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 RESPONDENT

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QUESTION PRESENTED

Ordinarily, when private litigants attempt to vindicate a federal constitutional right by seeking damages in a federal court, they must identify a cause of action created by Congress. Most commonly, they may sue the "person" who "subjects, or causes [them] to be subjected" to a constitutional deprivation under 42 U.S.C. §1983. Such a claim is not available, however, against a State because a sovereign State is not a "person" within the meaning of §1983. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). Here, however, Petitioners sued the State of Texas for damages without identifying a federal statute creating a cause of action. The question presented is:

Whether the Fifth Amendment's Takings Clause, as incorporated against the States through the Fourteenth Amendment's Due Process Clause, impliedly creates a cause of action by which private parties may sue a State for damages.

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INTRODUCTION

The State of Texas takes property rights extremely seriously. Indeed, the Texas Constitution goes beyond the U.S. Constitution by providing that "[n]o person's property shall be taken, *damaged*, *or destroyed* for or applied to public use without adequate compensation being made, unless by the consent of such person." Tex. Const. art. I, §17 (emphasis added). Texas courts also decide takings claims and award full compensation under both the U.S. Constitution and the more protective Texas Constitution.

This case therefore is not about property rights. Instead, it is about the separation of powers. To date, Congress has not seen fit to create a cause of action to enforce the Fourteenth Amendment—and by extension the Takings Clause of the Fifth Amendment—against the States. That is presumably because the States are appropriately resolving takings disputes. Tellingly, Petitioners do not identify any State that refuses to provide just compensation for a taking. Tellingly, Petitioners have not identified any State that refuses to provide just compensation for a taking.

Nonetheless, although they were free to (and did) sue Texas under a state cause of action, Petitioners ask the Court to hold that the U.S. Constitution itself creates a federal cause of action. Their argument does not withstand scrutiny. No one disputes that the Fifth Amendment "did not expressly create a right of action when it mandated just compensation for Government takings of private property for public use." *Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1328 n.12 (2020) (cleaned up); *see* Pet.Br.17. Nor does anyone dispute that for nearly a century after the founding, "takings claims against the federal government were

resolved directly by Congress." Pet.Br.27. It thus defies constitutional text and history to litigate a federal takings claim without a federal takings statute. Indeed, Justice Scalia lampooned the concept as one that "[n]o one would suggest." *Webster v. Doe*, 486 U.S. 592, 613 (1988) (Scalia, J., dissenting). Similar analysis applies to the Fourteenth Amendment, which creates no cause of action and was ratified during the same era in which takings claims were resolved by Congress rather than courts. Nothing in its text, structure, or history suggests that the Fourteenth Amendment deprives States of the same authority possessed by Congress regarding how to satisfy their just-compensation duty. To borrow Petitioners' phrase (at 8), these points alone should "begin and end" the Court's analysis.

Yet Petitioners urge "one last drink," *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001), from the "heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition," *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring). "[I]mplying constitutional causes of action," however, "is 'a disfavored judicial activity.'" Supp.Pet.App.51a (quoting *Egbert v. Boule*, 596 U.S. 482, 491 (2022)). And the Court should be especially reluctant to create a new cause of action here. It is one thing for a federal court to recognize a new federal cause of action against the federal government. That, at least, represents a single sovereign governing its own affairs. It is something else entirely for a federal court to create a federal cause of action against the States, which are separate sovereigns.

Enforcing the Constitution as written would not leave aggrieved property owners without recourse. Because

the Takings Clause is self-executing, as soon as a taking occurs, a State is obligated to provide just compensation. And, in Texas, property owners can bring state causes of action. Since 1887, the federal government has largely satisfied its duty through the Court of Federal Claims. The key point, however, is that the Constitution empowers legislatures—both state and federal—to choose how to provide just compensation, whether through statutory causes of action, special bills, executive tribunals, or legislative courts. And because state courts are courts of general jurisdiction, they often also can resolve takings claims by enjoining uncompensated takings or under common-law causes of action. Petitioners could have pursued—and, in fact, *did* pursue—such an alternative avenue to relief.

