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 FOR PROFESSOR CARLOS M. VÁZQUEZ AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICUS CURIAE

Professor Carlos M. Vázquez is an Associate Dean and the Scott K. Ginsburg Professor of Law at Georgetown University Law Center.[1] He has written extensively on sovereign immunity and official liability for constitutional violations. He is a member of the American Law Institute and served as an advisor to the Restatement (Fourth) of Foreign Relations Law. He

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

has also served as chair of the Federal Courts section of the Association of American Law Schools. He teaches Federal Courts and the Federal System, Conflict of Laws, and Transnational Litigation, among other courses. Before joining the Georgetown Faculty, Professor Vázquez practiced with the law firm Covington & Burling in Washington, D.C. He submits this brief as a scholar of constitutional remedies and to supply historical context for causes of action against governments and government actors for violations of constitutional rights.

INTRODUCTION AND SUMMARY OF ARGUMENT

The principle that governments cannot take property without paying just compensation is a bedrock feature of American constitutional law. Professor Vázquez agrees with petitioners that the Takings Clause's text and history, and this Court's precedents, authorize aggrieved property owners to vindicate this fundamental right by seeking redress in the Courts—irrespective of whether the legislature has provided them a cause of action. Everyone agrees that the Takings Clause requires that public takings be accompanied by just compensation. To rule that the remedy provided by the Takings Clause cannot take the form of a claim for "just compensation" would thus require the Clause be vindicated in some other way, such as injunctive relief, that could prove far more intrusive than the remedy contemplated by the constitutional text. And for no reason: The Framers themselves called for the remedy they intended when they composed the constitutional command that "private property [cannot] be taken for public use, without just compensation." U.S. Const. amend. V.

In reaching the opposite conclusion, the Fifth Circuit principally relied not on this Court's Takings Clause jurisprudence, but rather on *Hernandez* v. *Mesa*, 140 S.

Ct. 735 (2020)—a case interpreting *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Pet. App. 2a. Similarly, two members of the Fifth Circuit panel, concurring in the denial of rehearing *en banc*, grounded their reasoning in this Court's recent *Bivens*-related jurisprudence. Judge Higginbotham, for example, first cited *Mesa* and then inferred that Congress implicitly rejected a cause of action against the States for takings by omitting States from the text of 42 U.S.C. § 1983. Pet. Supp. App. 50a. Judge Higginson was more explicit. In his concurrence, he drew an apparent distinction between remedies and causes of action, and then analogized directly to this Court's proclamation that "implying constitutional causes of action is 'a disfavored judicial activity.'" *Id.* at 51a (quoting *Egbert* v. *Boule*, 142 S. Ct. 1793, 1803 (2022)). And he borrowed from the mode of statutory interpretation recently espoused in *Mesa* and *Egbert*, warning that "implying a cause of action against the states in the Takings Clause" risks "arrogat[ing] legislative power[.]" *Id.* at 56a (quoting *Egbert*, 142 S. Ct. at 1803). Texas echoed both sentiments when opposing *certiorari*. Opp. 15-16.

This reliance on *Bivens* is misguided. As an initial matter, and as petitioners (and Judge Oldham) explain, this Court has already held in *First English* that the Takings Clause creates a right of action by force of its own text. Resorting to *Bivens* is therefore unnecessary: there is no reason to grapple with difficult inquiries regarding the scope and nature of implied rights of action generally—whether in the Constitution or in statutory text—when the Takings Clause contains an explicit remedy of "compensation" in the context of a taking, and when this Court has already explained that such

expressly commanded compensation is the equivalent to an express right of action.

But even assuming *arguendo* (*pace First English*) that a legal text creating the remedy of compensation is not technically the same as the creation of a right of action to seek that remedy, *Bivens* and its progeny do not support the Fifth Circuit's holding below.

First, this Court's *Bivens* jurisprudence is inapposite to the present inquiry. If the rationale in recent *Bivens* jurisprudence was insufficient to overrule *Bivens* itself (or the two other Supreme Court decisions recognizing a *Bivens* remedy), even less should it be grounds to overrule *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U.S. 304 (1987). Further, neither *Bivens* nor this Court's other implied-right-of-action cases involved provisions (like the Takings Clause) that explicitly established their affirmative remedy. The rationale underlying the recent *Bivens* jurisprudence—deference to legislative balances and compromise, and reticence to endorse judicial creativity when laws are silent as to their remedies—has no application to a constitutional provision where that compromise has expressly been struck, and the judge's task is not creative but textually prescribed: to award compensation that is just. This Court's recent decisions on *Bivens* and on the implication of rights of action under statutes instruct courts to be cautious before recognizing a right of action for remedies not prescribed by the lawmaker. They do not urge caution before recognizing rights of action for remedies that are prescribed in the relevant legal texts.

