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 THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber is particularly interested in maintaining durable constitutional protections for private property rights, and promoting the stability, fairness, and predictability of the legal regime governing property rights in the United States. In this case, the rights of businesses and private parties across the country, including those of many Chamber members, would be imperiled if this Court were to affirm the Fifth Circuit's judgment. The court of appeals' ruling jeopardizes the federal Constitution's guarantee of just compensation as a predictable and meaningful protection for private property. As Texas did here, states that prefer not to pay compensation could remove federal Takings claims to federal court and promptly move to dismiss for failure to state a claim.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

And states may, or may not, provide an equivalent just-compensation guarantee as a matter of state law. See Pet. Br. 43-44.

American businesses routinely make investments and other economic decisions in reasonable reliance on the protections that the Just Compensation Clause provides against the uncompensated expropriation of, or regulatory infringement on, private property by various government entities, including states. Property owners benefit from the confidence and predictability of being able to assert a federal claim for just compensation, in a federal forum, that does not depend on available state remedies or procedural gamesmanship. Upholding the Fifth Circuit's decision, by contrast, would sharply undermine the predictability and stability of private property protections nationwide, with sweeping negative effects on investment and economic development.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The basic principle that just compensation is owed to those whose property has been taken for a public use predates the Republic. The right to just compensation, enshrined in the Fifth Amendment's Takings Clause, protected the new American citizenry from arbitrary and tyrannical actions by the government. Furthermore, the right to just compensation sets the Takings Clause in a textual category of its own within the Bill of Rights; no other provision dictates a particular remedy when it is violated. This Court has long characterized the Takings Clause as "self-executing."

2. Texas, facing a federal inverse condemnation claim related to state action intended to flood private property, has circumvented this Court's precedents and the very purpose of the Takings Clause. The State removed the case to federal court pursuant to 28 U.S.C. § 1441, then moved to dismiss on the basis that Congress has not provided a statutory cause of action. The district court rejected this reasoning out of hand, concluding that the State's argument "eviscerates hundreds of years of Constitutional law in one fell swoop, and flies in the face of commonsense." Pet. App. 15a, 34a.

With scant explanation or effort to reconcile its position with decades of precedent, the Fifth Circuit disagreed, accepting the State's argument that a federal court must dismiss a federal just compensation claim for want of a statutory cause of action. Pet. App. 2a. This merits ruling, as cursory as it is remarkable, appears to bar Petitioners from future adjudication of their federal Takings claim in any court. The Fifth Circuit's decision thus gives states an easy roadmap for dismissing federal claims for just compensation at the outset of a case, thereby evading this core constitutional protection for private property rights.

3. If allowed to stand, the Fifth Circuit's ruling would undermine the reasonable, investment-backed expectations of property owners across every sector of the U.S. economy, from individual homeowners and small businesses to the largest corporations whose enterprises depend on protection for physical, intellectual, and other forms of property. Free from any federal-law obligation to pay just compensation for (among other things) outright appropriations of

property, patent infringement, or regulatory takings, state entities will have a pathway to externalize the costs of government operations by taking private property, rather than raising funds through taxes or other means. A survey of federal Takings Clause jurisprudence illustrates the practical importance of a federal just-compensation guarantee, across a wide variety of economic sectors. The Fifth Circuit's unsupported, ahistorical, and destabilizing decision cannot stand.

ARGUMENT

I. Property Owners Must Have a Meaningful Remedy to Seek Just Compensation Under the Takings Clause.

Governments have long provided means of obtaining compensation for property that has been appropriated for public use. The Magna Carta itself expressly prohibited the King's officers from taking the corn or other goods of any individual without immediately paying money for them. Magna Carta art. XXVIII (1215); accord Pet. Br. 19-22. In the eighteenth century, William Blackstone noted that while the government "can, and indeed frequently does, interpose, and compel the individual to acquiesce" to the seizure of property for the common good, the government must do so "not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained." 1 William Blackstone, *Commentaries on the Laws of England* *139.

The prohibition against uncompensated taking of personal property influenced early American practice. See *Horne* v. *Dep't of Agric.*, 576 U.S. 350, 358 (2015)

("The colonists brought the principles of Magna Carta with them to the New World, including that charter's protection against uncompensated takings of personal property.") In 1641, the Massachusetts Body of Liberties—the first legal code established in New England and the first modern bill of rights—established a compensation requirement for the seizure of personal property:

> No mans Cattel or goods of what kinde soever shall be pressed or taken for any publique use or service, unlesse it be by warrant grounded upon some act of the generall Court, nor without such reasonable prices and hire as the ordinarie rates of the Countrie do afford. And if his Cattle or goods shall perish or suffer damage in such service, the owner shall be suffitiently recompenced.

