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 PROFESSORS JAMES W. ELY, JR., AND JULIA MAHONEY AND THE BUCKEYE INSTITUTE AS AMICI CURIAE IN SUPPORT OF PETITIONERS

JAMES W. ELY, JR.
VANDERBILT LAW SCHOOL
131 21st Ave. South
Nashville, TN 37203-

JULIA D. MAHONEY
UNIVERSITY OF VIRGINIA SCHOOL OF LAW
580 Massie Road
Room WB380
Charlottesville, VA 22903

DAVID TRYON
JAY CARSON
THE BUCKEYE INSTITUTE
88 East Broad Street
Suite 1300
Columbus, OH 43215

THOMAS G. SAUNDERS
Counsel of Record
DONNA M. FARAG
ANDREW R. MILLER
CONNOR J. KURTZ
WILMER CUTLER PICKERING HALE AND DORR LLP
2100 Pennsylvania Ave., NW
Washington, DC 20037
(202) 663-6000
thomas.saunders@wilmerhale.com

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INTEREST OF AMICI CURIAE

James W. Ely, Jr., is the Milton R. Underwood Professor of Law, Emeritus, and Professor of History, Emeritus, at Vanderbilt University.[1] Professor Ely is a renowned property law expert and legal historian who has written extensively about the Takings Clause and just compensation requirement. He is the co-author of *The Law of Easements and Licenses in Land* (revised ed. 2021), and the author of *The Guardian of Every Other Right: A Constitutional History of Property Rights* (3d ed. 2008), *Railroads and American Law* (2001), and *The Contract Clause: A Constitutional History* (2016). This Court and twenty-one other federal courts have relied upon Professor Ely's scholarship. *See*, *e.g.*, *Marvin M. Brandt Revocable Tr.* v. *United States*, 572 U.S. 93, 96 (2014); *United States Forest Serv.* v. *Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1844 (2020); *Sveen* v. *Melin*, 138 S. Ct. 1815, 1828 (2018) (Gorsuch, J., dissenting). Courts in forty-one states and territories have cited Professor's Ely's work, including twenty-nine state supreme courts.

Julia D. Mahoney is the John S. Battle Professor of Law and the Joseph C. Carter, Jr. Research Professor of Law at the University of Virginia School of Law, where she teaches courses in property and constitutional law. Her scholarly articles include Kelo's *Legacy: Eminent Domain and the Future of Property Rights*, 2005 Sup. Ct. Rev. 103 (2006); *Federal Courts and Takings Litigation*, 97 Notre Dame L. Rev. 679 (2022) (with Ann

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

Woolhandler); and Cedar Point Nursery *and the End of the New Deal Settlement*, 11 Brigham-Kanner Prop. Rts. J. 43 (2022).

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—whose mission is to advance free-market public policy in the states. The staff at The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policy solutions, and marketing them for implementation in Ohio and replication nationwide. The Buckeye Institute is a nonpartisan, non-profit, tax-exempt organization as defined by I.R.C. section 501(c)(3). The Buckeye Institute's Legal Center files and joins amicus briefs that are consistent with its mission and goals and has been active in defending private property rights in both state and federal courts.

SUMMARY OF ARGUMENT

The Fifth Amendment's Takings Clause provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The requirement that a taking be subject to just compensation was the codification of a natural law principle that was part of the English tradition, colonial charters, and state constitutions. State courts took the lead in fashioning takings jurisprudence and affirmed the just compensation principle. The just compensation requirement was so deeply rooted in American society and considered fundamental to justice that state courts implied causes of action to decide takings cases. By the time this Court ruled that the just compensation requirement was made binding on the states through the Fourteenth Amendment, states had long been ruling on, and awarding

damages for, takings under states' eminent domain principles.

The lower court's opinion abandons the well-settled principle that just compensation is required for a taking and threatens to leave property owners without the remedy they are constitutionally guaranteed. Such a decision ignores the text, structure, and history of the just compensation principle. If permitted to stand, it will empower the government to seize property with impunity. This is particularly troubling given the current, broad definitions of what constitutes a taking for "public use." Any construction that renders the just compensation requirement a nullity eviscerates the protective function of the Fifth and Fourteenth Amendments and should be rejected by this Court.