Second, even if *Bivens* were relevant to the question presented, the historical context surrounding the Bill of Rights (and the Takings Clause) cautions against an

overly restrictive view of damages actions against governments and government actors. The animating principle of statutory construction undergirding this Court's recent *Bivens* jurisprudence (and presumably the panel's decision below) is that *statutes* are products of legislative compromise to which courts should defer. But that mode of analysis has less purchase with respect to *constitutional* provisions like the Bill of Rights, which the Framers intended to be effectively policed. Recognizing that, when the Bill of Rights was written, rights of action for constitutional violations were assumed to be readily available by virtue of the common law therefore honors the Framers' intentions. This Court has already acknowledged that the Takings Clause (along with the rest of the Bill of Rights) was drafted and adopted against a historic backdrop of common law remedies for various torts (including property-related torts like trespass) recognized in English common law and in the early Republic. The Framers were undoubtedly aware of that "*ancien régime*." *Mesa*, 140 S. Ct. at 741. A direct cause of action for uncompensated takings accords with not just the text of the Fifth Amendment but its historical context as well.

In short, this Court should resist the anachronistic argument suggested by the Fifth Circuit and Texas that the Framers *intended* there be no direct cause of action under the Takings Clause. The Takings Clause's text, and the historical backdrop against which it was written, both support the opposite conclusion.

ARGUMENT

I. THE TEXT OF THE TAKINGS CLAUSE AND *FIRST ENGLISH* ANSWER THE QUESTION PRESENTED

Answering the question presented can begin and end with the constitutional text. The Fifth Amendment commands that "just compensation" be paid when "private property" is "taken for public use." U.S. Const. amend. V. Petitioners correctly explain that this constitutional conferral of both right and remedy—described by this Court as "self-executing"—does not depend for its efficacy on federal or state legislative grace. *Knick* v. *Township of Scott*, 139 S. Ct. 2162, 2172 ("'[I]n the event of a taking, the compensation remedy is required by the Constitution.'" (quoting *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U.S. 304, 316 (1987))); *id.* ("rejecting the view that the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government" (internal citation and quotation marks omitted)); *id.* at 2170 ("[I]f there is a taking, the claim is 'founded upon the Constitution'" (quoting *United States* v. *Causby*, 328 U.S. 256, 267 (1946)); *First English*, 482 U.S. at 315 ("claims for just compensation are grounded in the Constitution itself"); *id.* ("'*suits* [for just compensation are] *founded upon the Constitution of the United States*'") (quoting *Jacobs* v. *United States*, 290 U.S. 13, 16 (1933)). Rather, compensation for the government's taking of a person's property is constitutionally mandated, full stop. Vázquez, *What is the Eleventh Amendment?*, 106 Yale L.J. 1683, 1709-1710 (1997) (explaining that the Takings Clause is "one of the few constitutional provisions that expressly addresses issues of liability" and that this "Court has indicated that this remedy is available in the state courts even if there is no statute that authorizes it[.]");Vázquez, *The Constitution as a*

Source of Remedial Law, 132 Yale L.J. Forum 1062, 1064-1065 (2023) (noting that the Takings Clause is one of only two express references to remedies in the Constitution).

Here, petitioners plausibly contend that Texas took their property without paying for it. They sued in state court, but Texas removed the case to federal court. As such, the Takings Clause (made applicable to Texas via the Fourteenth Amendment) afforded petitioners the opportunity, in state court and in the federal court that Texas itself chose, to seek redress irrespective of the fact they cannot sue Texas as a "person" under 42 U.S.C. § 1983. The fact that the Fifth Circuit, in affirming the dismissal below, has now left petitioners with no remedy for the State's flooding of their property—neither a venue, nor a cause of action—is itself a strong indication that the court has seriously erred.

The Fifth Circuit's view that petitioners lack a right of action for monetary relief because states are not persons within the meaning of § 1983 overlooks the fact that the Takings Clause itself establishes a right of action for just compensation, as this Court has held. *See First English*, 482 U.S. at 315 ("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." (internal citations and quotations omitted)); *see* Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century Just Compensation Law*, 52 Vanderbilt L. Rev. 57, 58 (1999) ("[T]he idea that the federal and state just compensation clause provide a private right of action for damages is a familiar one."); *United States* v. *Clarke*, 445 U.S. 253, 257 (1980) ("[A] landowner is entitled to bring ['a cause of action against a government defendant to recover the value of

property which has been taken in fact by the government defendant'] as a result of 'the self-executing character of the constitutional provision with respect to compensation … .'" (quoting Hagman, *Urban Planning and Land Development Control Law* 328 (1971) and 6 Nichols, *Eminent Domain* § 25.41 (3d rev. ed. 1972))).