Massachusetts Body of Liberties art. 8 (1641).

Likewise, the Fundamental Constitutions of Carolina, drafted by John Locke in 1669, contained a provision mandating compensation for the seizure of real property. See *Fundamental Constitutions of Carolina* art. 44 (1669). Specifically, that document provided that "[t]he damage the owner of such lands (on or through which any such public things shall be made) shall receive thereby shall be valued, and satisfaction made by such ways as the grand council shall appoint." *Ibid.* Scholars agree that "compensation was the norm when the state took private property." William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 787 (1995).

2. The Takings Clause codifies this practice of protection by providing that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. This provision reflected a deep-seated concern for the defense of property rights and individual liberties in the nascent American Republic. Justice Story would later explain the rationale behind the Takings Clause as follows:

> It is founded in natural equity, and is laid down by jurists as a principle of universal law. Indeed, in a free government, almost all other rights would become utterly worthless, if the government possessed an uncontrollable power over the private fortune of every citizen. One of the fundamental objects of every good government must be the due administration of justice; and how vain it would be to speak of such an administration, when all property is subject to the will or caprice of the legislature, and the rulers.

3 Joseph Story, *Commentaries on the Constitution of the United States* § 1784 (1833).

After the ratification of the Fourteenth Amendment, the Takings Clause became the first right to be incorporated against the states. See *Chicago, Burlington & Quincy R.R.* v. *Chicago*, 166 U.S. 226, 241 (1897) (concluding that private property taken by state without just compensation to owner is "wanting in the due process of law required by the fourteenth amendment of the constitution of the united states"). And over time, this Court has correctly recognized that the Takings Clause protects not only against outright physical takings of property, but against regulations that "go[]

too far." *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922).

3. The Takings Clause is one of only two constitutional clauses that specify a particular remedy. See Richard H. Fallon et al., *Hart & Wechsler's Federal Courts and the Federal System* 330 (7th ed. 2015) (Just Compensation Clause and Suspension Clause for the remedy of habeas corpus). And this Court has described the Takings Clause as "self-executing"—in the sense that the Clause itself provides the remedy of just compensation for takings. See *Knick* v. *Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162, 2172 (2019) ("[A] taking without compensation violates the self-executing Fifth Amendment at the time of the taking . . . ."). As this Court has explained, "[a] constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law." *Davis* v. *Burke*, 179 U.S. 399, 403 (1900).

This Court has time and again affirmed the self-executing character of the Takings Clause. In *First English Evangelical Lutheran Church of Glendale* v. *Los Angeles County*, this Court noted that it has "frequently repeated the view that, in the event of a taking, the compensation remedy is required by the Constitution." 482 U.S. 304, 316 (1987). In response to the Solicitor General's argument that "the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government," this Court emphasized that "it is the

Constitution that dictates the remedy for interference with property rights amounting to a taking." *Id.* at 316 n.9.

In *Jacobs* v. *United States*, landowners brought an inverse condemnation suit against the United States to recover just compensation after the construction of a congressionally authorized dam caused periodic flooding on their farms. 290 U.S. 13, 16 (1933). The question in *Jacobs* concerned whether the interest on the compensation was awardable. *Ibid.* The court of appeals held that inverse condemnation suits were akin to suits on an implied contract with the government, wherein interest could not be recovered. *Ibid.* In reversing, the Court explained that the landowners' suit arose under the Constitution itself:

> The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the amendment. The suits were thus founded upon the Constitution of the United States.

Ibid. See also *United States* v. *Causby*, 328 U.S. 256, 267 (1946) ("If there is a taking, the claim is founded

upon the Constitution.") (internal quotation marks omitted); *Phelps* v. *United States*, 274 U.S. 341, 343 (1927) ("Under the Fifth Amendment plaintiffs were entitled to just compensation . . . the claim is one founded on the Constitution.").

As this Court held in *Knick*, "because a taking without compensation violates the self-executing Fifth Amendment at the time of the taking, the property owner can bring a federal suit at that time." 139 S. Ct. at 2172. The property owners in *Knick* were suing a municipality under Section 1983; thus, this Court did not reach the question whether owners suing states have a similar right of access to federal court at the time of taking. Confirming that federal courts are open to property owners seeking just compensation for takings by state governments is essential to fostering and restoring confidence in the sanctity of private property rights—confidence that has been shaken by the Fifth Circuit's flawed decision below.

