings Clause obviates the need for § 1983 in takings litigation.

A. Fourteenth Amendment Claims Are Not Committed To The State Courts.

The self-executing remedy mandated by the Fifth Amendment's Takings Clause applies with equal force to the states because the Fourteenth Amendment requires them to play by the same rules as the Federal Government. *Chicago, B. & Q.R. Co.* v. *City of Chicago*, 166 U.S. 226, 235 (1897). This Court has repeatedly held that "[i]ncorporated Bill of Rights guarantees are 'enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'" *Timbs* v. *Indiana*, 139 S. Ct. 682, 687 (2019) (quoting *McDonald* v. *City of Chicago*,

561 U.S. 742, 765 (2010)).[11] But the Reconstruction Congresses that drafted the Fourteenth Amendment did not entrust its enforcement to the states. Rather, by enacting the general federal question statute in 1875, they altered the original Judiciary Act's presumption that federal rights claims would be brought in state court in the first instance.[12] As this Court explained a half-century ago, "this latter enactment [made] the lower federal courts * * * 'the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States.'" *Steffel* v. *Thompson*, 415 U.S. 452, 464 (1974) (quoting Felix Frankfurter & James Landis, The Business of the Supreme Court 65 (1928)). This means that the ability of federal courts to provide a remedy for state violations of those rights cannot turn on the availability of a state court remedy. This Court has recognized for over a century that federal remedies do not—and cannot—depend on

---

[11] See also *New York State Rifle & Pistol Association* v. *Bruen*, 142 S. Ct. 2111, 2137 (2022) ("[I]ndividual rights enumerated in the Bill of Rights and made applicable against the States through the Fourteenth Amendment have the same scope as against the Federal Government."); *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1397 (2020) ("[I]ncorporated provisions of the Bill of Rights bear the same content when asserted against States as they do when asserted against the federal government.").

[12] See generally Justin Crowe, Building the Judiciary: Law, Courts, and the Politics of Institutional Development 161–68 (2012) (recounting how the 1875 Act creating general federal question jurisdiction made federal courts the primary guarantors of federal rights, and that Congress intended not only to protect the freed former slaves but also to use federal courts to protect property and business interests from state action).

state law.

In *Home Telephone & Telegraph Co.* v. *City of Los Angeles*, 227 U.S. 278, 282 (1913), plaintiffs brought a federal due process challenge to the city's telephone rates. The City argued that because its rates might have violated the *state* constitution, the federal court could not consider the federal claim until a state court first resolved whether there was valid "state action" under state law. *Id.* at 284. This Court rejected that argument, declaring that the federal courts' power to "afford protection to a claim of right under the Constitution of the United States, as against the action of a state or its officers, [cannot] depend on the ultimate determination of the state courts [or] * * * require a stay of all action to await such determination." *Ibid.* Such a rule would "remov[e] from the control of that Amendment the great body of rights which it was intended it should safeguard." *Id.* at 286. That would "wholly misconceiv[e] the scope and operation of the [Fourteenth] Amendment." *Ibid.*; see also *McNeese* v. *Board of Education for Community Unit School District 187*, 373 U.S. 668, 674 (1963) (holding that when plaintiffs assert the "depriv[ation] of rights protected by the Fourteenth Amendment * * * [s]uch claims are entitled to be adjudicated in the federal courts").

The availability of a federal remedy also does not turn on whether a state, rather than a municipality, violated the Fourteenth Amendment. Although this Court's initial post-Fourteenth Amendment Takings Clause cases recognize a remedy against municipalities rather than states, see, e.g., *Village of Norwood* v. *Baker*, 172 U.S. 269 (1898); *Chicago, B. & Q.R. Co.*, 166 U.S. 226; see generally Woolhandler &

Mahoney, *supra*, at 691–92 (citing nineteenth century takings cases in federal court), those cases were not meant to differentiate municipalities from their sovereign states. These cases did not generally rely on 42 U.S.C. § 1983, see Woolhandler & Mahoney, *supra*, at 691–94, and indeed this Court did not suggest that the availability of that statute might be different as to states and their political subdivisions until the *Monell* and *Will* cases in the late twentieth century.[13] Instead, this Court recognized that the Fourteenth Amendment "refer[s] to *all* the instrumentalities of the state,—to its legislative, executive, and judicial authorities," *Chicago, B. & Q.R. Co.*, 166 U.S. at 233, and that state officials "by virtue of public position under a state government" can violate the Fourteenth Amendment, *Raymond* v. *Chicago Union Traction Co.*, 207 U.S. 20, 36 (1907) (enjoining a state board of equalization from taking property without due process of law).

B. The Fifth Circuit's Decision Undermines *Knick's* Robust Protection Of Property Rights.

Rejecting any federal court vehicle for asserting takings claims against a state would conflict with this Court's reasoning in *Knick*, 139 S. Ct. 2162. That recent decision holds that a plaintiff need not pursue state-law remedies before bringing a Takings Clause claim under § 1983 in federal court. *Id.* at 2171. As this Court explained, the availability of state-law

---

[13] See *Monell*, 436 U.S. at 690 (holding that municipalities are "persons" subject to § 1983 liability); *Will* v. *Michigan Department of State Police*, 491 U.S. 58, 71 (1989) (holding that the state is *not* a person under § 1983).

remedies for takings cannot limit a person's right to just compensation under the Fifth Amendment. *Ibid.* That conclusion did not rest on the availability of a right of action against local governments under § 1983. Instead, it centered on the "self-executing" nature of the Fifth Amendment. *Id.* at 2172. That remedy is equally available against a state.

Knick recognizes that a requirement to exhaust state remedies would subject plaintiffs to a "preclusion trap." *Id.* at 2167. Because "a state court's resolution of a claim for just compensation under state law generally has preclusive effect in any subsequent federal suit," plaintiffs who litigated their takings claims on the merits in state court would be barred from ever litigating those claims in federal court. *Ibid*. An exhaustion requirement thus "imposes an unjustifiable burden on takings plaintiffs." *Ibid.* Preclusion by a state court's judgment is only a "trap," of course, if the plaintiff is entitled to a *federal* forum.

The Fifth Circuit's refusal to recognize the self-executing remedy of the Takings Clause imposes a much greater obstacle to vindicating property rights than the "preclusion trap" that the *Knick* Court cautioned against. Without a self-executing remedy, no federal court could review plaintiffs' takings claims against a state absent the rare occasions when this Court grants certiorari. Such a takings regime would curtail federal review even more severely than the scheme that this Court rejected in *Knick* because it would not merely create a preclusion trap—it would foreclose access to the federal courts altogether. If the Court is to "restor[e] takings claims to the full-fledged constitutional status the Framers envisioned when they included the Clause among the other protections

in the Bill of Rights," *id.* at 2170, it must reject the Fifth Circuit's takings-claims-only-in-state-court regime.

Under the Fifth Circuit's rule, states and municipalities easily could sidestep *Knick*. Most takings are carried out by cities, counties, and other state political subdivisions that are subject to suit under § 1983 and *Knick*. But states have considerable flexibility in how to allocate government functions among state and municipal agencies. If states can avoid any accountability for takings—or even just ensure that takings claims will be heard in state court—simply by reassigning regulatory or construction responsibilities to state agencies, many states will surely do so. And so what might presently be a relatively small subset of federal takings claims may well become a very large one in short order. This Court should not countenance a regime that would allow state governments to game the system and gut the protections established by this Court in *Knick*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

Gregg J. Costa
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
811 Main Street, Suite 3000
Houston, TX 77002-6117
346.718.6600
GCosta@gibsondunn.com

Counsel for Amici Curiae

November 20, 2023