This Court's holding in *First English* that a law that establishes a right to compensation for takings of property also establishes a *right of action* for compensation is consistent with this Court's frequently expressed view that when a provision "command[s] the payment of a specified amount … [it] impliedly authorizes (absent other indication) a claim for damages[.]" *Maine Cmty. Health Options* v. *United States*, 140 S. Ct. 1308, 1329 (2020) (quoting *Bowen* v. *Massachusetts*, 487 U.S. 879, 923 (1988) (Scalia J., dissenting)). Indeed, "to say that A shall be liable to B is the *express* creation of a right of action.'" *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 818 n.11 (1994) (quoting *id.* at 823 (Scalia, J., dissenting)) (emphasis in original). To say that A is under a legal obligation to pay compensation to B is the same as saying that A is liable to B. A person is "liable" to another when that person is under a duty to provide a remedy for the breach of a legal obligation. *See Black's Law Dictionary* at 823, 824 (5th ed. 1979) (definitions of "liability" and "liable.").[2]

Perhaps for that reason, the Fifth Circuit did not rely on this Court's Takings Clause cases. Rather, both

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[2] In *Maine Cmty. Health Options*, the Court said in a footnote that the Takings Clause does not create an express right of action. Nevertheless, it concluded that, because the clause creates a "mandatory … obligation to pay," it creates one by necessary implication. 140 S. Ct. at 1328 n.12. Otherwise, the "mandatory" "constitutional" "obligation to pay" would be "meaningless." *Id.*

Judge Higginbotham and Judge Higginson—members of the original panel concurring in denial of rehearing *en banc*—principally relied on two recent decisions from this Court interpreting *Bivens*: *Hernandez* v. *Mesa*, 140 S. Ct. 735 (2020), and *Egbert* v. *Boule*, 142 S. Ct. 1793 (2022). Pet. Supp. App. 44a (first citation in Judge Higginbotham's concurrence); *id.* at 51a (second citation in Judge Higginson's).

But this is a Takings Clause case, not a *Bivens* case, and this Court's recent *Bivens* jurisprudence does not and should not require eviscerating a cause of action under the Takings Clause. *Bivens* was about when it is appropriate for a court to judicially recognize a right of action for the violation of a constitutional provision that—unlike the Takings Clause—does not itself create a particular remedy. The *Bivens* line of cases is entirely inapposite.

II. THE TAKINGS CLAUSE STRIKES ITS OWN BALANCE

The Fifth Circuit's holding appears to reflect the view that for a law to establish a legal remedy such as compensation is not the same thing as the law establishing a right of action to recover that remedy. Pet. Supp. App. 54a n.1 (acknowledging this Court's holding that "'the compensation remedy is required by the Constitution'" but maintaining that "the Takings Clause does not create an express constitutional cause of action." (quoting *First English*, 482 U.S. at 316)). This view is inconsistent with *First English* and the many authorities discussed in Part I. But, even accepting *arguendo* that a law which provides for an affirmative remedy does not necessarily create a cause of action to seek that remedy, this Court's recent *Bivens* decisions do not support overruling *First English*.

First, it is worth noting that, although this Court has distanced itself from the reasoning of the *Bivens* decision, that skepticism has led it to hold only that *expansion* of *Bivens* is a "disfavored judicial activity." *Egbert*, 142 S. Ct. at 1803. This Court has accordingly established a stringent test for extending *Bivens* to "new contexts." By "new contexts," this Court means contexts not controlled by its own prior decisions recognizing a *Bivens* action—*i.e.*, *Bivens* itself, *Davis* v. *Passman*, 442 U.S. 228 (1979), and *Carlson* v. *Green*, 446 U.S. 14 (1980). *Egbert*, 142 S. Ct. at 1808 (enumerating these three cases). If the Fifth Circuit were correct that this case presents a *Bivens* issue, the Court would have included *First English* on this list. That it did not is a strong indication that this Court understands the Takings Clause issue to be distinct from a *Bivens* issue. And even if *First English* was excluded from this list inadvertently, the Court's decision to preserve the three previously-recognized *Bivens* actions should lead it to preserve *First English* as well. If the rationale in *Egbert* does not warrant overruling *Bivens* itself (or its extension in *Carlson* and *Davis*) then certainly that same rationale cannot warrant overruling *First English* either.

Second, even assuming that a law creating a remedy does not *ipso facto* create a right of action to seek that remedy, this Court's unreceptiveness to implying rights of action for violations of the Constitution does not apply to constitutional provisions which, like the Takings Clause, expressly create a remedy. *In re Fin. Oversight & Mgmt. Bd.*, 41 F.4th 29, 46 (1st Cir. 2022) ("Neither *Bivens* nor section 1983 rests on a provision of the Constitution that mandates a specific remedy in the same way the Takings Clause mandates just compensation[.]"), *cert. denied*, 143 S. Ct. 774 (2023). None of this Court's decisions declining to imply a private right

action in the constitutional or statutory contexts has involved a provision that explicitly identifies a remedy. But the Takings Clause does. That *express* remedy obviates resorting to a canon or jurisprudence pertaining to implying a right of action under laws that do not expressly provide the lawmakers' desired remedy.

