No. 22-913

In the Supreme Court of the United States

RICHARD DEVILLIER, ET AL., PETITIONERS

v.

STATE OF TEXAS

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the Fifth Amendment, as incorporated against the States through the Fourteenth Amendment, provides a cause of action for compensation or damages against a State based on the State's alleged taking of private property for public use without just compensation.

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INTEREST OF THE UNITED STATES

The question presented is whether the Fifth Amendment's Takings Clause provides a cause of action for damages for an alleged taking of property without just compensation. The United States has a substantial interest in that question because it implicates when the federal government may be sued for alleged takings of property.

STATEMENT

1. This case concerns the Texas Department of Transportation's construction of a concrete traffic barrier in the median strip on Interstate 10 near Houston. Pet. App. 7a-8a. Petitioners allege that the barrier acts as a dam that protects the eastbound lanes on the southern half of the freeway from flood waters flowing from the north to facilitate their use as an evacuation route dur-

ing flooding. *Ibid.* Petitioners further allege that during two rainfall events—the 60- and 40-inch deluges from Hurricane Harvey and Tropical Storm Imelda in 2017 and 2019—the barrier caused petitioners' properties to flood. *Id.* at 8a; see *id.* at 8a-9a (photographs). Petitioners allege that such flooding will recur. J.A. 13.

2. Petitioners sued the State of Texas in state court, filing four similar cases alleging that the barrier resulted in an uncompensated taking of property for public use, in violation of the Fifth Amendment's Takings Clause and the Texas Constitution's takings provision. Pet. App. 4a-5a. The State removed the cases to federal district court under 28 U.S.C. 1441(a). See Pet. App. 5a, 68a. After the cases were consolidated, *id.* at 5a, petitioners filed an amended master complaint (J.A. 1-48) making the same claims, J.A. 24-42. Texas moved to dismiss that complaint. Pet. App. 7a.

The district court denied the State's motion, Pet. App. 33a-35a, adopting the memorandum and recommendation of a magistrate judge, *id.* at 34a-35a.

In the adopted opinion (Pet. App. 4a-32a), the district court determined that the State's removal of the underlying actions to federal court waived the State's sovereign immunity from suit. *Id.* at 20a-21a. The court further determined that the State had waived its "immunity from liability" on takings claims, concluding that the Texas takings provision—which "'confers upon property owners greater rights of recovery against the [state] government than its federal fifth amendment counterpart'"—had been interpreted by the Texas Supreme Court to waive "governmental immunity" from takings claims under the state takings provision. *Id.* at 21a-22a (citation omitted). The court then concluded

that that waiver of immunity "applies with equal force to [Fifth Amendment] takings claims." *Id.* at 22a.

The district court further determined that the Fifth Amendment supplies a private right of action for damages and, for that reason, petitioners did not need to rely on a cause of action separately provided by another source of law such as 42 U.S.C. 1983. Pet. App. 12a-18a. The court reasoned that "[t]he Fifth Amendment's Takings Clause is self-executing in that it creates a substantive right to just compensation that springs to life when the government takes private property." *Id.* at 15a-16a.

3. On interlocutory appeal under 28 U.S.C. 1292(b), the court of appeals vacated and remanded for further proceedings. Pet. App. 1a-3a (revised opinion).

The court of appeals "h[e]ld that the Fifth Amendment Takings Clause as applied to the states through the Fourteenth Amendment does not provide a right of action for takings claims against a state." Pet. App. 2a. The court cited a decision stating that a "federal court's authority to recognize a damages remedy [for a constitutional violation] must rest at bottom on a statute enacted by Congress." *Id.* at 2a n.1 (citation omitted).

The court of appeals observed that "[t]he Supreme Court of Texas recognizes takings claims under the federal and state constitutions, with differing remedies and constraints turning on the character and nature of the taking." Pet. App. 2a n.2. The court emphasized that nothing in its opinion is "intended to displace the Supreme Court of Texas's role as the sole determinant of Texas state law." *Id.* at 2a.

4. The court of appeals denied rehearing en banc. Pet. App. 40a-41a; Supp. App. 42a-43a.

Judge Higginbotham concurred in the denial of rehearing. Supp. App. 44a-50a. He explained that this

Court's reference to the "'self-executing character'" of the Takings Clause in *Knick* v. *Township of Scott*, 139 S. Ct. 2162, 2171 (2019) (citation omitted), simply referred to "the completeness of the claim itself," not a cause of action. Supp. App. 46a-47a & n.5.

Judge Higginson separately concurred in the denial of rehearing. Supp. App. 51a-63a. He observed that "implying constitutional causes of action is 'a disfavored judicial activity'" and concluded that doing so here would impermissibly "infringe separation-of-powers principles." *Id.* at 51a (citation omitted); see *id.* at 54a-55a. Judge Higginson identified "four warning signs" that implying "a cause of action against the [S]tates" here would impermissibly "'arrogate legislative power'": (1) an "alternative remedial structure already exists in state inverse-condemnation law"; (2) Congress enacted 42 U.S.C. 1983's cause of action for constitutional claims but elected not to extend that provision to States; (3) an implied cause of action against States would implicate federalism concerns best left to Congress; and (4) the "'systemwide consequences'" of recognizing an implied right of action against States cannot be predicted. Supp. App. 56a-57a (citations omitted).

Judge Oldham, joined by four other judges, dissented from the denial of rehearing en banc. Supp. App. 64a-97a.

SUMMARY OF ARGUMENT

The Fifth Amendment, as applied to the States through the Fourteenth Amendment, does not itself supply a cause of action for monetary relief against a State. Such a cause of action must be created by Congress or state law. If compensation has not been made available for a taking of property, a property owner may obtain equitable relief to enjoin the taking.

A. The text of the Fifth Amendment's Takings Clause does not confer a cause of action for compensation or damages. The Clause is phrased as a prohibition and makes compensation a necessary condition for a lawful taking, but it does not itself provide a cause of action for monetary relief against the United States or a State.