II. Depriving Property Owners of a Cause of Action to Enforce the Federal Just-Compensation Guarantee Against States Would Create Profound Uncertainty and Undermine Private Property Protections.

1. Ex ante certainty and clarity about the availability of a federal cause of action to seek just compensation from states or state entities is critical to encouraging investment and development. "The Takings Clause is an essential part of the constitutional structure, for it protects private property from expropriation without just compensation; and the right to own and hold property is necessary to the exercise and preservation of freedom." *Stop the Beach*

Renourishment, Inc. v. *Florida Dep't of Env't Prot.,* 560 U.S. 702, 734 (2010) (Kennedy, J., concurring).

When it comes to property rights, "predictability and stability are of prime importance." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 271 (1994); see also Roscoe Pound, *Interpretations of Legal History* 154 (Peter Smith 1967) (1923) ("In matters of property and commercial law," "security of acquisitions and security of transactions" have "controlling" importance). Here, however, the Fifth Circuit held that (absent action by Congress) there is no federal cause of action to assert Takings claims against states or state entities. The Fifth Circuit's rule risks depriving property owners of *any* judicial forum for a federal just-compensation claim, and indeed invites states to extinguish federal Takings claims without ever paying just compensation (subject only to whatever compensation is available under state law). That rule, if adopted by this Court, poses a significant threat to property owners' investment-backed expectations. See *PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74, 83 (1980). As James Madison recognized, "What farmer or manufacturer will lay himself out for the encouragement given to any particular cultivation or establishment, when he can have no assurance that his preparatory labors and advances will not render him a victim to an inconstant government?" *The Federalist No. 62*, at 381-382 (James Madison) (Clinton Rossiter ed., 1961).

2. The Fifth Circuit, however, has provided a roadmap for states to extinguish federal just-compensation claims, and diminish the value of private property itself. In Judge Oldham's view, "[t]he panel decision reduces the Takings Clause to nothing." Pet. Supp. App.

78a (Oldham, J., dissenting from denial of rehearing en banc). Under the Fifth Circuit's rule (which the Ninth Circuit also employs), a landowner whose property is taken by the state has two options in seeking compensation under the federal Constitution: "The landowner can try to bring a federal takings claim in state court; the State removes; the federal court must assert jurisdiction and dismiss the claim with prejudice under the panel's published decision in this case. Likewise if the landowner tries to bring suit originally in federal district court." *Ibid.* "So the landowner now has only two choices—both of which render the Takings Clause a dead letter." *Ibid.*

This "heads I win, tails you lose" scenario mirrors the conundrum once faced by property owners seeking just compensation from local governments—a problem this Court remedied in *Knick*. In *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, this Court held that a property owner could not bring a Fifth Amendment Takings claims in federal court until a state court had denied the claim for just compensation under state law. 473 U.S. 172, 200 (1985). The unintended consequences of this decision were stark:

> [A] state court's resolution of a claim for just compensation under state law generally has preclusive effect in any subsequent federal suit. The takings plaintiff thus finds himself in a Catch-22: He cannot go to federal court without going to state court first; but if he goes to state court and loses, his claim will be barred in federal court. The federal claim dies aborning.

Knick, 139 S. Ct. at 2167.

Citing the "preclusion trap" created by the state-litigation requirement, this Court recently overruled *Williamson County*, thereby allowing property owners seeking just compensation from local governments to bring their claims directly in federal court. *Id.* at 2167-2168. The Fifth Circuit's rule creates a more pernicious trap for federal Takings claims against states than existed for claims against local governments pre-*Knick*; after all, under *Williamson County*, property owners could at least have their federal Takings claims adjudicated on the merits in state court. Under the Fifth Circuit's rule, state entities can apparently remove federal Takings claims to federal court at the outset of a case, then move for a merits dismissal of the federal claims, with future preclusive effect. As the district court recognized, this "pretzel logic" would "eviscerate[] hundreds of years of Constitutional law in one fell swoop." Pet. App. 15a, 34a. And, as Petitioners explain, if this Court were to agree with the Fifth Circuit that a federal just-compensation claim cannot be asserted without a legislative cause of action, states might follow suit, and decline to entertain federal just-compensation claims in state court, either. See Pet. Br. 10, 42-43.