More fundamentally, the *rationale* underlying this Court's recent *Bivens* jurisprudence—*i.e.*, deference to legislative balancing of interests—has no purchase where the balance is already struck within the provision itself.

This Court's recent reticence to find implied causes of action in statutes rests on "the insight that legislation does not reflect a single legislative purpose but is instead the product of a compromise among competing interests." Vázquez, Bivens *and the* Ancien Régime, 96 Notre Dame L. Rev. 1923, 1294 (2021); Fallon, Jr., et al., *Hart & Wechsler's The Federal Courts and the Federal System* 654 (7th ed. 2015). As this Court explained in *Mesa*:

> [A] lawmaking body that enacts a provision that creates a right or prohibits specific conduct may not wish to pursue the provision's purpose to the extent of authorizing private suits for damages. For this reason, finding that a damages remedy is implied by a provision that makes no reference to that remedy may upset the careful balance of interests struck by the lawmakers.

140 S. Ct. at 742; *see also Ziglar* v. *Abbasi*, 582 U.S. 120, 135 (2017); *Cannon* v. *University of Chicago*, 441 U.S. 677, 730, 743, 746 (1979) (Powell, J., dissenting) (dissenting from decision finding that Title IX contains an implied right of action, explaining that doing so "allow[ed] the Judicial Branch [to] assume policymaking authority

vested by the Constitution in the Legislative Branch[.]"); Vázquez, 96 Notre Dame L. Rev. at 1926.

As *Mesa* shows, the Court's recent approach to *Bivens* is an extension of its new approach to implying rights of action under statutes. While this Court previously assumed a "duty … to be alert to provide such remedies as are necessary to make effective the congressional purpose," *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 433 (1964), it has more recently reframed its "judicial task" as a duty "to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right of action but also a private remedy," *Alexander* v. *Sandoval*, 532 U.S. 275, 286-287 (2001); Vladeck, Bivens *Remedies and the Myth of the "Heady Days*," 8 U. St. Thomas L.J., 513, 521 (2011) ("[W]hatever the merits of *Sandoval*'s approach … the crux of the dispute between the majority and the dissenters—and between more recent and older case law—boils down to methodological disagreements over statutory interpretation."). In keeping with this new approach just two terms ago, the Court reduced the test for expanding *Bivens*—which originally "in no way required indicia of legislative intent," Vladeck, 8 U. St. Thomas L.J. at 519—"to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy." *Egbert*, 596 U.S at 492.

But deference to tacit balances struck in legislation has no application where the relevant law is not silent, but contains the very remedy at issue. There is no risk of "upset[ting] the careful balance of interests struck by the lawmakers," *Mesa*, 140 S. Ct. at 742, when the Framers have carefully struck a balance by including within the Takings Clause itself the remedy they intended. As the petitioners note, Pet. Br. 37-38, if the Takings Clause were not read to establish a right of action for

compensation, then the default remedy for an uncompensated taking under established principles of equity would be an injunction against the relevant state officials. Such a holding would judicially *undermine* the balance struck by the Framers (and relied on by property owners), contrary to the spirt of judicial deference espoused in *Mesa* and *Egbert*.

Consistent with this conclusion, the Court has uniformly held in the context of implied statutory rights of action that the courts should hesitate before implying a right of action for remedies *not specified in the statute*. As this Court has explained, the cases concerning implication of private rights of action address "whether a private *remedy* is implicit in a statute not expressly providing one." *Cort* v. *Ash*, 422 U.S. 66, 78 (1975) (emphasis added). *Accord Merrill, Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 373 n.51 (1982); *id.* at 396 (Powell, J., dissenting) ("In determining whether an 'implied' cause of action exists under a federal statute, 'what must be ultimately determined is whether Congress intended to create the private *remedy* asserted.'" (quoting *Transamerica Mortg. Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 15-16 (1979))) (emphasis added); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 562 (1979); *Cannon*, 441 U.S. at 688 n.9. In answering that question, the Supreme Court has instructed that the courts should place primary emphasis on whether "there [is] any indication of legislative intent, explicit or implicit, either to create such a *remedy* or to deny one." *Cort*, 442 U.S. at 78. These cases thus support the argument that the question whether a law creates a private right of action is the same as the question whether it creates a private remedy. When a law provides that a party is entitled to "compensation," the legislature's intent to create a private remedy is found in the law's text, and there is no

need to consider whether "a private remedy is implicit" in the law; the private remedy is explicit and the law thus creates a private right of action. But even if the Fifth Circuit were right in regarding the remedy and the right of action as distinct (and this Court in *First English* was wrong in treating them the same), these cases show that this Court's hesitancy to find a private right of action in a statute that does not specify one has no application to laws that themselves specify the legislature's preferred remedy. Among the Supreme Court's "legion of implied-right-of-action cases," *see Sandoval*, 532 U.S. at 287, we know of none declining to find a private right of action to seek a particular remedy where the law in question mandated that remedy.