ARGUMENT

I. THE COMMON LAW REQUIREMENT FOR JUST COMPENSATION FOR A TAKING WAS RECOGNIZED AT THE FOUNDING

The principle that just compensation is required for a taking was rooted in natural law doctrine and shaped by jurists and philosophers across Europe in the 1600s and 1700s. The principle carried over to the colonies, where it was codified in colonial laws and became entrenched in society. State constitutions and legislation drew on natural law principles to safeguard property rights and adopted compensation provisions that were ultimately "forerunners of the takings clause of the Fifth Amendment." Ely, *The Guardian of Every Other Right* 31 (2007).

A. Just Compensation Was A Common Law Principle Rooted In Natural Law And The English Tradition

The English constitutional tradition safeguarded property rights. Notably, Magna Carta prohibited "constable[s] or other royal official[s]" from "tak[ing] corn or other chattels of any man without immediate payment, unless the seller voluntarily consents to postponement of payment." Magna Carta ch. 28 (1215). It further provided, "No free man shall be seized or imprisoned, or stripped of his rights or possessions … except by the lawful judgment of his equals or by the law of the land." *Id.* at ch. 39. Together, these provisions "secured the rights of owners against arbitrary deprivation of property without due process of law" and affirmed that when the government seizes private property, it must compensate the owner. *See* Ely, *The Guardian of Every Other Right* 13.

Natural law jurists across Europe affirmed the need for compensation. Acknowledging the principle of eminent domain and authority of "the supreme sovereignty … to seize that thing for the necessities of the state," German jurist Samuel Pufendorf wrote that any such seizure must be "on condition" of the owner receiving a refund "by … other citizens." Ely, "*That Due Satisfaction May be Made*:" *The Fifth Amendment and the Origins of the Compensation Principle* ("*Due Satisfaction*"), 36 Am. J. Legal Hist. 1, 16 (1992) (quoting 2 Pufendorf, *De Jure Natural Et Gentium Libri Octo* 1285 (C.H. Oldfather & W.A. Oldfather trans., 1934)).

John Locke espoused a similar natural-law-based theory of property rights. According to Locke, the government existed to protect natural property rights and preserve "'Lives, Liberties and Estates.'" Ely, *The*

Guardian of Every Other Right 17. Given this charge, any arbitrary seizure of property or levy of taxes without popular consent "invades the *Fundamental Law of Property*, and subverts the end of Government." *Id.* Locke's philosophy was instrumental in shaping English common law. Blackstone relied on Locke's thesis in defining property rights. *Id.* "So great … is the regard of the law for private property," Blackstone wrote, that although the legislature could take private property, the owner was entitled to "a full indemnification and equivalent for the injury thereby sustained." 1 Blackstone, *Commentaries on the Laws of England* 139 (1765). This conception of property rights and the need for compensation carried over to the colonies and became integral to American jurisprudence.

B. The Colonies Recognized The Just Compensation Requirement

The colonies drew on natural law and common law principles, treating just compensation in particular as fundamental to property rights and liberty. Although not adopted, the 1669 Fundamental Constitutions of Carolina, drafted in part by John Locke, reflected the compensation mandate. *See* Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 785-786 (1995). The Fundamental Constitutions set forth the eminent domain powers of the high steward's court, which included "mak[ing] cuts, channels, banks, locks, and bridges, for making rivers navigable, or for draining fens, or any other public use," but specified that damage "shall be valued, and satisfaction made." Fundamental Consts. of Carolina art. 44 (1669). Massachusetts formally affirmed that "no mans goods or estaite shall be taken away from him … unlesse it be by the vertue or equitie of some expresse law of the Country." Mass. Body of Liberties ¶ 1

(1641). It also contemplated the need for eminent domain, authorizing towns to develop highways but requiring them to make "reasonable satisfaction" if "any man be thereby damaged in his improved ground." Ely, *Due Satisfaction*, 36 Am. Legal Hist. at 4 (quoting *The Book of the General Lawes and Libertyes Concerning the Inhabitants of the Massachusetts* 25 (Thomas G. Barnes ed., 1975)).