If allowed to stand, the Fifth Circuit's rule gives states a roadmap to escape accountability for federal Takings claims. The financial and practical incentives to avoid paying for infringements on private property would be irresistible, for even the most well-intentioned state officials. And, at minimum, the Fifth Circuit's decision deprives property owners of a certain, predictable federal forum in which to pursue those

claims. The legal and practical consequences of accepting those propositions—for property owners specifically and for market stability generally—would be devastating.

III. The Fifth Circuit's Rule Would Have Significant Negative Consequences.

If the Fifth Circuit's ruling here were affirmed, states would have an overwhelming incentive to employ Texas's procedure for avoiding payment of federal just compensation claims to private property owners. The financial and practical incentives for elected officials to do so would be too strong to expect any other outcome.[2]

Even just a few examples from federal Takings jurisprudence illustrate the magnitude of the incentives at issue, the wide range of factual and legal circumstances in which the Takings Clause provides an essential bulwark for private property rights against state action, and the political, practical, and regulatory windfall that states would enjoy if they are effectively immune from federal inverse-condemnation liability. Indeed, several cases that have been fundamental in shaping this Court's own modern Takings jurisprudence involved state action. It is far from clear whether the claims in those cases could have survived

[2] If this Court were to affirm the Fifth Circuit's ruling here, municipal and other governments would have a strong incentive to reframe and centralize programs under a state umbrella, given the availability of § 1983 liability against municipal actors, and states' ability to externalize costs onto private property owners without paying just compensation.

under the Fifth Circuit's rule.[3] Going forward, there is no telling what actions states would take if the federal Takings Clause effectively no longer applies to them. While the textual, historical, and doctrinal flaws of the decision below provide ample basis for reversal, the decision's serious adverse practical consequences for vast portions of the U.S. economy provide additional support for that outcome.

A. The Fifth Circuit's Rule Jeopardizes Just Compensation for Direct Physical Expropriations of Private Property.

Modern Takings Clause jurisprudence illustrates the striking diversity and breadth of government actions and regulations that can infringe on core private property rights, implicating the federal Just Compensation guarantee. But one critical (and unfortunately oft-recurring) strand of Takings doctrine deals with perhaps the most obvious kind of state action requiring just compensation: outright physical appropriation of private property.

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[3] See, *e.g.*, *Hawaii Hous. Auth.* v. *Midkiff*, 467 U.S. 229 (1984) (addressing Hawaii's Land Reform Act of 1967, which allowed the state to transfer title from lessors to lessees in the name of achieving a more equitable distribution of land ownership); *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987) (finding that a state's imposition of a development permit condition lacking any nexus to permissible regulatory purposes constitutes a taking); *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992) (holding that a state's complete deprivation of property's economic use constitutes a taking); *Palazzolo* v. *Rhode Island*, 533 U.S. 606 (2001) (finding that a Takings claim is not barred by acquisition of title subsequent to the effective date of regulation).

Case reporters are replete with reminders that the federal Takings Clause plays a critical and ongoing role in protecting private property against direct expropriation in government programs of every stripe. *E.g.*, *Horne* v. *Dep't of Agric.*, 576 U.S. 350, 354 (2015) (government price-control program, under which "a percentage of a grower's [raisin] crop must be physically set aside in certain years for the account of the Government, free of charge" and without just compensation); *Milwaukee & Suburban Transport Corp.* v. *Milwaukee Cnty.*, 263 N.W.2d 503, 508 (Wis. 1978) (government seized private bus system and began operating it under public ownership); *Innovair Aviation, Ltd.* v. *United States*, 72 Fed. Cl. 415 (2006), *rev'd on other grounds*, 632 F.3d 1336 (Fed. Cir. 2011) (government seized airplanes that were under contract to Air Columbia); *Nixon* v. *United States*, 978 F.2d 1269 (D.C. Cir. 1992) (law depriving former President of his presidential papers was a *per se*, compensable taking).

To take just one more example, a recent Minnesota statute requires certain pharmaceutical manufacturers to provide free insulin to patients who meet eligibility criteria, with no assurance of compensation for the manufacturer. Under one branch of this state scheme, eligible individuals can obtain free insulin for up to one year; manufacturers are legally compelled to provide insulin to such patients (through a participating pharmacy) at no charge, and with no assurance of reimbursement. Under another branch of that scheme, manufacturers must provide a 30-day supply of free insulin to eligible individuals; pharmacies dispense the insulin directly to qualifying patients, and then have a legal right to require the manufacturer

either to reimburse the pharmacy for its out-of-pocket costs, or to send a (free) replacement drug supply.