Applying those principles here, Petitioners are correct (at 8) that the "question is easy": Unless and until Congress creates a federal cause of action for takings claims against the States, no such federal cause of action exists. Petitioners may prefer such a cause of action, but the Constitution does not entitle them to one.

STATEMENT

I. Petitioners' Consolidated Suits and the District Court's Ruling

This case concerns four state-court lawsuits, involving more than 70 plaintiffs, filed in two Texas counties along an interstate highway. Because "[t]he gist of all these lawsuits was the same," they were "removed to and consolidated in federal district court." Pet.Br.1-2. Removal allowed the cases to proceed in the same forum (something that could not happen in state court) with a single, consolidated complaint. JA.1-48. Petitioners did not object to removal.

According to the operative complaint, Petitioners own property north of the interstate in Chambers and Jefferson Counties. Pet.App.4a; JA.7. They allege that during a hurricane and a subsequent tropical storm, a concrete barrier that divides traffic between lanes on the interstate acted as a dam that caused their properties to flood. JA.8-11, 15.

Claiming that the flooding damaged their real and personal property, JA.14-16, Petitioners sued the State of Texas for inverse condemnation under the Fifth Amendment's Takings Clause and its counterpart in the Texas Constitution, JA.3-5. Petitioners also asserted federal-law claims under both the procedural and substantive aspects of the Due Process Clause. JA.42-46.

Texas law provides an inverse-condemnation cause of action. *See, e.g.*, *Tarrant Reg'l Water Dist. v. Gragg*, 151 S.W.3d 546 (Tex. 2004) (adjudicating such a claim). As the Fifth Circuit has observed, "the courts of the State of Texas are open to inverse condemnation damage claims against state agencies on the basis of the Fifth Amendment, as applied to the states through the Fourteenth Amendment, as well as on the basis of the Texas Constitution and laws." *Gutersloh v. Texas*, 25 F.3d 1044, 1994 WL 261047, at *1 (5th Cir. 1994) (per curiam). Petitioners nevertheless attempted to invoke a federal cause of action that, in their view, derives from the Takings Clause itself.

Once the lawsuits were consolidated in the Southern District of Texas, Texas moved for judgment on the pleadings as to Petitioners' Fifth Amendment takings claims on the ground that Congress has not enacted a cause of action as applied to the States. ROA.1199-1219. The district court denied Texas's motion but allowed an interlocutory appeal. Pet.App.35a.

II. Texas's Interlocutory Appeal

A. On appeal to the Fifth Circuit, Texas argued that Petitioners lack a federal cause of action to sue a State for compensation under the Fourteenth Amendment based on an alleged Fifth Amendment taking. Pet.App.2a. Again, the State did not dispute that the Texas Supreme Court, which is a common-law court, has recognized a cause of action to seek compensation for a taking. *Id.* (citing, *inter alia*, *City of Baytown v. Schrock*, 645 S.W.3d 174, 178 (Tex. 2022)); *see Brown v. De La Cruz*, 156 S.W.3d 560, 563 n.14 (Tex. 2004) (recognizing that it can be "proper" for Texas's "common-law courts to create causes of action when federal tribunals should not"). But Texas explained that "[f]ederal courts, unlike state courts, are not general common law courts," *City of Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981), and the U.S. Constitution itself does not create a cause of action for use in either state or federal court, Tex.Br.23-29.

Texas further explained that Petitioners could not identify any federal statute authorizing them to sue a State to enforce the Takings Clause. After all, unlike local governments, States are not "persons" within the meaning of 42 U.S.C. §1983—regardless of whether the claim is pursued in state or federal court. *Will*, 491 U.S. at 71; *accord Haywood v. Drown*, 556 U.S. 729, 735 (2009) (requiring state courts to adjudicate §1983 claims on equal terms). The question thus was whether, despite the absence of a federal statutory cause of action, Petitioners could pursue an implied federal constitutional cause of action. Texas argued that that under foundational separation-of-powers principles, the answer to that question must be no.