Massachusetts was not alone. Several colonies enacted statutes providing for compensation for certain kinds of takings. In 1752, Rhode Island required payment for the use of eminent domain to obtain land for pest houses, and in 1755, New York enacted a statute directing juries to assess the amount of money to be paid to lot owners whose property was used to place fortifications. Ely, *Due Satisfaction*, 36 Am. Legal Hist. at 5-6. Some New England colonies and North Carolina awarded compensation when land was taken for a highway, while South Carolina and Pennsylvania awarded compensation for taking "improved" land. Ely, *The Guardian of Every Other Right* 24. That money was not provided for unimproved land does not undermine the just compensation requirement; rather, it was a reflection of the low monetary value associated with unimproved land during the colonial period because it was so plentiful. *Id.* As undeveloped land became more valuable, however, the requirement for just compensation swept more broadly, such that the "the granting of compensation was well established and extensively practiced at and before the time of the Revolution." *Id.* at 25.

C. The Revolutionary War And Founding Era Yielded Enhanced Property Rights Protections, Including The Codification Of The Just Compensation Principle

At the time of the American Revolution, more colonies had embraced the principle that takings were subject to the consent of the property owner or elected representatives and that compensation was required. Virginia, for instance, declared that persons who owned enough property for suffrage "cannot be taxed or deprived of their property for public uses without their own consent or that of their representative so elected." Va. Decl. of Rights § 6 (1776). It "allowed the seizure of surplus 'live stock, or beef, pork, or bacon" for the military, but only upon 'paying or tendering to the owner the price so estimated by the appraisers.'" *Horne* v. *Department of Agric.*, 576 U.S. 350, 358-359 (2015) (quoting 1777 Va. Acts ch. XII). South Carolina likewise permitted the "seizure of 'necessaries' for public use" so long as they were paid for. *Id.* at 359 (quoting 1779 S.C. Acts § 4).

The uncompensated takings of real and personal property that resulted from the Revolutionary War made the issue of just compensation especially salient to the early Americans. "Loyalist property was seized. Undeveloped land was taken for roads. Goods of all types were impressed for military use." Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L. J. 694, 698 (1985) (citations omitted). John Jay decried "military impressment by the Continental Army of 'Horses, Teems, and Carriages,'" and expressed concern that the practices would not end there. *Horne*, 576 U.S. at 359. The "heightened concern for the protection of property rights" yielded explicit compensation requirements in state legislation and constitutions. Ely, *The Guardian*

of Every Other Right 26; *see also, e.g.*, Mass. Decl. of Rights art. X (1780) ("[W]henever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor."); Vt. Const. ch. I, art. II (1786) ("[W]henever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money."); 1778 N.Y. Laws ch. 29 (providing compensation for the impressment of horses and carriages).

The requirement for just compensation—born of common law and natural law jurisprudence, adopted by the colonists, and developed further in the wake of colonists' uncompensated losses during the war—eventually made its way into federal law. The Continental Congress enacted the Northwest Ordinance in 1787, which provided that "should the public exigencies make it necessary for the common preservation to take any person's property, or to demand his particular services, full compensation shall be made for the same." Northwest Ordinance of 1787 art. II. This was the "first national legislation" to require compensation when the government exercised its eminent domain powers. Ely, *The Guardian of Every Other Right* 29.