The Constitution's allocation of powers to Congress confirms that the Fifth Amendment does not itself supply such a cause of action. The United States is immune from suit unless Congress expressly waives that immunity; the Constitution's Appropriations Clause similarly requires congressional authorization of a cause of action for a money judgment against the United States; and Congress's constitutional power to pay the debts of the United States includes authority to determine how monetary claims may be considered. Under that allocation to Congress of power over the Nation's fiscal matters—an allocation that was particularly important when the Fifth Amendment was adopted—no constitutional right exists to a have a court compel payments by the United States. Any such cause of action must be expressly provided in an Act of Congress.

B. History further confirms that conclusion. At the Founding and for many years thereafter, there were no general causes of action through which plaintiffs could obtain compensation for property taken for public use. The only means of obtaining compensation from the United States itself was through a private Act of Congress. Thus, until the 1870s, the typical judicial recourse of a property owner was to bring a common-law trespass action against a responsible government official, rather than the government, to obtain tort remedies, including ejectment.

Congress created the Court of Claims in 1855 to consider certain monetary claims against the United States and, in 1887, Congress expanded that court's authority to hear claims founded upon the Constitution. But this Court concluded that any action alleging a taking of property had to rest on a theory of implied contract. In 1946, for the first time, the Court determined that a Tucker Act claim may rest directly on the Fifth Amendment. But the Fifth Amendment alone does not give rise to the cause of action. It is the combination of the Tucker Act and the substantive source of law—like the Fifth Amendment's Takings Clause—on which the plaintiff relies that gives rise to a cause of action for money from the government where that substantive provision is fairly interpreted as mandating compensation by the government.

C. Petitioners provide no sound basis for now construing the Fifth Amendment to confer a right of action for money. Petitioners' primary contention is that *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304 (1987), held that such a cause of action exists. But neither *First English* nor any other decision of this Court has so held.

Petitioners' contention (Br. 10) that courts must enforce the Fifth Amendment by ordering the government to pay money is misplaced. The obligation to pay compensation as a necessary condition to render a taking lawful is distinct from a cause of action for damages if the government has not made compensation available. Petitioners similarly err in asserting (Br. 8-9) that the "unrefuted" "historical record" supports their position.

Finally, Congress and the States have provided many inverse condemnation provisions to obtain compensation. There is no reason at this late date for an

additional cause of action for compensation directly under the Fifth Amendment itself.

ARGUMENT

THE FIFTH AMENDMENT DOES NOT CONFER A CAUSE OF ACTION FOR COMPENSATION OR DAMAGES

The court of appeals correctly held that the Fifth Amendment's Takings Clause does not itself supply a cause of action for damages against a State. Pet. App. 2a. On that basis, the court vacated the district court's decision and remanded for further proceedings, which will allow the district court to decide whether state law creates a cause of action for compensation from the State. This Court should affirm.

The text of the Fifth Amendment, which as adopted and still today applies only to the United States, does not confer a cause of action for compensation or damages against the United States. The Constitution vests Congress alone with power to waive the United States' sovereign immunity from suit, to determine whether to appropriate funds from the Treasury for any monetary claim, and to pay the debts of the United States. And at the Founding, "there were no general causes of action through which plaintiffs could obtain compensation for property taken for public use." *Knick* v. *Township of Scott*, 139 S. Ct. 2162, 2175, 2175-2176 (2019). It follows that the Fifth Amendment as applied to the States through the Fourteenth Amendment likewise does not itself confer a cause of action for monetary relief against a State and that any such cause of action must be created by Congress or state law.

A. This Case Involves Only Whether The Fifth Amendment Itself Confers A Cause Of Action For Monetary Relief

The Fifth Amendment's Takings Clause provides: "nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. V. That prohibition, ratified in 1791 as part of the Bill of Rights, operates "solely as a limitation on the exercise of power by the government of the United States." *Barron* v. *Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 250-251 (1833) (Marshall, C.J.). In 1897, more than a century later, this Court determined that the Fourteenth Amendment's application of the requirement of "due process of law" to the States also "requires compensation to be made or adequately secured to the owner of private property taken for public use under the authority of a State." *Chicago, Burlington & Quincy R.R.* v. *Chicago*, 166 U.S. 226, 235-241 (1897).

If adequate legal relief is available in "a suit for compensation * * * brought * * * subsequent to [a] taking," this Court has observed that "[e]quitable relief" will "not [be] available to enjoin [the] alleged taking of private property." *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1016 (1984); see *Knick*, 139 S. Ct. at 2175, 2177. But if Congress or the State has not established an adequate mechanism to recover compensation, a person who believes his property has been taken may sue the responsible federal or state officer for an injunction prohibiting the action alleged to constitute a taking. As this Court has explained, an individual's "ability to sue to enjoin unconstitutional actions by state and federal officers" is a "creation of courts of equity," reflecting "a long history of judicial review of illegal executive action." *Armstrong* v. *Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326-327, 329 (2015); see, *e.g.*, *Ex parte Young*,

209 U.S. 123 (1908); see also *Virginia Office for Prot. & Advocacy* v. *Stewart*, 563 U.S. 247, 254-255 (2011) (*Ex parte Young* action is action against official in her official capacity). Here, however, petitioners seek monetary relief for the alleged taking.

A plaintiff who seeks monetary relief based on a violation of an asserted right or obligation must establish jurisdiction and identify the substantive source of law creating that right or obligation. If the plaintiff sues the United States or a State, the plaintiff must also identify a relevant waiver or abrogation of sovereign immunity from suit. See *FDIC* v. *Meyer*, 510 U.S. 471, 475 (1994); *Alden* v. *Maine*, 527 U.S. 706, 715-730 (1999) (state sovereign immunity). And the plaintiff must further identify a "'cause of action'" that allows "the rights and obligations" created by the substantive source of law to "be judicially enforced" by the plaintiff in a suit for monetary relief. *Davis* v. *Passman*, 442 U.S. 228, 238-239 (1979); cf. *Meyer*, 510 U.S. at 483-484 (stating that existence of a "cause of action," which "provides an avenue for relief" in court, is "'analytically distinct'" from the existence of a relevant "waiver of sovereign immunity") (citation omitted).