B. The Fifth Circuit agreed with Texas that no such implied constitutional cause of action exists, holding 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 Fifth Circuit cited *Hernandez v. Mesa* for the proposition that "a federal court's authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress." 140 S. Ct. 735, 742 (2020). It also noted that, even before *Hernandez*, the Ninth Circuit had held that "a takings plaintiff has 'no cause of action directly under the United States Constitution.'" Pet.App.2a (quoting *Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992)).[1]

C. The Fifth Circuit later denied rehearing en banc. Supp.Pet.App.43a. Concurring in that denial, Judge Higginbotham, who had been on the panel, explained that because neither the Takings Clause nor §1983 provides a right of action in federal court for a takings claim against a State, "[t]he pathway for enforcement in takings by the state is ... through the state courts to the Supreme Court." *Id.* at 44a. He further explained that "[t]he Supreme Court of Texas recognizes takings claims under the federal and state constitutions," thus "fulfilling the State's obligations under the Takings Clause for takings by the [S]tate." *Id.* at 44a, 45a; *see also id.* at 49a (noting that Texas has allowed such claims for more than a century). Judge Higginbotham also noted

[1] The Fifth Circuit initially concluded that the absence of a cause of action under §1983 deprived the court of jurisdiction. Supp.Pet.App.69a. As Texas explained at the rehearing stage, the absence of a cause of action is a merits issue, not a jurisdictional issue. The Fifth Circuit agreed. Pet.App.2a. Petitioners' federal takings claims were thus dismissed on the merits, but their state takings claims and their federal Due Process Clause claims remain pending in district court.

recognizing an implied cause of action for alleged takings "would reflect a distrust of the state courts" even though state judges, who "deal[] with state property interests on a daily basis," "take the same oath to faithfully apply the law as do federal judges." *Id.* at 48a.

Judge Higginbotham further explained that the term "self-executing," as used, for example, in *Knick v. Township of Scott*, 139 S. Ct. 2162, 2172 (2019), "speaks only to the completeness of the claim itself"—that is, "the point at which a takings claim is ready for *a* court." Supp.Pet.App.46a. The term thus signifies nothing about which forum should hear a takings claim or whether the Takings Clause creates a federal cause of action. Rather, whether there should be a federal cause of action to enforce the Takings Clause is a question that the Constitution deliberately leaves to "Congress," which "wrote §1983" but declined to allow suits against the States. *Id.* at 50a.

Judge Higginson, another panel member, also wrote separately to further explain why the federal judiciary has no authority to recognize "an implied cause of action in the Fifth and Fourteenth Amendments for [takings] claims." *Id.* at 51a. He noted that just "[t]hree terms ago," every Justice of this Court "agreed 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.'" *Id.* (quoting *Me. Cmty. Health Options*, 140 S. Ct. at 1328 n.12). Because "a cause of action against the federal government is not express in the Fifth Amendment," Judge Higginson reasoned that "if such a cause of action exists, it must be 'judicially created.'" *Id.* at 53a (quoting *Egbert*, 596 U.S. at 491). Yet even assuming the existence of an implied cause of action for takings claims against

the federal government, it would not follow that such a judicially created cause of action should "be coextensive with a substantive constitutional right," let alone "incorporated" against the States "through the Fourteenth Amendment." *Id.* at 54a. If judicially created causes of action were incorporated alongside substantive constitutional rights, there is no reason why claims under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), would not also be incorporated against the States—a proposition no one defends. Supp.Pet.App.54a.