Manufacturers challenged the Minnesota law, arguing that it unconstitutionally compels them to give away their property to the program, without compensation, in violation of the Takings Clause. See *Pharm. Rsch. & Mfrs. of Am.* v. *Williams*, 525 F. Supp. 3d 946, 949 (D. Minn. 2021), *rev'd and remanded*, 64 F.4th 932 (8th Cir. 2023). The manufacturers filed their claims in federal district court and asserted a cause of action under the Takings Clause. As the complaint explained, "if a state's compulsory appropriation of medicine is permissible, there is no reason a state cannot commandeer other products for its residents as the state sees fit to advance its public policy goals." Complaint at ¶ 7, *Pharm. Rsch. & Mfrs. of Am.* v. *Williams*, No. 0:20-cv-1497 (D. Minn. June 30, 2020), ECF No. 1.

No matter how well-intentioned a state's policy goal may be (for Minnesota, a laudable desire of ensuring that patients have affordable access to life-saving medications), those goals must be achieved via constitutional means. Expropriating private property allows a state to fund public programs at low (or even no) cost to taxpayers, forcing "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960).

The Fifth Circuit's rule gives state governments a pathway to avoid paying federal just-compensation claims for property directly seized in the context of any manner of programs, from housing to transportation, and from nutrition and public health to energy and beyond. In each instance, the state could simply seize

the property, or infringe or eliminate its value through regulation, and frustrate claims for just compensation under the federal Takings Clause through procedural gamesmanship.

B. The Fifth Circuit's Rule Jeopardizes Just Compensation for the Infringement, Minimization, or Denial of Property Rights.

The negative impacts of the Fifth Circuit's rule are not limited to instances where the government directly appropriates property. That rule would subject virtually every form of property (and each stick in the bundle of property rights) to the threat of infringement, reduction, or outright appropriation. Such a threat would chill invention and innovation on a national scale.

For example, this Court has long held that intellectual property enjoys protection under the Takings Clause. In 1882, this Court held that patents "confer[] upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the government itself, without just compensation." *James* v. *Campbell*, 104 U.S. 356, 358 (1882). Likewise, "[a] patent for an invention is as much property as a patent for land." *Consolidated Fruit–Jar Co.* v. *Wright*, 94 U.S. 92, 96 (1876); see also *Brown* v. *Duchesne*, 60 U.S. (19 How.) 183, 197 (1856) ("For, by the laws of the United States, the rights of a party under a patent are his private property[.]"). Similarly, the Takings Clause protects trade secrets recognized under state law. *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1003-1004 (1984). Intellectual property rights, no less than real property or chattels, cannot be

appropriated or modified by the government without providing just compensation.

Private parties have relied on the federal Just Compensation guarantee to protect intellectual and other property rights against infringement (without just compensation) by states or state agencies in a range of circumstances. For example, in *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627 (1999), a bank alleged patent infringement when a state entity appropriated the bank's financing methodology for a prepaid-tuition product that the state entity offered to Florida residents. Although the primary issue in this Court concerned the abrogation of state sovereign immunity, this Court pointedly noted that "where the State provides no remedy, or only inadequate remedies, to injured patent owners for its infringement of their patent," "a deprivation of property without due process [could] result." *Id.* at 643.

The Fifth Circuit's rule is hard to square with *Florida Prepaid*. Under that rule, states can eliminate the federal remedy for expropriation of intellectual property by removing the federal-law claim to federal court and moving to dismiss. It is not difficult to imagine hard-fought disputes under a wide range of state substantive laws—and state efforts to regulate various industry sectors more generally—transitioning into state efforts to achieve public-policy or other goals via direct expropriation or infringement of intellectual and other property. That risk is particularly acute given the strong financial incentive that states would have to act with disregard for private property rights,

knowing they are effectively immune from federal inverse condemnation liability.

C. The Fifth Circuit's Rule Jeopardizes Just Compensation for Regulatory Takings.

The Fifth Circuit's rule similarly threatens private property rights in a wide range of regulatory takings scenarios, potentially affecting virtually every sector of the U.S. economy, from the energy industry to manufacturing, and from services industries to finance and beyond.