The incorporation of a just compensation requirement into the Bill of Rights reflected the entrenched nature of that requirement in early America. Madison included only the principles that he believed were broadly accepted by American society, avoiding anything "'of a controvertible nature that might endanger the concurrence of two-thirds of each House and three quarters of the States.'" Ely, *Due Satisfaction*, 36 Am. Legal Hist. at 17 (quoting 12 *The Papers of James Madison* 272 (Robert A. Rutland & Charles F. Hobson eds., 1979)). Sure enough, the provision garnered no opposition

during the ratification process, as Federalists and Anti-Federalists alike objected to uncompensated takings. *Id.* at 18. Madison underscored the "inviolability of property" as a moral imperative, asserting that:

> If the United States mean to obtain or deserve the full praise due to wise and just governments, they will equally respect the rights of property, and the property in rights: they will rival the government that most sacredly guards the former; and by repelling its example in violating the latter, will make themselves a pattern to that and all other governments.

1 *The Papers of James Madison* 598 (William T. Hutchinson ed., 1962). The just compensation requirement was regarded as essential to justice and deemed long settled at the point it was ratified as part of the Bill of Rights. *Id.*

II. THE JUST COMPENSATION REQUIREMENT WAS RECOGNIZED AS ESSENTIAL AT THE RATIFICATION OF THE FOURTEENTH AMENDMENT

State jurisprudence throughout the nineteenth century reinforced the importance of just compensation. Judicial opinions across the various states continued to emphasize that the legislative power to seize property was conditioned on the provision of compensation. Indeed, by the time of the Fourteenth Amendment's enactment, a slew of state court opinions had sided with plaintiffs and awarded damages for asserted takings. And although this Court did not incorporate the just compensation requirement against the states until 1897, there was already a body of state court opinions that made clear what this Court later echoed—that the principle was an essential element of due process and universal law.

A. State Courts Recognized The Fundamental Nature Of Just Compensation

State courts took the lead in fashioning takings jurisprudence, affirming states' constitutional and legislative pronouncements about the just compensation requirement. State courts consistently upheld the right to just compensation, with reasoning frequently grounded in natural law principles and universal law.

The fundamental nature of the just compensation requirement was perhaps best articulated by Chancellor James Kent in the seminal case *Gardner* v. *Village of Newburgh*, 2 Johns. Ch. 162 (N.Y. Ch. 1816). Although there was no express just compensation provision in the New York Constitution at the time, Kent found that just compensation for a taking of property was warranted on natural law grounds. While affirming the legislature's right to take private property when necessary, he clarified:

> [T]o render the exercise of the power valid, a fair compensation must, in all cases, be previously made to the individuals affected, under some equitable assessment to be provided by law. This is a necessary qualification accompanying the exercise of legislative power, in taking private property for public uses; the limitation is admitted by the soundest authorities, and is adopted by all temperate and civilized governments, from a deep and universal sense of its justice.

Id. at 166.[2] Kent further explained that indemnification was so integral to the "inviolability of private property"

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[2] *See also* 11 Kent, *Commentaries on American Law* 275-276 (1827) ("A provision for compensation is a necessary attendant on

and "a clear principle of natural equity" that it had been incorporated into the constitutions of countries in Europe and several states. *Id.* at 167. Invoking the United States Constitution's just compensation provision as a "higher authority, and … absolutely decisive of the sense of the people of this country," Kent concluded that just compensation was "an indispensable attendant on the due and constitutional exercise of the power of depriving an individual of his property." *Id.* at 167-168. *See also Proprietors of Piscataqua Bridge* v. *New Hampshire Bridge*, 7 N.H. 35, 66 (1834) (construing the New Hampshire Bill of Rights to "include, as a matter of right, and as one of the first principles of justice … due compensation" for property taken without consent).

That just compensation was considered a fundamental right is also evinced by courts' willingness to imply a cause of action. In the antebellum period, property owners often relied on common law forms of action to seek compensation for takings. *See Knick* v. *Township of Scott*, 139 S. Ct. 2162, 2176 (2019); *see also* Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 Vand. L. Rev. 57, 67-68 (1999). When the common law actions were abolished, state courts implied rights of action for damages under state constitutions.[3] In one of

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the due and constitutional exercise of the power of the law-giver to deprive an individual of his property without his consent; and this principle in American constitutional jurisprudence, is founded in natural equity, and is laid down by jurists as an acknowledged principle of universal law.").