In rejecting Petitioners' request for a judicially created cause of action, Judge Higginson also reiterated that "implying constitutional causes of action is 'a disfavored judicial activity'" that courts should not undertake "if 'there is any reason to think that Congress might be better equipped to create a damages remedy.'" *Id.* at 51a (quoting *Egbert*, 596 U.S. at 491). Applying that standard, Judge Higginson explained that "by implying a cause of action against the states in the Takings Clause of the Fifth Amendment as incorporated by the Due Process Clause of the Fourteenth Amendment," the federal judiciary would "arrogate legislative power." *Id.* at 56a (quoting *Egbert*, 596 U.S. at 492). And he identified four distinct reasons to defer to Congress. *First*, "[a]n alternative remedial structure already exists in state inverse-condemnation law." *Id.* (citing *Ziglar v. Abbasi*, 582 U.S. 120, 137 (2017)). *Second*, in §1983, "Congress decided to provide a damages remedy for takings claims against municipalities and certain local government units, but not states." *Id.* (citations omitted). *Third*, "[i]mplying a judicial remedy against states implicates federalism, and the elected legislative branch is better equipped to balance federal and state interests

in this area" than the judiciary. *Id.* at 56a-57a. And *fourth*, it is hard to "'predict the systemwide consequences of recognizing a cause of action' under the Fifth and Fourteenth Amendments for takings claims against states." *Id.* at 57a (quoting *Egbert*, 596 U.S. at 493).

Judge Higginson also responded to Judge Oldham's dissent from denial of rehearing, criticizing its reliance on inapplicable cases. *Id.* at 57a-60a. He further explained that the dissent's primary cases—*First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987), and *Knick*—did not resolve whether the Constitution creates a cause of action to enforce the Takings Clause or displace the familiar rule that federal courts do not have a free hand to create causes of action. Supp.Pet.App.60a-63a.

D. Because it concluded that Petitioners failed to state a claim under the non-existent federal cause of action that Petitioners purported to locate in the Takings Clause itself, the Fifth Circuit had no occasion to resolve Texas's argument that the State is entitled to sovereign immunity with respect to any liability for such a non-existent cause of action. Texas.Br.7-13. Nor did the Fifth Circuit address Texas's argument that, even assuming an implied cause of action exists, many of Petitioners' claims would be time barred. *Id.* at 19-21. No court has yet resolved Petitioners' takings claims under any cause of action provided by Texas law.

SUMMARY OF ARGUMENT

Petitioners misstate the issue before the Court. The decision under review did not "render[] the Takings Clause a 'dead letter' throughout the Fifth Circuit." Pet.Br.7. And this is not a case about whether the "People" should have "bothered to ratify the federal

Takings Clause in the first place." *Id.* at 44. Neither Texas nor the Fifth Circuit has ever disputed Petitioners' entitlement to just compensation if their property has been taken, an issue yet to be litigated.

Instead, this case is about something more prosaic, but no less important: Who decides *how* the sovereign will fulfill its just-compensation obligation? Constitutional text, structure, and history all answer that question the same way: the legislature.

I. The Takings Clause does not create a federal cause of action to sue the States—either by its terms or read in the broader context of the Constitution. Instead, the Constitution gives Congress both the responsibility and authority to "examine and determine claims for money against the United States." *Williams v. United States*, 289 U.S. 553, 569 (1933). Recognizing a cause of action not expressly provided under the Fifth Amendment would nullify Congress's exclusive power to appropriate funds from the federal treasury and to pay the nation's debts. Moreover, until 1887 (if not later), claims for just compensation were resolved by Congress through private bills—not by litigation. It is implausible that the Constitution created a cause of action that no one noticed or used. Even today, the federal government still generally does not provide compensation through ordinary litigation in Article III courts, but rather through the Court of Federal Claims, a specialized legislative court created pursuant to Congress's power of the purse.

Nor does the Fourteenth Amendment change the analysis. This Court follows the "well-established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government." *McDonald v. City of Chicago*, 561 U.S. 742, 766 n.14

(2010). The Fourteenth Amendment says nothing about any cause of action, and—critically—was ratified during the same period in which Congress itself resolved takings claims through private bills. Nothing in the Fourteenth Amendment suggests that the Constitution treats the States less favorably than the federal government with respect to how they may satisfy their just-compensation obligations. And for the reasons Judge Higginson identified, even if the Court were to determine that judge-made doctrine demands an implied cause of action under the Fifth Amendment, it would not follow that such an implied cause of action would travel with the Takings Clause via incorporation through the Fourteenth Amendment. No one argues, for example, that *Bivens* has been incorporated against the States.