Here, the State invoked federal-question jurisdiction under 28 U.S.C. 1331 when it removed the case to federal court based on petitioners' assertion of a right to compensation under the Fifth and Fourteenth Amendments. And the State does not contest the proposition that its removal of the case to federal court waives its sovereign immunity from suit in federal court.

As for a cause of action, a suit under 42 U.S.C. 1983 based on a violation of a constitutional right is not available against a State. *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 62-71 (1989). And the court of ap-

peals did not address whether such a cause of action has been created by state law, a matter it left open on remand. Pet. App. 2a. Finally, petitioners do not argue that the Court should extend *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to "imply" a new, judge-made cause of action under the Fifth (or Fourteenth) Amendment, see Br. 34, 37, a course that this Court has eschewed for decades, see *Egbert* v. *Boule*, 142 S. Ct. 1793, 1802-1804, 1808-1809 (2022). And no such cause of action could be implied for monetary relief directly against the United States or a State in any event. Thus, as this case comes to the Court on interlocutory review, the only question is whether the Fifth Amendment itself confers a cause of action for compensation or damages when property has been taken without just compensation. It does not.

B. The Fifth Amendment Does Not Confer A Cause Of Action For Monetary Relief

The Fifth Amendment—here as incorporated against the State by the Fourteenth Amendment—does not of its own force confer a cause of action against the government for monetary compensation or damages in the event property is taken without compensation. The text of the Fifth Amendment does not confer such a right of action and the broader context of the Constitution refutes that proposition.

1. The text of the Fifth Amendment's Takings Clause makes no mention of any judicial means of enforcement. The Clause is phrased as a substantive prohibition, making it unlawful for the government to take "private property * * * for public use, without just compensation." U.S. Const. Amend. V. Nothing in that text specifying that compensation is a necessary condition for a lawful taking provides a cause of action for a plaintiff to

obtain compensation in court. Nor does anything in the text suggest that it creates a cause of action for damages if Congress does *not* make compensation available. This Court has therefore recognized that "the Constitution did not 'expressly create . . . a right of action' when it mandated 'just compensation' for Government takings of private property for public use." *Maine Community Health Options* v. *United States*, 140 S. Ct. 1308, 1328 n.12 (2020) (*Maine Community*) (citations omitted).

2. The Constitution confirms in multiple other ways that there can be no suit for money against the United States in the absence of an Act of Congress.

First, the rule "that 'the sovereign power is immune from suit'" was "'well settled and understood' at the time of the Constitutional Convention." *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 562-564 (1962) (plurality opinion) (quoting *Williams* v. *United States*, 289 U.S. 553, 573 (1933)). Indeed, Alexander Hamilton explained in *The Federalist* that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*." *The Federalist No. 81*, at 548 (Jacob E. Cooke ed., 1961). It was thus "universally" accepted that "no suit c[ould] be commenced or prosecuted against the United States" without that consent. *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 411-412 (1821) (Marshall, C.J.). That "immunity from suit exists whatever the character of the proceeding or the source of the right sought to be enforced," and applies even if the government is alleged to have violated "rights conferred upon the citizen by the Constitution." *Lynch* v. *United States*, 292 U.S. 571, 582 (1934). And the power to waive that immunity resides exclusively in the Legis-

lative, not Judicial, Branch. See *Lane* v. *Pena*, 518 U.S. 187, 192, 196 (1996).

Second, beyond the requirement of an Act of Congress clearly waiving federal sovereign immunity, an Act of Congress is also necessary to recognize a cause of action for a money judgment against the United States. The Appropriations Clause provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. Art. I, § 9, Cl. 7. That provision "provides an explicit rule of decision" requiring that any "claim for money from the Federal Treasury" be "authorized by a statute." *OPM* v. *Richmond*, 496 U.S. 414, 424 (1990). That requirement applies to "a judicial proceeding seeking payment of public funds." *Id.* at 425. "Any exercise of [judicial] power granted by the Constitution" therefore is "limited by a valid reservation of congressional control over funds in the Treasury," ensuring "that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good" rather than "the individual pleas of litigants." *Id.* at 425, 428; see *Reeside* v. *Walker*, 52 U.S. (11 How.) 272, 291 (1851).

Third, the resolution of "claims for money against the United States" is "a function which belongs primarily to Congress as an incident of its power to pay the debts of the United States." *Williams*, 289 U.S. at 569 (citation omitted); see U.S. Const. Art. I, § 8, Cl. 1 ("The Congress shall have power * * * to pay the Debts * * * of the United States."); *United States* v. *Sherwood*, 312 U.S. 584, 587 (1941). Congress, in its "discretion," may either "exercise [that authority] directly" or "delegate [it] to other agencies." *Williams*, 289 U.S. at 569 (citation omitted); see *id.* at 580. And because "controver-

sies respecting claims against the United States" are "equally susceptible of legislative or executive determination," this Court has made clear that "there is *no constitutional right* to a *judicial remedy*" for payment. *Id.* at 579-580 (emphases added). That holds true even when the debt may arise from a legal obligation to pay "just compensation under the Fifth Amendment." *Id.* at 581. The decision whether to supply a right to obtain payment from the United States in court therefore rests exclusively with Congress.

3. The central importance of Congress's authority over the United States' public fisc was particularly acute when the Fifth Amendment was ratified in 1791. Throughout the 1780s, the United States, which "remained in default on much of its interest-bearing debt," "was for all practical purposes bankrupt." Edmund W. Kitch & Julia D. Mahoney, *Restructuring United States Government Debt: Private Rights, Public Values, and the Constitution*, 2019 Mich. St. L. Rev. 1283, 1293 (2019) (*Government Debt*). In the Compromise of 1790, Congress assumed the substantial Revolutionary War debts of the States to promote "an orderly, economical and effectual arrangement of the public finances" in a statute that also confronted the young Nation's massive debt by authorizing new loans to "discharge" the "installments of the principal" and "arrears of interest" owed to foreign nations. Funding Act of 1790, ch. 34, §§ 1-2, 13, 1 Stat. 138-139, 142-143; see Christian C. Day, *Hamilton's Law and Finance—Borrowing from the Brits* (*and the Dutch*), 47 Syracuse J. Int'l L. & Com. 1, 41-44 (2019); *id.* at 29-35 (explaining that "in 1789 the most pressing national problem was the nation's finance" and "massive" public debt).