[3] As time went by, just compensation provisions were added to more state constitutions. *See* Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 Wis. L. Rev. 67, 70 (1931) (only three of the original fourteen states' constitutions had provisions for

the seminal cases about eminent domain from the late nineteenth century, the New Hampshire Supreme Court opined, "The form of action … cannot be decisive of the question whether the injury falls within the constitutional prohibition [for just compensation]." *Eaton* v. *Boston, Concord & Montreal R.R.*, 51 N.H. 504, 520 (1872).

B. State Courts Specifically Awarded Damages Or Required Compensation For Takings

State courts not only implied causes of action but regularly upheld compensation or damages for takings of private land for public use—well before the Fourteenth Amendment was enacted. In *Hooker* v. *New Haven & Northampton Company*, for instance, a plaintiff brought a common law action to recover damages from flooding caused by a canal company chartered by the state that had the power of eminent domain. 14 Conn. 146 (1841). On appeal, the Connecticut Supreme Court held that the flooding was a taking and that the plaintiff's injury to his property "flowed directly from … throwing … surplus water upon the plaintiff's land, … depriving him of the use of it … without any just compensation therefor." *Id.* at 161-162. The court concluded that the taking required compensation under "natural equity" and "universal law" and directed a new trial for determination of damages. *Id.* at 153.

Such cases were prevalent in the years immediately before and after the Fourteenth Amendment's enactment and ratification. In *Henry* v. *Dubuque & Pacific Railroad Company*, the Iowa Supreme Court upheld a lower court opinion requiring compensation for land

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just compensation in 1800; by 1868, nine of the fourteen had such a provision).

taken to construct a railroad. 10 Iowa 540 (1860). Compensation was provided for under the Iowa Constitution and state statute. *Id.* at 546. The court reasoned that, although plaintiff could have sued to enjoin the railroad company to restrain it from using the land, he was "not confined to this remedy." *Id.* at 545.

In 1872, four years after the Fourteenth Amendment was ratified, the New Hampshire Supreme Court issued a pivotal and oft-cited eminent domain decision that also involved flooding. The court concluded that a defendant railroad corporation acting under legislative authority was liable under a common law action for damages for removing a natural ridge, which caused a river to periodically flood the plaintiff's land. *Eaton*, 51 N.H. at 504.[4] The court determined that plaintiff should be paid compensation for unintended flooding by relying on the New Hampshire constitutional provision for a "certain remedy" "for all injuries [a subject] may receive … in his property." *Id.* at 517-518. The flooding amounted to a taking, the court explained, because "[c]overing the land with water, or with stones, is a serious interruption of the plaintiff's right to use it in the ordinary manner." *Id.* at 513. The injury to the plaintiff's property had two important characteristics: "[I]t is a physical injury to the land itself … an actual disturbance of the plaintiff's possession" and "it would clearly be actionable if done by a private person without legislative authority." *Id.*

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[4] Railroad companies were typically granted the power of eminent domain and thus acted as "public agents." *See generally* Ely, *Railroads and American Law* 35-37 (2001). In *Eaton*, the defendant took the plaintiff's property under state authority to build a railroad. As a consequence, the railroad caused other flooding damage constituting a taking, which was ultimately found to require compensation.

Other courts likewise recognized that property owners whose land was flooded due to legislative authorization were entitled to compensation. The Michigan Supreme Court affirmed a jury award for a farm owner who sued a booming company for damages from the backflow of a river caused by the company's activities. *Grand Rapids Booming Co.* v. *Jarvis*, 30 Mich. 308 (1874). As in *Eaton*, the court reasoned that "the flowing of lands against the owner's consent, and without compensation, is a taking of his property in violation of … our constitution[.]" *Id.* at 321. The court went on to describe the violation as "so self-evident as hardly to admit of illustration by any example which can be made clearer, and which therefore can hardly need the support of authorities." *Id.*