In the *Bivens* context as well, when this Court has said that the courts should hesitate to recognize a private right of action for violation of particular constitutional provisions, it has done so because, in its view, the creation of a *remedy* is generally the prerogative of Congress. *See, e.g.*, *Egbert*, 142 S. Ct. at 1803 ("While our cases describe two steps, those steps often resolve to a single question: whether there is any reason to thing that Congress might be better equipped to create a damages *remedy*." (emphasis added)); *Mesa*, 140 S. Ct. at 737 ("The most important question is whether Congress or the courts should create a *damages remedy*." (emphasis added)); *Ziglar*, 582 U.S. at 135 ("The question is 'who should decide' whether to provide for a damages *remedy*, Congress or the courts?" (emphasis added) (quoting *Bush* v. *Lucas*, 462 U.S. 367, 380 (1983))). These and many similar passages suggest that the Court regards the issue of a remedy and the issue of a right of action to enforce that remedy as the same, as argued in Part I. But, again, even if the two concepts are different, as the Fifth Circuit appears to insist, this Court's recent

Bivens decisions establish that the reasons for hesitating before recognizing a right of action for a given remedy do not apply when the constitutional provision in question expressly creates the remedy being sought.

III. The Historical Pedigree Of Damages Remedies For Constitutional Violations

Finally, even if this Court were to consider recent *Bivens* cases as relevant to this case despite the Taking Clause's express reference to the remedy of compensation, the Court should not extend the rationale of these cases to reverse *First English*. As already noted, this Court has defended its new approach to the *Bivens* issue by analogy to its new approach to the implication of private rights of actions under statutes. Implying rights of action under statutes is problematic, according to the Court, because doing so upsets the legislative compromise. The legislature's omission of private rights of action may well have reflected "a compromise that the available remedies would be limited—that full compliance was neither desired nor desirable." Fallon, Jr., et al., *Hart & Wechsler's The Federal Courts and the Federal System* at 742 (citing Easterbrook, *Forward: The Court and the Economic System*, 98 Harv. L. Rev. 4, 45-51 (1984)). But this rationale for declining to recognize private rights of action under statutes supports a *different* approach to recognizing damages remedies for the violation of constitutional rights.

The "inapplicability" of the Court's new approach "to the question of remedies for constitutional violations[] was … acknowledged from its inception." Vázquez, 96 Notre Dame L. Rev. at 1926. The intellectual seeds of the Court's current approach to the implication of rights of action under statutes were sown in Justice Powell's dissent in *Cannon*, 441 U.S. 677. While

Justice Powell agreed with the Court's current understanding that "federal courts should not assume the legislative role" when "Congress chooses not the provide a private civil remedy," at the same time he acknowledged the question is "significantly different" for "private actions" that "could be implied directly from particular provisions of the Constitution," because this Court possesses a "traditional responsibility to safeguard constitutionally protected rights." *Cannon*, 441 U.S. at 733 n.3.

As to those "constitutionally protected rights," we do not typically assume that the omission of express remedies reflected the Framers' view that full compliance was neither desired nor desirable. To the contrary, "we usually assume that the Framers intended the rights guaranteed by [the Bill of Rights] to be generally effective." Vázquez, 96 Notre Dame L. Rev. at 1927 (citing Fallon, Jr. & Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1787-1791 (1991)); *Knick*, 139 S. Ct. at 2169 (the prohibition against uncompensated takings cannot be "relegate[d] to the status of a poor relation among the provisions of the Bill of Rights."). Thus, when Justice Powell noted that in light of the need to "safeguard constitutionally protected rights" this Court has a "freer hand" to exercise "greater judicial creativity with respect to implied constitutional causes of action," *Cannon*, 441 U.S. at 733 n.3, he was echoing Thomas Jefferson's famous pre-*Marbury* defense of the Bill of Rights as a "'legal check which it puts in the hands of the judiciary.'" Vázquez, 96 Notre Dame Law Rev. at 1927-1928 (quoting Maier, *Ratification: The People Debate the Constitution, 1787-1788*, at 455 (2010)). Which is to say, recognizing that the courts can and should enforce the Takings Clause through suits for monetary relief is consistent

with the Founder's original intention, not a defunct "*ancien regime*." *Mesa*, 140 S. Ct. at 741 (quoting *Ziglar*, 582 U.S. at 131).