"[T]he United States became zealous in its commitment to fiscal probity." *Government Debt* 1295. Reflecting that zeal, "Congress' early practice was to adjudicate each individual money claim against the United States, on the ground that the Appropriations Clause forbade even a delegation of individual adjudicatory functions where payment of funds from the Treasury was involved." *Richmond*, 496 U.S. at 430. Particularly considering that practice and the Nation's troubled finances, the Framers, like courts now, would have been "particularly alert to require" express statutory authorization "before the United States [could] be held liable" by a court for "monetary exactions." *United States* v. *Idaho*, 508 U.S. 1, 8-9 (1993); see *Lane*, 518 U.S. at 196. As explained above, there is no such language in the Fifth Amendment.

"[C]ontemporaneous commentary" concerning the Takings Clause "is in very short supply," Joseph L. Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 58 (1964), and petitioners point to no discussion by the Framers concerning suits against the United States to compel the payment of money. When James Madison presented a draft of the Bill of Rights to Congress in 1789, he stated that "tribunals of justice will consider themselves in a peculiar manner the guardians of those rights." *Davis*, 442 U.S. at 241-242 (quoting 1 Annals of Cong. 439 (1789)); see Supp. App. 80a. But Madison did not address the Takings Clause specifically; suggest that the Clause itself compelled judicial awards of money against the United States; or address the authority vested exclusively in Congress to waive sovereign immunity from suit, control payments from the Treasury, and pay federal debts. Neither did Madison's other statements quoted by petitioners. See Br. 24-25.

Given the central importance of the Constitution's allocation of monetary authority to Congress at the Founding, the absence of any contemporaneous discussion of those subjects, like the absence of language addressing them in the Fifth Amendment, is powerful confirmation that the Framers understood that the Fifth Amendment did not modify the just-established separation of powers by requiring courts to award money judgments against the United States without congressional authorization.

C. History Confirms That The Fifth Amendment Does Not Itself Confer A Cause Of Action

The manner in which Congress and the courts historically addressed takings of property for public use confirms that the Fifth Amendment does not itself confer a right of action in court for compensation or damages.

1. As this Court recently explained, "[a]t the time of the founding," "there were no general causes of action through which plaintiffs could obtain compensation for property taken for public use." *Knick*, 139 S. Ct. at 2175-2176. Under the Fifth Amendment, a "citizen's only means of obtaining recompense from the Government" itself was through "private Acts of Congress." *Library of Congress* v. *Shaw*, 478 U.S. 310, 316 n.3 (1986); see *United States* v. *Mitchell*, 463 U.S. 206, 212-213 (1983).

2. The difficulty of securing enactment of a private Act of Congress meant that, "[u]ntil the 1870s, the typical recourse of a property owner who had suffered an uncompensated taking was to bring a common law trespass action against the responsible corporation or government official," rather than the government itself. *Knick*, 139 S. Ct. at 2176. And in such cases, the plain-

tiff's cause of action was based on common-law tort law, not the Fifth Amendment.

The courts in such common-law actions addressed the Fifth Amendment only indirectly, if the defendant official asserted "the defense that his trespass was lawful because authorized by statute or ordinance." *Knick*, 139 S. Ct. at 2176. The "plaintiff would respond that the law [invoked as a defense] was unconstitutional because it provided for a taking without just compensation." *Ibid.* Those contentions allowed the court to determine whether the Fifth Amendment was violated. *Ibid.*; see Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 Vand. L. Rev. 57, 67-72 (1999) (*Remedial Revolution*).

In *United States* v. *Lee*, 106 U.S. 196 (1882), for instance, this Court sustained a common-law suit for ejectment filed by the son of General Robert E. Lee against government officials to "recover possession" of the Lee family estate on which the federal government, after acquiring the property, had built a fort and Arlington National Cemetery. *Id.* at 197-199, 210; see *id.* at 224 (Gray, J., dissenting). The Court determined that the government's tax-sale purchase of the property did not transfer valid title. *Id.* at 199-204. The officials nevertheless argued in defense that they were acting under government authority regarding property "devoted to public uses." *Id.* at 217. This Court rejected that contention as "inconsistent with" the Fifth Amendment's prohibition against the taking of private property "'for public use without just compensation,'" *id.* at 218 (quoting U.S. Const. Amend. V). See *Malone* v. *Bowdoin*, 369 U.S. 643, 647-648 (1962) (describing *Lee* as allowing "a suit for specific relief against the officer[s]" where their

actions were "'constitutionally void'" because "there was no remedy by which the plaintiff could have recovered compensation for the taking of his land" and the possession of that land by officials constituted "'an unconstitutional taking of property without just compensation'") (citation omitted); cf. *Block* v. *North Dakota*, 461 U.S. 273, 281 (1983) (discussing officer suits in land disputes). Rather than relinquish control of the cemetery, Congress appropriated funds to purchase the property. Act of Mar. 3, 1883, ch. 141, 22 Stat. 584; S. Rep. No. 993, 47th Cong., 2d Sess. 2 (1883).[1]

Those common-law tort actions, however, were both logically and legally distinct from a cause of action against the United States itself based directly on a violation of the Fifth Amendment. This Court has made clear that the indirect means for adjudicating such an alleged violation (as a response to a defense) did not provide a means "to obtain money damages for a permanent taking—that is, just compensation for the total value of his property"—from the government. *Knick*, 139 S. Ct. at 2176. A plaintiff could obtain from the defendant official only the remedies for the common-law writ on which the plaintiff's cause of action was based, which in a trespass action meant "only retrospective damages [against the official], as well as an injunction ejecting the government [official] from [the plaintiff's]