In short, well before this Court weighed in on the just compensation requirement's application to states' exercise of eminent domain, state courts had done so, invoking the universal principles that were codified in state constitutions and the federal constitution. *See also, e.g.*, *Stone* v. *Fairbury, Pontiac & N.W. R.R. Co.*, 68 Ill. 394 (1873) (holding plaintiff successfully stated common law cause of action for a taking resulting from railroad company's engine waste and remanding the case for further proceedings); *Alloway* v. *City of Nashville*, 13 S.W. 123 (Tenn. 1890) (affirming judgment of monetary award when property was taken for public use); *Ham* v. *City of Salem*, 100 Mass. 350 (1868) (upholding jury finding for damages for a taking by city for its water supply). Although the nature of the taking and legal authorities invoked may have varied, these cases make clear that state courts viewed monetary compensation as a proper and necessary remedy for takings.

C. This Court Acknowledged The Role Of Common Law Principles And State Constitutions In Providing For Just Compensation Before Ultimately Incorporating The Just Compensation Requirement

In 1897, this Court held that the Fourteenth Amendment's Due Process Clause guarantees compensation for takings of private property for public use by the states. *Chicago, Burlington & Quincy R.R. Co.* v. *Chicago*, 166 U.S. 226 (1897). But even before the Court's incorporation ruling, the Court had decided a number of takings cases against states and the federal government. In doing so, it emphasized that just compensation is a right stemming from common law principles and relied on "treaty provisions, the Contract Clause, and the general common law to provide redress for state and local takings." Woolhandler & Mahoney, *Federal Courts and Takings Litigation*, 97 Notre Dame L. Rev. 679, 684 (2022). For example, in *Yates* v. *City of Milwaukee*, the plaintiff sued to enjoin the city from removing his wharf. 77 U.S. (10 Wall.) 497 (1871). This Court, directing the lower court to grant an injunction, reasoned that the plaintiff had a right to erect his wharf and if the city insisted on removing it, just compensation would be required. This Court invoked the common law principles that states had already been affirming (while noting that it was not bound by the Wisconsin courts' view of the common law in making this determination). *See id.* at 506-507.

One year later, in *Pumpelly* v. *Green Bay Company*, this Court likewise ruled in favor of a plaintiff who brought a common law action against a defendant for overflowing his land. 80 U.S. (13 Wall.) 166 (1872). This time, the Court used the Wisconsin constitution as the basis for its ruling. But it also pointed out that just

compensation is "a settled principal of universal law"—one "so essentially a part of American constitutional law that it is believed that no State is now without it." *Id.* at 177-178. The only issue was the application of the principle to the facts. *Id.* at 176-177.

In the last decade of the nineteenth century, this Court unanimously announced that the measure of "just compensation" was a judicial and not a legislative function. *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 327 (1893). In this takings case brought against the United States, the Court traced the foundations of the just compensation requirement, surveying its own precedent and prior discussions of natural equity and universal law before ultimately relying on the principle as articulated in the Fifth Amendment. *Id.* at 324-325.

These decisions ultimately culminated in this Court's decision in *Chicago, Burlington & Quincy Railroad*, which held that the Fourteenth Amendment requires compensation for a taking by a state. Although the Court did not expressly mention the Fifth Amendment, it drew on the same just compensation principles that state courts had been citing for more than a century:

> Due protection of the rights of property has been regarded as a vital principle of republican institutions. … The requirement that … property shall not be taken for public use without just compensation is but "an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down as a principle of universal law."

166 U.S. at 235-236. The just compensation requirement was one of the first provisions of the Bill of Rights incorporated into the Due Process Clause of

the Fourteenth Amendment and made binding on the states.

By the turn of the century, the principle that just compensation was the remedy for a taking had been articulated by courts around the country. Just compensation for takings was required by practically all state constitutions, the Fifth Amendment, and the Fourteenth Amendment via the Due Process Clause. *See* Nichols, *The Power of Eminent Domain* § 259 (1909).

III. The Just Compensation Requirement Effectuates The Takings Clause's Protective Function

Although the nature of what constitutes a taking has evolved, one principle has endured from common law until now: the just compensation requirement protects individual property owners from arbitrary seizures by imposing a real cost to the government. Without the obligation to pay for property it seizes, there is little to rein in the government's authority, largely rendering property rights illusory.