At the same time, Petitioners' theory runs headlong into the Court's *Bivens* cases. It is no secret that the Court is reluctant to recognize implied causes of action. But whatever one thinks of *Bivens*, the separation-of-powers implications here are more severe: *Bivens* involved a federal court recognizing a federal cause of action against federal officials. Petitioners ask the Court to create a federal cause of action against the States themselves, which are separate sovereigns. Likewise, by authorizing a cause of action under §1983 against local governments but not the States, Congress signaled that it does not want such a cause of action, presumably because the States already provide just compensation. The consequences of Petitioners' theory, moreover, are far-reaching. Not only would accepting it needlessly disrespect state-court judges and legislators, but it would also require the Court to engage in even more judicial lawmaking down the road with respect to adjacent questions, such as how this new constitutional

cause of action interacts with sovereign immunity—state and federal—and what affirmative defenses apply.

II. Petitioners' counterarguments are unpersuasive. They regularly conflate the substance of the just-compensation right—which no one disputes—with the procedural mechanisms used to vindicate those rights. Their main thrust, for example, is that this Court says the Takings Clause is "self-executing." *First English*, 482 U.S. at 315. No one disagrees. But that statement means only that the just-compensation requirement imposes an obligation on the government without need for further legislative action. It does not, as Petitioners insist, deprive a legislature of its prerogative to select the method for meeting the government's obligation. Not only is that clear from the context in which *First English* used the phrase, but it is the only understanding that comports with what the Takings Clause says and how it has been applied since 1791. Petitioners' suggestion that Texas is asking the Court to overrule *First English* is therefore inaccurate.

Petitioners' contrary interpretation of the Constitution's text and history, moreover, elides the fundamental distinction between substantive law and judicial remedy. The Takings Clause creates a substantive choice: The government must either allow private parties to keep their property or pay them just compensation, including for any temporary taking. The Takings Clause does not, however, prevent legislatures from choosing the method by which to provide just compensation. It certainly does not bar them from selecting long-understood methods such as state causes of action, specialized tribunals, or private bills. And the other constitutional provision to which Petitioners refer, the Suspension Clause, identifies the well-established

writ of habeas corpus, which the ratifying generation would have understood as a judicial mechanism—unlike the Takings Clause, which the founders did *not* understand to necessitate a judicial remedy.

Petitioners' policy arguments also fail. Holding that the Takings Clause does not create a cause of action would not nullify its substantive guarantee. And if someday a State were to stop paying just compensation, Congress could respond. Moreover, causes of action emanating from the common law or equity have been used throughout the nation's history to vindicate the Takings Clause and remain available today, including in Texas. Simply put, Petitioners may wish to litigate under the Takings Clause rather than through the state causes of action that Texas provides, but the Constitution does not permit (let alone require) this Court to fashion a federal cause of action that Congress has not enacted.

ARGUMENT

I. The Takings Clause Does Not Create Its Own Cause of Action.

The question before the Court is straightforward: Does the Takings Clause, of its own force, create a federal cause of action to pursue monetary compensation in court? The answer is no. Nothing in the Constitution's text, structure, or history supports such a cause of action. In fact, Petitioners concede that for nearly a century after the founding, *no one* could seek compensation in court in connection with the Fifth Amendment's Takings Clause, and that the United States—the sole original target of the clause, *see Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250-51 (1833)—instead provided just compensation through private bills. That concession should be the end of this appeal because nothing in the Fourteenth Amendment suggests that the

States have fewer options than Congress regarding how to satisfy their constitutional duty to provide just compensation.