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[1] See also, *e.g.*, *Meigs* v. *M'Clung's Lessee*, 13 U.S. (9 Cranch) 11, 16, 18 (1815) (Marshall, C.J.) (concluding plaintiff "sustain[ed] his action" for "ejectment" against officers at an Army garrison because the land on which it was built was "property of the Plaintiff" and the United States could not have "intended to deprive him of it * * * without compensation"); *Mitchell* v. *Harmony*, 54 U.S. (13 How.) 115, 128, 132, 134 (1852) ("action of trespass" for seizure of goods).

property going forward." *Ibid.*; see *Remedial Revolution* 70, 97-99.[2]

3. Subsequent experience under the Tucker Act, 28 U.S.C. 1491, demonstrates that an Act of Congress is required to authorize suits to obtain money from the United States based on a takings claim.

a. In 1855, Congress created the Court of Claims "to relieve the pressure on Congress caused by the volume of private bills." *United States* v. *Bormes*, 568 U.S. 6, 11 (2012) (citation omitted). The court's jurisdiction initially extended to monetary claims against the United States founded upon an Act of Congress or an express or implied contract, but not the Constitution. See *id.* at 11-12. A plaintiff could therefore seek compensation for a taking of property indirectly by proving the existence of a contract to pay for the government's use of property or services. See *United States* v. *Russell*, 80 U.S. (13 Wall.) 623, 628, 630-631 (1871) (affirming award based on factual findings that officials "intend[ed] * * * to pay a reasonable compensation" for using steamboats, the owner shared that "understanding," and "payments for the services were made" before the owner sued for "a larger sum"); *id.* at 626 (findings); see *Schillinger* v. *United States*, 155 U.S. 163, 170-171 (1894) (discussing *Russell*). That limited route to relief led the Court in *Langford* v. *United States*, 101 U.S. 341

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[2] Federal courts adjudicated those common-law claims based on Acts of Congress that "defined the causes of action that federal courts could enforce in actions at law" by requiring use of the "causes of action that the courts of the [relevant] state" would use, such as a "writ of trespass" or other state common-law action. Anthony J. Bellia Jr., *Justice Scalia, Implied Rights of Action, and Historical Practice*, 92 Notre Dame L. Rev. 2077, 2095 (2017); *id.* at 2094-2097.

(1880), to reject a takings claim but state that "[i]t is to be regretted that Congress has made no provision by any general law for ascertaining and paying this just compensation." *Id.* at 343.

b. In 1887, Congress enacted the Tucker Act, which vested the Court of Claims with jurisdiction over, as relevant here, "[a]ll claims founded upon the Constitution * * * or upon any contract, expressed or implied, with the Government of the United States * * * in cases not sounding in tort." Act of Mar. 3, 1887, ch. 359, § 1, 24 Stat. 505 (codified as amended at 28 U.S.C. 1491(a)(1)). The Tucker Act, however, did not recognize takings claims directly under the Fifth Amendment.

This Court concluded that the Tucker Act did not extend to every claim under the Takings Clause, because it applies only to claims that do not "sound[] in tort" and, for that reason, "some element of contractual liability must lie in the foundation of every action" brought under the Act. *Schillinger*, 155 U.S. at 167-169. The Court reasoned that if a Fifth Amendment takings claim based on "wrongful[]" action were cognizable in a damages action, then the violation of "every other provision of the Constitution" would be too, because the "prohibition of the taking of private property for public use without compensation is no more sacred than" other constitutional provisions guaranteeing, for instance, that "no person shall be deprived of * * * property without due process of law." *Id.* at 168. A "claimant's cause of action" therefore had to "arise out of [an] implied contract." *United States* v. *Great Falls Mfg. Co.*, 112 U.S. 645, 656-657 (1884); see *Hooe* v. *United States*, 218 U.S. 322, 335 (1910).

In 1946, however, this Court in *United States* v. *Causby*, 328 U.S. 256, found a taking on the basis of

repeated overflights over the plaintiffs' land but declined to decide whether repeated trespasses might give rise to an implied contract, because "[i]f there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims" under the Tucker Act. *Id.* at 267 (citing only Takings Clause decisions decided under implied-contract theories).

c. Today, the Tucker Act is understood to apply to monetary claims based on the Constitution, a statute, or regulation, but only if the provision "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Eastport Steamship Corp.* v. *United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967) (en banc). The Court of Claims adopted that interpretation to reflect the "historical boundaries" of its authority to award monetary relief. *Id.* at 1008-1009; see *Williams*, 289 U.S. at 569. In 1976, this Court adopted that "established" interpretation as furnishing the correct test for deciding whether a plaintiff may maintain a Tucker Act suit. *United States* v. *Testan*, 424 U.S. 392, 400 (1976) (adopting *Eastport Steamship's* formulation); see *Maine Community*, 140 S. Ct. at 1328. As explained below, takings claims against the United States ordinarily qualify under that standard.

The Court has stated that the Tucker Act supplies jurisdiction, *Testan*, 424 U.S. at 400, and "a waiver of sovereign immunity," *Mitchell*, 463 U.S. at 212, 216, for monetary claims. See *Bormes*, 568 U.S. at 10. But the Tucker Act does not itself "create[] substantive rights." *United States* v. *Navajo Nation*, 556 U.S. 287, 290 (2009).

The fair-interpretation formulation adopted in *Testan*, quoted above, then serves as the test for determining when a cause of action is available in a suit under

the Tucker Act based on a substantive provision of law like the Takings Clause. That "test [is used] for determining whether" a substantive provision that "imposes an obligation but does *not provide the elements of a cause of action* qualifies for suit under the Tucker Act." *Bormes*, 568 U.S. at 15-16 (emphasis added). If the provision of substantive law invoked by the plaintiff supplies its own cause of action and thus provides its own "judicial remedy," that more specific cause of action, rather than the general "Tucker Act remedy," applies. *Id.* at 16. A cause of action is available under the Tucker Act only if the substantive provision on which the plaintiff relies does not supply its own "cause of action." *Maine Community*, 140 S. Ct. at 1329-1330. And "under [this Court's] case law," property owners "can sue through the Tucker Act" based on an alleged taking under the Fifth Amendment, because the "money-mandating inquiry" supplies the "framework for determining when *Congress* has authorized a claim against the Government" under the Tucker Act. *Id.* at 1328 n.12 (emphasis added).