A. Just Compensation Is Necessary To Fulfill The Takings Clause's Protective Function Of Ensuring Individual Property Owners Do Not Bear Public Costs

The Takings Clause secures the rights of individuals against government—not by prohibiting the taking of private property for public use *per se*, but by requiring any taking be limited to public use and subject to *just compensation*. *See Cedar Point Nursery* v. *Hassid*, 141 S. Ct. 2063, 2071 (2021) ("When the government physically acquires private property for a public use, the Takings Clause imposes a clear and categorical obligation to provide the owner with just compensation."); *see also Brown* v. *Legal Found. of Wash.*, 538 U.S. 216, 235

(2003); *First Eng. Evangelical Lutheran Church of Glendale* v. *Los Angeles Cnty.*, 482 U.S. 304, 315 (1987); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 631 (1952) (Douglas, J., concurring) ("The power of the Federal Government to condemn property is well established. … But there is a duty to pay for all property taken by the Government.").

The rationale undergirding the just compensation requirement is that no individual property owner should bear the costs of a public benefit. Pufendorf articulated this in 1672, explaining:

> [T]here are times in the life of every state when a great necessity does not allow the collection of strict quotas from every one, or when something belonging to one or a few citizens is required for the necessary uses of the commonwealth, the supreme sovereignty will be able to seize that thing for the necessities of the state, on condition, however, that whatever exceeds the just share of its owners must be refunded them by the other citizens.

Ely, *Due Satisfaction*, 36 Am. J. Legal Hist. at 16 (quoting 2 Pufendorf, *De Jure Natural Et Gentium Libri Octo* 1285).

American state and federal jurisprudence has echoed this justification. *See Vanhorne's Lessee* v. *Dorrance*, 2 U.S. (2 Dall.) 304, 310, 28 F. Cas. 1012 (C.C.D. Pa. 1795) (No. 16,857) ("[N]o one can be called upon to surrender or sacrifice his whole property, real and personal, for the good of the community, without receiving a recompense in value."); *Monongahela*, 148 U.S. at 325 (declaring that the right to compensation "prevents the public from loading upon one individual more than his

just share of the burdens of government"); *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."); *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 618 (2001) ("[The purpose of the Takings Clause] is to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'"); *Murr* v. *Wisconsin*, 582 U.S. 383, 394 (2017) (same) (quoting *Palazzolo*, 533 U.S. at 618). Indeed, this Court reaffirmed that understanding just last term in holding that a taxpayer who "made a far greater contribution to the public fisc than she owed" plausibly alleged a taking. *Tyler* v. *Hennepin Cnty.*, 598 U.S. 631, 647 (2023).

By permitting takings only with just compensation, the Framers struck a balance between the sovereign's long-settled right to take property for its own use and the private owner's right to be secure in his property: While the former is "deemed to be essential to the life of the state," *State of Georgia* v. *City of Chattanooga*, 264 U.S. 472, 480 (1924), the latter is "indispensable to the promotion of individual freedom," *Cedar Point Nursery*, 141 S. Ct. at 2071; *see also* Adams, *Discourses on Davila* in 6 *Works of John Adams* 280 (C. Adams ed., 1851) ("Property must be secured, or liberty cannot exist."); *cf. Monongahela*, 148 U.S. at 324 ("[I]n any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government."). The belief that property, liberty, and happiness are interwoven were enshrined in

the Virginia Declaration of Rights and adopted by other states. *See* Va. Decl. of Rights § 1 ("That all men … have certain inherent rights … namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."); Mass. Decl. of Rights art. I ("All men … have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.")