Instead, under familiar separation-of-powers principles, Congress decides whether to create federal causes of action. That rule applies with special force where, as here, the cause of action would apply against the States. Congress, however, has declined to create such a cause of action, no doubt because the States are providing just compensation. Furthermore, if the Court were to fashion a new federal cause of action, the need for judicial creativity would not end with this case. None of this proposed judicial lawmaking is consistent with—much less compelled by—the Constitution.

A. The Takings Clause's Text Does Not Create a Cause of Action.

The "[s]eparation of powers"—both horizontal and vertical—"was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (quoting *INS v. Chadha*, 462 U.S. 919, 946 (1983)). Because the requirement to respect the Constitution's division of authority applies to courts every bit as much as to the political branches, this Court "start[s] with the text of the Constitution" when determining what claims courts can resolve. *Id.*

The Takings Clause states in full: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. This language unambiguously prohibits the federal government from taking private property for public use without providing "just compensation." But that is *all* it says. Nothing in the Clause tells the federal government how it must go

about providing that just compensation. The Takings Clause speaks neither to lawsuits nor to the forum in which any such lawsuits may be brought. It also says nothing about private bills, specialized commissions, or legislative courts. Instead, on its face, the Takings Clause merely creates a constitutional duty to pay just compensation should private property be taken for public use.

Accordingly, as Judge Higginson noted, the Court has 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." Supp.Pet.App.51a (quoting *Me. Cmty. Health Options*, 140 S. Ct. at 1328 n.12 (cleaned up)). Even Petitioners acknowledge (at 17) that "[t]he Takings Clause does not *explicitly* say that property owners can file lawsuits."

Because the Takings Clause does not direct how the federal government must satisfy its duty to provide just compensation, Congress gets to decide. A duty to provide just compensation carries with it, of course, the power to do so, and the Necessary and Proper Clause empowers Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution ... all ... Powers vested by this Constitution in the Government of the United States." U.S. Const. art. I, §8, cl. 18. Congress thus can choose to satisfy the Takings Clause's just-compensation requirement by creating a federal cause of action—as Petitioners would prefer. But Congress can equally choose to use private bills, specialized tribunals, executive action, or other appropriate means.

This plain-text reading, moreover, is not a new one—it's what the words have always been understood to

mean. As a court explained with respect to the New York Constitution of 1821, which used the same language as the U.S. Constitution's Takings Clause, *see* N.Y. Const. of 1821, art. VII, §7:

> The mode of ascertaining damages by commission has been adopted by the legislature in a great variety of cases; and I can see nothing in the provisions of the constitution which render such a course exceptionable. It was well known to the framers of the new constitution that such had been the practice in relation to the assessment of damages for private property taken for the Erie and Champlain Canals, and for a great number of turnpike roads, as well as for other public uses. When, therefore, the constitution provided that private property should not be taken for public uses without just compensation, and without prescribing any mode in which the amount of compensation should be ascertained, it is fairly to be presumed the framers of that instrument intended to leave that subject to be regulated by law, as it had been before that time; or in such other manner as the legislature, in their discretion, might deem best calculated to carry into effect the constitutional provision, according to its spirit and intent.

Beekman v. Saratoga & Schenectady R.R., 3 Paige Ch. 45, 75 (N.Y. Ch. 1831). Put another way, where a constitution "direct[s] that private property should not be taken for public use without just compensation[,] but sa[ys] nothing as to the manner in which such compensation should be ascertained," it follows that the ratifiers "intended to leave that subject to the discretion of the legislature, to be regulated in such manner as

might be prescribed by law." *Livingston v. Mayor of N.Y.*, 8 Wend. 85, 102 (N.Y. Ch. 1831).