The Tucker Act standard was not adopted as a test for when the substantive provision on which the plaintiff relies creates an implied private right of action for damages. Under the Court's modern implied right-of-action decisions, "private rights of action to enforce federal [statutory] law," for instance, can only "be created by Congress." *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001). As a result, "a cause of action does not exist" under that theory unless a statute, properly interpreted, reflects Congress's "intent" to create such a "private remedy" in court. *Id.* at 286-287; see *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008).

Thus, in its application, the Tucker Act does not function only to supply jurisdiction and waiver of sovereign immunity. Within the congressional grant of authority under the Tucker Act framework, the *combination* of that Act and the substantive source of law on which the plaintiff relies give rise to a cause of action where the substantive provision "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained," *Testan*, 424 U.S. at 400 (citation omitted); cf. *Goodyear Tire & Rubber Co.* v. *United States*, 276 U.S. 287, 293 (1928) (Tucker Act supplies "right of action" based on "a contract express or implied in fact").[3]

In this way the Tucker Act typically provides for suits to obtain compensation for a taking. But that statutory recourse is not available in circumstances where Congress would not have intended to pay compensation if the particular statute or its application were found to constitute a taking, but instead would have intended courts to invalidate the statute or its application and

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[3] Although Justices Alito and Gorsuch have stated in dissenting opinions that the Tucker Act does not itself create a "right of action," *Maine Community,* 140 S. Ct. at 1332 (Alito, J., dissenting); see *Arizona* v. *Navajo Nation*, 599 U.S. 555, 594-595 (2023) (Gorsuch, J., dissenting), those brief statements did not address whether the Act does so in conjunction with a substantive source of law. Justice Alito noted the "obvious tension" between the Tucker Act's fairly-interpreted test and the Court's decisions governing "recognition of private rights of action" and suggested additional briefing to "understand how" the two relate. *Maine Community,* 140 S. Ct. at 1333, 1135 & n.5. Justice Gorsuch did not address whether the cause of action required in every Tucker Act case is supplied through the combination of the Act (with its generally applicable fairly-interpretated test), *Navajo Nation*, 556 U.S. at 291, and the source of substantive law on which the plaintiff relies.

"grant[] equitable relief for Takings Clause violations" resulting from the absence of compensation. *Eastern Enter*s. v. *Apfel*, 524 U.S. 498, 520-522 (1998) (plurality opinion); see, *e.g.*, *Horne* v. *Department of Agric.*, 569 U.S. 513, 528 (2013) (following *Eastern Enterprises* and allowing challenge to administrative fine rather than after-the-fact damages action); *Babbitt* v. *Youpee*, 519 U.S. 234 (1997) (affirming grant of injunctive relief). That would be especially so, for example, under a program adjusting benefits and burdens between private parties. See, *e.g.*, *Connolly* v. *Pension Benefit Guar. Corp.*, 475 U.S. 211, 219, 228 (1986) (affirming denial of equitable relief in takings challenge to employer's withdrawal liability to multi-employer pension plan). That inquiry is one of statutory interpretation akin to severability analysis.

D. Petitioners' Contrary Arguments Do Not Support A Cause Of Action Directly Under the Fifth Amendment Itself

1. This Court has not held that the Fifth Amendment provides a cause of action for compensation or damages

a. Petitioners primarily argue (Br. 11-18) that *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304 (1987), held that the Takings Clause itself supplies a cause of action to obtain compensation or damages. *First English* did not decide that question.

The question in *First English* was whether a property owner "who claims that his property has been 'taken' by a land-use regulation may * * * recover damages for the time before it is finally determined that the regulation constitutes a 'taking' of his property." 482 U.S. at 306-307. The state appellate court concluded

that the owner could not because, under the rule established in an earlier California Supreme Court decision, "compensation is not required until" a court has determined that the regulation effects a taking and the government elects "to continue the regulation in effect." *Id.* at 308-309. This Court rejected that rule, reasoning that the judicial "[i]nvalidation of the ordinance * * * , though converting the taking into a 'temporary' one, is not a sufficient remedy to meet the demands" of the Fifth Amendment because, under the Takings Clause, "compensation is measured from th[e] time" that an "interference * * * effects a taking." *Id.* at 319, 320 n.10; see *id.* at 313, 322. The Court observed that "the self-executing character of the constitutional provision with respect to compensation" reflects that "[s]tatutory recognition [i]s not necessary" and that a "promise to pay [i]s not necessary" for the Fifth Amendment's obligation to provide just compensation to take effect. *Id.* at 315 (quoting *United States* v. *Clarke*, 445 U.S. 253, 257 (1980), and *Jacobs* v. *United States*, 290 U.S. 13, 16 (1933)).

First English thus determined only the scope of the Fifth Amendment's substantive obligation, not whether that obligation may be judicially enforced through a cause of action for monetary relief directly under the Fifth Amendment itself. The Court had no occasion to consider that federal cause-of-action question because "the complaint in [*First English*] invoked only the California Constitution." *First English*, 482 U.S. at 313 n.8. The complaint alleged two "cause[s] of action" for "inverse condemnation" (see *id.* at 308-309 & nn.2-3) under the state takings provision and specifically relied on a state statute governing "[i]nverse condemnation" actions recognized under state law, Cal. Gov't Code § 905.1

(West 1980). See J.A. at 44-53, *First English*, *supra* (No. 85-1199) (complaint); see also, *e.g.*, Cal. Civ. Proc. Code § 1245.260(a) (West 1981). The complaint did not assert any federal takings claim, much less a cause of action for compensation directly under the Fifth Amendment.

The Fifth Amendment issue in *First English* arose only indirectly. The state rule rejected by this Court did not call into question the availability of a (state-law) cause of action for damages in takings cases generally. The rule was simply that "damages [could not be recovered] for the time *before* it is finally determined that the regulation constitutes a 'taking' of [the plaintiff's] property." *First English*, 482 U.S. at 306-307 (emphasis added). The federal question arose because, in "applying th[at] state rule," the state court "rejected on the merits the claim that the rule violated the United States Constitution." *Id.* at 313 n.8. That federal constitutional ruling then enabled this Court to resolve that specific issue because it was "raised and passed upon below." *Id.* at 314 n.8.