Other than due process and the command that takings be for public use, the just compensation requirement is the only limit on government's expansive ability to take property. Permitting the government to avoid its obligation, as the lower court does here, upsets this delicate balance. As Justice Joseph Story declared, such action disregards the "fundamental maxims of a free government [that] seem to require[] that the rights of personal liberty and private property should be held sacred." *Wilkinson* v. *Leland*, 27 U.S. (2 Pet.) 627, 657 (1829). And it allows the government to take or destroy property and reap the benefits without incurring the costs that otherwise would serve as a check on whether it should use its eminent domain powers. Severing the just compensation requirement would undermine the fundamental principle that the government's authority to take property and its requirement to compensate "exist, not as separate and distinct principles, but as parts of one and the same principle." *Pumpelly*, 80 U.S. at 178.

B. The Just Compensation Requirement Is Especially Important As States Use Their Eminent Domain Powers More Expansively

The principle that takings and just compensation must go hand in hand applies with equal if not greater force against states—the seats of police power in our federal system—than the federal government, constrained by its delegated enumerated powers. States have taken private property for projects like shopping malls, motor speedway parking lots, and BMW dealerships. *See* Jones, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 Syracuse L. Rev. 285, 303 (2000). The need for just compensation takes on special significance now that this Court has endorsed a state's ability to seize property for "economic development," stretching the concept of public use. *See Kelo* v. *City of New London*, 545 U.S. 469 (2005). Mahoney, Kelo*'s Legacy: Eminent Domain and the Future of Property Rights*, 2005 Sup. Ct. Rev. 103, 129-132 (2005) (explaining the benefits of judicial protections of property rights).

As the public-use requirement has been substantially weakened, the just compensation principle has become all the more crucial to protecting property rights and, necessarily, liberty. *See Wilkinson*, 27 U.S. at 657 (cautioning that a government can "scarcely be deemed to be free" when "the rights of property are left solely dependent upon the will of a legislative body[] without any restraint."). The just compensation mandate erects a barrier to state takings by requiring the government to assess whether any benefits justify the costs that will be borne by the public, and then providing the fair value of the taking. Importantly, nearly all states are subject to a statutory or constitutional requirement to balance

their budgets. *See* Crain, *Volatile States: Institutions, Policy, and the Performance of American State Economies* 99 (2003). By mandating that government outlays do not exceed revenues, such requirements theoretically put limits on spending, which in turn compels policymakers to choose between takings and other spending priorities. Those considerations—and resulting protections—vanish when states can take without compensating.

At its core, the just compensation requirement protects not just property, but people. *See Boston Chamber of Com.* v. *City of Bos.*, 217 U.S. 189, 195 (1910) ("[The Constitution] deals with persons, not with tracts of land."). That is for good reason, as property rights are fundamentally human rights. The Framers recognized that the Takings Clause was necessary "for the protection of and security of the rights of the individual as against the government." Mills & Abbott, *Mills on the Law of Eminent Domain* 119 (2d ed. 1888). Indeed, property ownership was interwoven with notions of happiness and liberty. William Penn's commentary on Magna Carta called upon colonists to "not … give away any thing of *Liberty* and *Property*" that they enjoy. Ely, *The Guardian of Every Other Right* 13-14. "The right of property" is ultimately "'the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty.'" *Id.* at 26 (citation omitted). The lower court opinion effectively places an unjustified barrier in the path of securing just compensation for taken property, and in so doing threatens the rights of the people against arbitrary government.

CONCLUSION

The judgment of the lower court should be reversed.

Respectfully submitted.

JAMES W. ELY, JR.
VANDERBILT LAW SCHOOL
131 21st Ave. South
Nashville, TN 37203

JULIA D. MAHONEY
UNIVERSITY OF VIRGINIA SCHOOL OF LAW
580 Massie Road
Room WB380
Charlottesville, VA 22903

DAVID TRYON
JAY CARSON
THE BUCKEYE INSTITUTE
88 East Broad Street
Suite 1300
Columbus, OH 43215

THOMAS G. SAUNDERS
Counsel of Record
DONNA M. FARAG
ANDREW R. MILLER
CONNOR J. KURTZ
WILMER CUTLER PICKERING HALE AND DORR LLP
2100 Pennsylvania Ave., NW
Washington, DC 20037
(202) 663-6000
thomas.saunders@wilmerhale.com

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