Just a few examples highlight the range of circumstances in which federal just-compensation claims may be raised for regulatory takings. In *Northwest Landowners Association* v. *North Dakota*, 978 N.W.2d 679 (2022), the North Dakota Supreme Court affirmed that surface owners retain property rights in subsurface pore spaces. At issue in the case was a state law granting certain companies access to these spaces for carbon sequestration activities. Federal and state clean energy policies, including the tax incentives in the Inflation Reduction Act, have resulted in increased demand for such pore spaces. Landowners challenged the law as a federal taking without just compensation. The North Dakota court agreed, finding that while "[p]roperty owners necessarily expect their use of property may be regulated through the exercise of a State's police powers, [] they do not take title subject to the possibility that their property can be 'actually occupied or taken away' without just compensation." *Id.* at 694 (quoting *Horne*, 576 U.S. at 361). But if this Court were to accept the Fifth Circuit's ruling here, it is unclear whether federal just-compensation claims

like those in *Northwest Landowners* would remain viable.

In *State ex rel. R.T.G., Inc.* v. *Ohio*, 780 N.E.2d 998 (2002), the Ohio Supreme Court held that the State's designation of hundreds of acres of property as being unsuitable for mining constituted a categorical taking of the owner's mineral rights, requiring just compensation. The State's unsuitable-for-mining designation had occurred only after the landowner invested time and capital by purchasing the property and mineral rights, conducting extensive test-drilling, filing mine permit applications, and preparing sites for operations. The Fifth Circuit's rule, however, undermines the landowner's substantial investment-backed expectations, given the state's ability to frustrate a federal just-compensation claim via the procedural mechanism used by Texas here.

To take another example, in *Creegan* v. *Kansas*, 391 P.3d 36, 38-39 (Kan. 2017), certain homeowners whose property was subject to single-family-use covenants sued the Kansas Department of Transportation. The Department had purchased 20 lots in a residential subdivision, on which it installed trailers and constructed various non-residential features (*e.g.*, bridges and pavements). The homeowners asserted an inverse condemnation claim under the federal Takings Clause. The Kansas Supreme Court ultimately ruled for the landowners, confirming that state actions breaching restrictive property covenants (even for the state's own land) could serve as the basis of Takings liability given the negative effect on neighboring landowners. *Id.* at 46. But under the Fifth Circuit's rule

here, Kansas may well have litigated those claims differently, with outcome-determinative effect.

Nor is the concern limited to real property. An ongoing dispute over Pennsylvania's efforts to seize hundreds of millions of dollars from the Pennsylvania Professional Liability Joint Underwriting Association is a case in point. The Underwriting Association (involved in medical malpractice insurance) has accumulated significant contingency funds, in excess of required capital ratios. Perceiving a financial opportunity, the Commonwealth of Pennsylvania enacted a statute purporting to transfer $200 million from the Association to the Commonwealth's General Fund. Pa. P.L. 725, No. 44 (2017). The Association sued in federal district court, which enjoined the law as a *per se* taking. *Pennsylvania Pro. Liab. Joint Underwriting Ass'n* v. *Wolf*, 324 F. Supp. 3d 519, 540 (M.D. Pa. 2018), *appeal docketed*, No. 18-2323 (3d Cir. June 13, 2018). Pennsylvania then enacted another law that sought to restrict the Association from receiving funding, other than through appropriations from the General Assembly. A federal district court again enjoined the state's actions as an unlawful regulatory taking. *Pennsylvania Pro. Liab. Joint Underwriting Ass'n* v. *Wolf*, 509 F. Supp. 3d 212 (M.D. Pa. 2020), *appeal docketed*, No. 21-1112 (3d Cir. Jan. 22, 2021); *see also* 2023 WL 2421665 (3d Cir. Jan. 19, 2023) (order in consolidated appeals certifying state-law question to Supreme Court of Pennsylvania). Under the Fifth Circuit's rule, Pennsylvania presumably could have moved to dismiss the initial federal-law claims with preclusive effect—leaving the private entity to whatever state-law remedies existed. Cf. Pet. Supp. App. 78a-79a

(Oldham, J., dissenting from denial of rehearing en banc) (noting that Louisiana "does not afford its citizens a state-law takings remedy").

As even these few examples make clear, the absence of federal constitutional guardrails on states requiring payment of just compensation—and the lack of an assured and straightforward federal forum in which to litigate such claims—could create profound and sweeping uncertainty for private property owners in a wide range of circumstances. And affirming the judgment here seems likely to unleash states to regulate aggressively, without the accountability and discipline imposed by an assured federal Just Compensation guarantee. The Fifth Circuit's rule would frustrate this salutary check on government power, and disserve the investment-backed expectations of property owners nationwide. The Fifth Circuit's novel and deeply troubling rule cannot stand.

CONCLUSION

For the foregoing reasons, and those set forth in the Petitioners' brief, the Fifth Circuit's judgment should be reversed.

Respectfully submitted.

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