The Court itself acknowledged the focused nature of its decision, emphasizing that "any deficiencies in the complaint as to federal issues" was "irrelevant for [the Court's] purposes." *First English*, 482 U.S. at 314 n.8. The property owner's counsel similarly argued that the case was only about "the substantive right to just compensation" under the Takings Clause, not whether a "remedial vehicle" like Section 1983 would supply the requisite "cause of action." Oral Arg. Tr. at 22, *First English*, *supra* (No. 85-1199).

First English's reference to the "self-executing character of the constitutional provision with respect to compensation" merely reflects that the Fifth Amend-

ment's obligation to pay compensation applies as soon as a taking occurs and does not, as the state appellate court had held, require additional action to trigger it (*i.e.*, a court ruling that the challenged regulation effected a taking). *First English*, 482 U.S. at 315 (citation omitted); see *Black's Law Dictionary* 1633 (11th ed. 2019) ("self-executing" refers to a legal instrument that is "effective immediately without the need of any type of implementing action"). And because that self-executing legal obligation arises as soon as a taking occurs, "a landowner is entitled to bring an action in inverse condemnation" at that time. *First English*, 482 U.S. at 315. This Court routinely refers to "self-executing" provisions in this way. See, *e.g.*, *City of Boerne* v. *Flores*, 521 U.S. 507, 524 (1997) (describing the "first eight Amendments to the Constitution"); *California* v. *Arizona*, 440 U.S. 59, 65 (1979) (describing original jurisdiction). This Court has observed, for instance, that a treaty is "'self-executing'" when it "has automatic domestic effect as federal law upon ratification," even though the Court stated that such a "self-executing" agreement is generally presumed not to "'provide for a private cause of action [for its enforcement] in domestic courts.'" *Medellin* v. *Texas*, 552 U.S. 491, 505 n.2, 506 n.3 (2008) (citation omitted).

b. The Court's decisions in *Jacobs* and *Clarke*, quoted in *First English*, 482 U.S. at 315, provide petitioners no greater support. *Jacobs* was a suit under the Tucker Act in which the "only question" was whether interest is a component of just compensation; it did not address whether a suit could be brought directly under the Fifth Amendment without regard to the Tucker Act. *Jacobs*, 290 U.S. at 15-16. *Clarke* considered whether a federal statute expressly authorizing a condemnation

proceeding to be brought *under state law* to acquire Indian trust lands also encompassed an "inverse condemnation suit" by a property owner that would be triggered by a state or local government's physical occupation of the property. *Clarke*, 445 U.S. at 254-255. As a result, no question of a cause of action directly under the Fifth Amendment was implicated. *Clarke* simply described the "common understanding" of the "phrase 'inverse condemnation.'" *Id.* at 257. Like *First English*, *Clarke*'s observation that a "landowner is entitled to bring" an inverse condemnation action "as a result of 'the self-executing character of the [Takings Clause] with respect to compensation," *ibid.* (citation omitted), reflected only that the obligation to pay compensation forming the basis for such an action arises as soon as property has been taken.

Petitioners' reliance (Br. 13-15, 33-34) on other takings decisions by the Court is similarly misplaced, because each addressed the substantive obligation to provide just compensation as a condition for a lawful taking, not the existence of a cause of action for damages directly under the Fifth Amendment. In *Seaboard Air Line Ry.* v. *United States*, 261 U.S. 299 (1923), the Court resolved a suit under the Lever Act's *express* statutory cause of action to recover the amount of unpaid just compensation for land taken for the national defense. *Id.* at 302-303 & n.2. And the plurality opinion in *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), observed that when the *government* itself initiates a condemnation action, "it provides the landowner a forum for seeking just compensation, as is required by the Constitution." *Id.* at 714.

The Court in *Knick* similarly determined that the Fifth Amendment right to just compensation "arises at

the time of the taking, regardless of post-taking remedies that may be available to the property owner." 139 S. Ct. at 2170. In other words, "a taking without compensation *violates the self-executing Fifth Amendment* at the time of the taking." *Id.* at 2172 (emphasis added). Moreover, *Knick*, like *First English*, had no occasion to consider the distinct question whether the Fifth Amendment itself confers a cause of action for compensation or damages. The *Knick* plaintiff filed suit under 42 U.S.C. 1983's express cause of action. See *Knick*, 139 S. Ct. at 2168. The Court thus specifically focused on "§ 1983 takings claims" and held that the plaintiff could "bring his claim in federal court under § 1983." *Id.* at 2168, 2173, 2177; see *id.* at 2170-2173, 2175 n.6, 2178-2179 (discussing Section 1983).

2. A substantive right to compensation does not itself provide a judicial action for monetary relief

Petitioners contend (Br. 10, 34-38) that this case does not concern "the judiciary's power to *create* a cause of action to enforce" the Takings Clause because "the Constitution itself *substantively requires compensation*" if there is a taking and "courts must enforce that command." But a substantive obligation to pay compensation as a necessary condition to render a taking lawful is distinct from a cause of action for damages against the government if it has *not* made compensation available and its action is therefore an unconstitutional taking. In an attempt (Br. 35-36) to support their assertion, petitioners identify only decisions, with which we agree, showing that an *equitable* action for injunctive relief—not a legal action for damages—will typically lie against government officials to enjoin government action in those circumstances. Such decisions simply reflect that courts possess equitable authority to end unlaw-

ful action on a prospective basis if there is no adequate remedy at law to obtain monetary relief, see pp. 8-9, *supra*; they do not authorize monetary relief against the government.

That is the conclusion the Court reached with respect to the Fifth Amendment's parallel instruction that no person shall "be deprived of * * * property, without due process of law," U.S. Const. Amend. V. The Amendment prohibits the taking or deprivation of "property," "without" (respectively) just compensation or due process. *Ibid.* The Court has rejected the contention that it should supplement traditional equitable relief for violations of the Due Process Clause, holding that no "cause of action for damages" exists against the government for unconstitutional deprivations of "a property right * * * without due process of law." *Meyer*, 510 U.S. at 474, 483-486.