And contrary to Petitioners' thesis, there were other well-understood methods to compensate for a taking. For example, in *Custiss v. Georgetown & Alexandria Turnpike Co.*, 10 U.S. (6 Cranch) 233 (1810), the Court addressed a non-judicial inquisition of 24 jurors to assess the compensation owed to owners whose property was taken for "the making of a turnpike road." *An Act to authorize the making of a Turnpike Road from Mason's Causeway, to Alexandria*, ch. 31, 2 Stat. 539 (1809). Chief Justice Marshall refused to interfere with the process required by the statute because "[t]he law asks not the intervention of the court, and requires no exercise of judicial functions." *Custiss*, 6 Cranch at 237.

The Constitution's text thus speaks for itself. The Takings Clause creates a duty of just compensation but is silent about how Congress must satisfy that duty. And it says nothing at all about any constitutional cause of action. Because the "text of [this] constitutional provision is not ambiguous," the Court should not "search for its meaning beyond the instrument." *Lake County v. Rollins*, 130 U.S. 662, 670 (1889).

B. The Constitution's Structure Is Incompatible with an Implied Takings Cause of Action.

Nor does a structural reading of the Constitution support an implied takings cause of action. Rather, such a reading underscores that Congress enjoys a range of options to meet its duty to provide just compensation.

1. To begin, the Takings Clause is not the only provision in the Constitution that concerns money.

At the founding, the power to take and spend the People's money was considered one of the most potent (and fraught) governmental powers. As James Madison

explained, the "power over the purse" would allow the government to provide "a redress of every grievance" and was "the most complete and effectual weapon with which any constitution can arm" an official. THE FEDERALIST No. 58, at 357 (James Madison) (Clinton Rossiter ed., 1961). Accordingly, because the legislative branch is closest to the People, the Constitution 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; and that Congress "shall have Power To lay and collect Taxes, Duties, Imposts and Excises [and] to pay the Debts," *id.* §8, cl. 1.

It is highly relevant that Congress alone can draw money from the treasury, even to pay the nation's debts. When the government takes property, the Constitution imposes a debt—the government must pay just compensation. Yet Congress still must legislate to pay that debt. Because other officials could be too stingy or generous with public funds, the Constitution allows Congress, if it "thinks proper," to "retain for itself" the prerogative to pay just compensation. *Williams*, 289 U.S. at 580. And this Court's cases reaffirm that the framers "provide[d] an explicit rule of decision," namely that "[m]oney may be paid out only through an appropriation made by law," *Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990), and no money can be paid that is not "authorized by a statute," *id.*; *see also Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937) ("[N]o money can be paid out of the Treasury unless it has been appropriated by an act of Congress."); *Reeside v. Walker*, 52 U.S. (11 How.) 272, 291 (1850) ("It is a well-known constitutional provision, that no money can be taken or drawn from the Treasury except under an appropriation by Congress.").

The Constitution thus precludes courts from granting "a money remedy that Congress has not authorized," because "[a]ny exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury." *Richmond*, 496 U.S. at 425-26. This bedrock principle holds true even when detrimental to private litigants. *Id.* at 429. Indeed, the Court has held that the judiciary cannot provide compensation even for a taking where Congress made "no provision by any general law for ascertaining and paying this just compensation." *Langford v. United States*, 101 U.S. 341, 343 (1879).

The federal government has also enjoyed sovereign immunity from the founding. *See, e.g.*, *United States v. Sherwood*, 312 U.S. 584, 586 (1941); THE FEDERALIST No. 81, *supra*, at 487 (Alexander Hamilton). As this Court has recognized, such immunity extends to takings. *See, e.g.*, *Lynch v. United States*, 292 U.S. 571, 579-82 (1934); *Schillinger v. United States*, 155 U.S. 163, 169-72 (1894). After all, the "prohibition of the taking of private property for public use without compensation is no more sacred than that other constitutional provision that no person shall be deprived of life, liberty, or property without due process of law," and to which sovereign immunity indisputably applies. *Schillinger*, 155 U.S. at 168. Congress, of course, can waive immunity, but that power—like the immunity itself—serves to guarantee Congress's control of the federal purse.