Recognizing a cause of action under the Takings Clause would not "interfere with the legislative process" or "arrogate legislative power" in the manner Judge Higginbotham lamented. Pet. Supp. App. 56a; *Cannon*, 441 U.S. at 733 n.3. Since at least *Sandoval*, Congress has been aware that this Court prefers clear textual evidence before "finding" a private right of action. Against that backdrop, Congress's choice now to omit a private right of action in the words of a given statute can fairly be understood as reflecting its intent that such an action not be judicially recognized or created. But the same cannot be said of the Bill of Rights. "We cannot manufacture a new presumption now and retroactively impose it on a Congress that acted 27 years ago," let alone on the Framers acting over 200 years ago. *Tanzin* v. *Tanvir*, 141 S. Ct. 486, 493 (2020). Indeed, if the goal of *Sandoval*'s "mode of analysis" is fidelity to the original intent underlying a given provision like the Takings Clause, then the Court should look to the "Framers' expectations regarding the remedies that would be available to give efficacy to the constitutional rights they were adopting." Vázquez, 96 Notre Dame L. Rev. at 1928. And the fact is, the prevailing expectation when the Takings Clause was ratified was that causes of action were generally available to seek compensation for governmental violations of the Constitution.

Specifically, "[t]he Framers adopted the Constitution's rights-conferring provisions"—including the Takings Clause—against the backdrop of an existing system of remedies under the common law and equity." Vázquez, 96 Notre Dame L. Rev. at 1928. As this Court has recognized, "[i]n the early Republic, 'an array of

writs … allowed individuals to test the legality of government conduct by filing suit against government officials' for money damages 'payable by the officer.' These common-law causes of action remained available through the 19th century and into the 20th." *Tanzin*, 141 S. Ct. at 491 (quoting Pfander & Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1871-1875 (2010)).[3]

Scholars are in accord, noting that victims of myriad constitutional injuries (including property-related injuries, *e.g.*, trespass) could bring claims against both federal and state officials. *E.g.*, Sisk, *Recovering the Tort Remedy for Federal Official Wrongdoing*, 96 Notre Dame L. Rev. 1789, 1792-1793 (2021); Vladeck, *The Inconsistent Originalism of Judge-Made Remedies Against Federal Officers*, 96 Notre Dame L. Rev. 1869, 1880 (2021); Vladeck, *The Disingenuous Demise and Death of* Bivens, 2019-2020 Cato Sup. Ct. Rev. 263, 267;

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[3] This observation (and *Bivens*, and the common law history that follows) pertains to suits against officials, whereas here petitioners sued the state. As relevant here, the main difference between actions against government officials and their governments is the latter's sovereign immunity. *See Ex Parte Young*, 209 U.S. 123, 163 (1908). In light of the Taking Clause's express mandate to provide "just compensation," it would appear that a waiver of state sovereign immunity was implicit in the constitutional plan. *Cf. PennEast Pipeline Co.* v. *New Jersey*, 141 S. Ct. 2244, 2263 (2021) (no "offen[se] to state sovereignty" when "the States consented at the founding to the exercise of federal eminent domain power."). Regardless, as Judge Oldham explained, "the State's decision to remove obviously constitutes a waiver of its sovereign immunity." Pet. Supp. App. 72a. Petitioners do not concede whether a state may ever invoke sovereign immunity to defeat a Takings Clause claim, and in light of Texas' waiver there is no need to consider that question here.

Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 Yale L.J. 77, 99 (1997).

And an array of cases from before and during the Founding Era confirm the basic assumption that injuries implied a remedy in the form of compensation from government actors. For example, in the colonial era, English common law provided rights of action against military and government officials whose tortious conduct exceeded official authority. *See* Vázquez & Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. Pa. L. Rev. 509, 537-539 (2013); Jaffe, *Suits Against Government and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 1-2 (1963). As reflected in a prominent treatise on the British constitution, a key element of the British rule of law was "the right of individuals to mount common-law claims against government officials who were held personally accountable for their actions unless able to justify them in accordance with the law of the land." Pfander, *Dicey's Nightmare: An Essay on the Rule of Law*, 107 Cal. L. Rev. 737, 744 (2019) (describing Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed. 1959)).

As one noteworthy example, *Entick* v. *Carrington*, (1765) 95 Eng. Rep. 807 (KB)—a "monument of English freedom" with which "every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar," *Boyd* v. *United States*, 116 U.S. 616-626 (1886)—was a trespass action against officials who conducted an unlawful search and seizure. The case is today celebrated for announcing limits on searches and inspiring the Fourth Amendment, but it also reveals that actions against the government to remedy constitutional wrongs—indeed, wrongs related to property—was so firmly entrenched in the pre-

revolutionary period that it went unquestioned in the 1765 decision.[4]