Petitioners assert (Br. 9, 18) that "the Constitution secures at least the remedies it expressly provides" and identify habeas corpus as the only "other remedy" so provided. But the Takings Clause does not speak of a *judicial* action, unlike the Suspension Clause, which provides that "[t]he Privilege of *the Writ of Habeas Corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it," U.S. Const. Art. I, § 9, Cl. 2 (emphasis added). And the relief in a habeas action runs not against the government, like the suit for a money judgment petitioners urge here, but against the individual government officer, just like an equitable suit for an injunction.

Moreover, petitioners' assumption that the Constitution itself affirmatively authorizes a court to issue a writ of habeas corpus is misplaced. Chief Justice Marshall, writing for the Court, concluded early in the Nation's

history that "the power to award the writ by any of the courts of the United States, *must be given by written* [*statutory*] *law,*" as it was in the Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94-95 (1807) (emphasis added); accord *Felker* v. *Turpin*, 518 U.S. 651, 664 (1996); cf. *DHS* v. *Thuraissigiam*, 140 S. Ct. 1959, 1969 n.12 (2020) (noting later debate about "whether the Clause independently guarantees the availability of the writ or simply restricts the temporary withholding of its operation" but declining to "revisit that question"); *id.* at 1984 (Thomas, J., concurring).

3. Petitioners identify no historical recognition of a Fifth Amendment right of action for compensation or damages

Petitioners err in asserting (Br. 8-9, 27-34) that history shows that "the Takings Clause gives property owners the right to sue for compensation" and that the "historical record" on that point "is unrefuted."

Petitioners, for instance, rely (Br. 29) on Takings Clause decisions involving suits for injunctive relief against either non-sovereign municipalities or state officials subject to suit under *Ex parte Young*, none of which suggests a constitutional cause of action for compensation or damages against the government. See *Norwood* v. *Baker*, 172 U.S. 269, 276, 290 (1898), aff'g 74 F. 997, 997, 1000 (C.C.S.D. Ohio 1896) (suit to enjoin enforcement of tax assessment); see also, *e.g.*, *Dohany* v. *Rogers*, 281 U.S. 362, 363-364 (1930); *Delaware, Lackawanna, & W. R.R.* v. *Town of Morristown*, 276 U.S. 182, 188, 195 (1928); *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 384, 395-397 (1926); *Cuyahoga River Power Co.* v. *City of Akron*, 240 U.S. 462, 463-464 (1916).

Petitioners also cite (Br. 32) federal precedents involving state takings provisions, but none addressed a suit by a property owner directly under a state constitution. Each involved either (1) a traditional common-law tort action against a non-governmental entity,[4] or (2) a condemnation proceeding brought by the entity taking the property.[5]

Petitioners identify (Br. 32) state decisions illustrating that, in the 1870s, "state courts began to recognize implied rights of action for damages under the state equivalents of the Takings Clause." *Knick*, 139 S. Ct. at 2176. Yet each of those state-court decisions inferred rights of action based on intervening constitutional amendments that expanded the application of state takings provisions from property taken to property taken "or damaged" for public use. See *Reardon* v. *City of S.F.*, 6 P. 317, 322, 325-326 (Cal. 1885) (amendment provided new "cause of action" beyond actions for "tort at common law"); *Harman* v. *City of Omaha*, 23 N.W. 503, 503-504 (Neb. 1885) (same); *City of Elgin* v. *Eaton*, 83 Ill. 535, 536-537 (1876) (stating that "the city became liable to an action" "after the adoption of our present constitution"); see also *Remedial Revolution* 115, 118-121 & nn.265, 270-272, 127, 132 (describing such recognition of "right[s] of action").[6] Although state courts may exercise "'common-law powers'" to "impl[y] * * * causes

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[4] *Transportation Co.* v. *Chicago*, 99 U.S. 635, 639-640 (1879) (trespass on the case to recover damages); *Pumpelly* v. *Green Bay Co.*, 80 U.S. (13 Wall.) 166, 176-181 (1872) (same).

[5] *Pacific R.R. Removal Cases*, 115 U.S. 1, 5-6 (1885); *Boom Co.* v. *Patterson*, 98 U.S. 403, 404-405 (1879).

[6] *Eaton* v. *Boston, Concord & Montreal R.R.*, 51 N.H. 504 (1872), was a common-law tort action ("action on the case," *id.* at 505, 520). See *id.* at 510-511.

of action" under their state constitutions, federal courts possess no similar common-law authority to imply a cause of action for damages against the government under the Fifth Amendment. *Egbert*, 142 S. Ct. at 1802 (citation omitted); see *Hernandez* v. *Mesa*, 140 S. Ct. 735, 742 (2020).

4. Petitioners provide no substantial justification for now reading a cause of action into the Fifth Amendment

Quite aside from the compelling textual and historical grounds for rejecting petitioners' position, petitioners have not shown any substantial justification for holding at this late date that the Fifth Amendment itself confers a cause of action for compensation or damages against the government. The Tucker Act generally supplies an avenue to seek compensation from the federal government. Section 1983 supplies a monetary remedy against municipalities, from which a significant proportion of takings cases arise. Although Congress did not apply Section 1983 to the States, it would have the authority to do so under its enforcement authority in Section 5 of the Fourteenth Amendment. And this Court has observed that every State, besides Ohio, "provides a state inverse condemnation action" in some form. *Knick*, 139 S. Ct. at 2168 & n.1; cf. *id.* at 2174 n.5 (reserving decision on whether Section 1331 provides federal jurisdiction over state inverse-condemnation actions seeking compensation based on the Fifth Amendment). And of course a suit in equity will lie to enjoin government action constituting a taking if compensation is not available.

Whether petitioners may recover compensation against the State under a cause of action created under

the Texas Constitution or state statutory or common law is open for the district court to decide on remand.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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