This tradition carried on in the Early Republic. "From the beginning of the nation's history, federal (and state) officials have been subject to common law suits as if they were private individuals, just as English officials were at the time of the Founding." Vázquez & Vladeck, 161 U. Pa. L. Rev. at 531; *see also* Pfander, *Constitutional Torts and the War on Terror* 6 (2017). It was well-accepted in the Nation's earliest years that non-statutory remedies were available, in both state and federal courts, when a federal or state official transgressed the Constitution or federal statutes while carrying out his official duties. These cases spanned a wide range, including: a postal official sued for malicious prosecution, *Merriam* v. *Mitchell*, 13 Me. 439 (1836); federal customs agents sued for wrongful seizures of vessels and their cargo, *Gelston* v. *Hoyt*, 16 U.S. (3 Wheat.) 246 (1818); *Imlay* v. *Sands*, 1 Cai. 566 (N.Y. Sup. Ct. 1804); revenue collectors sued for demanding unlawful custom duties, *Kidd* v. *Swartwout*, 14 F. Cas. 457 (C.C.S.D.N.Y. 1843)

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[4] There were several such cases in the pre-revolutionary period, providing remedies against officers in their personal capacity for a variety of unlawful official acts. *See, e.g.*, *Wilkes* v. *Wood*, (1763) 98 Eng. Rep. 489 (KB); *Chambers* v. *Robinson*, (1726) 93 Eng. Rep. 787 (KB). Damages were generally recognized for injuries to liberty caused by the unauthorized or excessive use of official power. In *Huckle* v. *Money*, (1763) 95 Eng. Rep. 768 (KB), for example, a printer was awarded £300 in damages for trespass, assault, and imprisonment after he was taken into custody for several hours by a King's messenger on suspicion of having printed an allegedly seditious pamphlet. *Id.* at 768. Rejecting the argument that damages were excessive because the plaintiff was treated well and confined only for a few hours, the court held the damages were justified because "it was a most daring public attack made upon the liberty of the subject." *Id.* at 769.

(No. 7,756); and a federal military officer sued for attempting to collect a fine assessed by a court martial that did not possess jurisdiction over the plaintiff, *Wise* v. *Withers*, 7 U.S. (3 Cranch) 331, 337 (1806).

In contrast to *Mesa*'s and *Egbert*'s assumption that implying a cause of action in the absence of explicit legislative text necessarily usurps legislative power, Congress did not perceive these Founding-era remedies as intruding upon its lawmaking sphere. Rather, Congress would simply exercise its legislative prerogative in deciding whether to indemnify the officer after judgment entered. Typically, Congress would grant indemnity if it determined the officer acted in good faith, and denied indemnity otherwise.[5] Pfander & Hunt, 85 N.Y.U. L. Rev. at 1866-1868. But what Congress did not do is admonish Courts for hearing cases awarding remedies in violation of its supposed plenary legislative prerogative and the separation of powers.

To be sure, these cases—and the long tradition of damages actions to seek compensation from the government that they represent—arose prior this Court's rejecting of the concept of general common law in *Erie*

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[5] For example, in the foundational case *Little* v. *Barreme*, 6 U.S. (2 Cranch) 170, 178 (1804) (Marshall, C.J.), Captain Little—a U.S. Navy officer and commander of a frigate during the Quasi-War with France—was ordered by the Secretary of the Navy to seize American vessels traveling "to or from" French ports, pursuant to the Non-Intercourse Act. Captain Little did as he was instructed and seized the *Flying Fish*, a vessel caught sailing from a French port. The problem was Captain Little's orders exceeded the Act, which only permitted seizure of vessels *approaching* a French port, not leaving one. This Court upheld a claim of damages against Captain Little notwithstanding his good faith reliance on the Secretary's orders. Congress, in turn, indemnified him. Act for the Relief of George Little, Priv. L. No. 09-02, ch. 4, 6 Stat. 63 (1807).

Railroad Co. v. *Tompkins*, 304 U.S. 64 (1938). Unsurprisingly, then, these pre-*Erie* cases often did not focus on the particular source of liability, whether it be constitutional, federal, state, or something in between. Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109, 1124 & nn.59-63 (1969); Kramer, *The Lawmaking Power of the Federal Courts*, 12 Pace L. Rev. 263, 281 (1992).[6] Post-*Erie*, it was uncritically assumed these common law actions were grounded in state law. That assumption, in turn, framed the question in *Bivens* as asking whether to recognize a supplementary federal remedy (rather than asking whether to elevate the pre-*Erie* common law remedy to federal status).[7] Framed as such, *Bivens*'

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[6] Perhaps because the question was not then deemed essential in the pre-*Erie* era, this Court never specifically "held that rights against the officer based on [unconstitutional or statute-violating] behavior must be sought under state law." Hill, 69 Colum. L. Rev. at 1124. But in some cases, this Court described the right at issue in terms that suggested the right originated in the federal Constitution. *E.g.*, *Mitchell* v. *Harmony*, 54 U.S. (13 How.) 115 (1851) (allowing damages for unlawful seizure against U.S. Army officer for the forcible taking of the plaintiff's property and for compelling him to travel with a campaign of the Mexican-American war). And more generally, this Court did not limit the officer's liability to that provided under state law. *E.g.*, *Philadelphia Co.* v. *Stimson*, 223 U.S. 605, 619-620 (1912); *Belknap* v. *Schild*, 161 U.S. 10, 18 (1896).

[7] Congress soon thereafter complemented *Bivens* by enacting the Federal Tort Claims Act, *see* 28 U.S.C. § 2680(h); *Carlson* v. *Green*, 446 U.S. 14, 19-20 & n.5 (1980)); Pfander & Baltmanis, *Rethinking* Bivens: *Legitimacy and Constitutional Adjudication*, 98 Geo. L.J. 117, 133 (2009) (noting that Congress rejected language proposed by the Department of Justice that "would have eliminated the *Bivens* action altogether in favor of suits against the government for constitutional violations"). When it subsequently enacted the Westfall Act, it explicitly preserved suits against officers in their individual capacities if plaintiffs allege "a violation of the Constitution of the United States." 28 U.S.C. § 2679(b)(2)(A); H.R. Rep. No. 100-700, at 6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5950

supplementary federal action was left vulnerable to the charge of raw judicial lawmaking—rather than, more accurately, as keeping with a long tradition. Vázquez, 96 Notre Dame L. Rev. at 1932. Indeed, that is what happened: this Court has declined to extend the *Bivens* remedy beyond the contexts in which it has already found it to be available. *Egbert*, 142 S. Ct. at 1809.

But the history remains. The Takings Clause's express conferral of a specific remedy text obviates resorting to that history (or to implied-right-of-action jurisprudence generally). But, if the Court is to look to *Bivens* and its progeny for guidance in interpreting whether suits may be brought directly under the Takings Clause, the Court should appreciate the significance of the fact that the Framers who wrote that clause did so with full knowledge and expectation that the courts would hear claims—and recognize traditional remedies—when plaintiffs seek compensation for governmental violations of constitutional rights, including with respect to property-related claims.

This Court's current *Bivens* jurisprudence reflects a preference for enforcing constitutional rights through suits for prospective relief. *See* Schwartz et al., *Going Rogue: The Supreme Court's Newfound Hostility to Policy-Based Bivens Claims*, 96 Notre Dame L. Rev. 1835, 1839 (2021) (noting that *Ziglar* reflects the Court's preference for injunctive relief over damages to address

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(stating that the Act "would not affect the liability of victims of constitutional torts to seek personal redress from Federal employees who allegedly violate their Constitutional rights"). In light of its text and legislative history, the Westfall Act should be understood to have endorsed a scope of *Bivens* that is at least as expansive as its common law precursors. Vázquez & Vladeck, 161 U. Pa. L. Rev. at 514.

unconstitutional policies); Fallon, Jr., *Constitutional Remedies: In One Era and Out the Other*, 136 Harv. L. Rev. 1300, 1356-1357 (2023) (citing *Bivens* as an example of how this Court is more willing to recognized implied jurisdiction than to award equitable relief to uphold non-statutory damages remedies). This preference is in some tension with the long tradition summarized here of awarding monetary relief for constitutional rights. But, more importantly, a preference for prospective injunctive relief is wholly inappropriate for the Takings Clause, as that clause contains an express preference for monetary relief. To extend the preference for prospective relief to the Takings Clause would entirely re-write the provision and subject states to a *more intrusive* remedy than the Framers devised. The Takings Clause diverges from other constitutional provisions by expressly giving the state the option of taking property for public use if it grants compensation. The historical argument summarized in this Part thus reinforces the arguments of Parts I and II that this Court's recent approach to the *Bivens* question is wholly inapplicable to a constitutional provision like the Takings Clause that specifically establishes a compensatory remedy.

Deference to the "compromise" struck by the authors of the Takings Clause is thus consistent with inferring a direct federal cause of action for uncompensated (and thus unconstitutional) takings—not as a novel judicial creation, but consistent with a tradition of enforcing the Constitution through damages actions that is centuries old, Vázquez, 96 Notre Dame L. Rev. at 1927-1929, and with respect to the Takings Clause, an express determination by the Framers that the compensatory remedy is the preferred remedy.

CONCLUSION

The Fifth Circuit deprived petitioners of their right to seek compensation under the Takings Clause. It did so in defiance of this Court's holding in *First English* that "suits" for just compensation are "'*founded upon the Constitution of the United States*.'" 482 U.S. at 315 (quoting *Jacobs*, 290 U.S. at 16). And it did so, at least in part, because *Mesa* and *Egbert* command that courts be cautious before inventing a new cause of action. But the Court's recent *Bivens* cases have no application here, where the Takings Clause contains its own remedy, strikes its own balance, and evinces a preference for a compensatory remedy over any other remedy for unconstitutional takings. Moreover, as the history recounted above demonstrates, there is nothing novel about suing the government for compensation to remedy a wrong, including property-related wrongs. It is a longstanding tradition dating to the first days of our Republic—a tradition understood by the Framers when they wrote the constitutional command that "private property" cannot be "taken for public use, without just compensation."

Respectfully submitted.

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