None of these features of our Constitution is compatible with an implied cause of action under the Takings Clause. Instead, each underscores what the text of the Fifth Amendment provides: When the federal government takes property, it has a duty to pay just

compensation, but the means by which it does so is a policy question for Congress to decide. Congress's power over the purse thus confirms that the Takings Clause does not constitutionalize a private cause of action.

2. Two other constitutional elements confirm that the Takings Clause does not create its own cause of action.

First, Article III gives Congress discretion to create lower federal courts, which "includes its lesser power to 'limit the jurisdiction of those Courts.'" *Patchak v. Zinke*, 583 U.S. 244, 252 (2018) (plurality op.) (quoting *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 33 (1812)). This Court also has original jurisdiction over "Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party"—but not "controversies to which the United States shall be a party." U.S. Const. art. III, §2, cl. 1-2. That omission is significant because until 1897, the Takings Clause was understood to apply only against the federal government. *See generally Chi., B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226 (1897).

Accordingly, unless Congress created federal courts and authorized them to act, there would be no federal forum in which a Takings Clause claim could be pursued. That casts considerable doubt on Petitioners' theory that the Fifth Amendment has always included an implied cause of action for just compensation. Nor would those who ratified the Takings Clause have anticipated suits against the United States for just compensation proceeding in state court; then, as now, no sovereign lightly subjects itself to suit in another sovereign's courts. *See, e.g.*, *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1493-95 (2019) (explaining that the founders "took" this principle "as given").

Second, upon ratification, the Supremacy Clause left the States powerless to enact laws in conflict with "the operations of the constitutional laws enacted by Congress," and a state law that does so is "void." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819); *cf. Collins v. Yellen*, 141 S. Ct. 1761, 1788-89 (2021) ("[T]he Constitution automatically displaces any conflicting statutory provision from the moment of the provision's enactment."); *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2353 (2020) (plurality op.) (explaining that "an unconstitutional statutory amendment 'is a nullity' and 'void' when enacted"). The Supremacy Clause is thus self-executing; any violation of it by itself voids state law without need for any further action by Congress.

That is a separate question, however, from whether the Supremacy Clause can be enforced in court when Congress has not authorized private litigation. This Court has held that the Supremacy Clause, of its own force, does not create a cause of action against the States. *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326 (2015). "If the Supremacy Clause includes a private right of action," the Court explained, "then the Constitution *requires* Congress to permit the enforcement of its laws by private actors, significantly curtailing its ability to guide the implementation of federal law." *Id.* at 325-26. Because the Necessary and Proper Clause grants Congress "broad discretion with regard to the enactment of laws," and nothing in the Supremacy Clause deprives Congress of its prerogative to decide how federal law should be enforced, Congress may choose "the means by which the powers [the Constitution] confers are to be carried into execution."

Id. (quoting *M'Culloch*, 4 Wheat. at 421). So too with the Takings Clause.

C. Historical Practice Confirms that the Takings Clause Does Not Create a Cause of Action.

If the Constitution's language and structure left any doubt that the Takings Clause does not create a cause of action, history would eliminate it. "A page of history," of course, "is worth a volume of logic." *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921). Here, both logic and volumes of history confirm that Congress may decide how to satisfy its duty to pay just compensation.

1. Petitioners concede (at 27) that "early takings claims against the federal government" were not the subject of litigation at all but rather "were resolved directly by Congress," and that there "are few early federal cases about the Takings Clause because there was no general federal question jurisdiction until 1875 and no Tucker Act jurisdiction until 1887." That concession sinks their entire argument. Given the significance of property rights in the founding period, if the Fifth Amendment, ratified in 1791, created a cause of action, it would not have taken nearly a century for anyone to make use of it.

Until it enacted the Tucker Act in 1887, Congress either delegated authority to resolve takings claims to the Treasury Department or individually resolved claims for just compensation through private bills. As the Court has documented, "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 (citing Wilson Cowen et al., *The United States Court of*

Claims, A History, 216 CT. CL. 1, 5 (1978)). Indeed, "[b]efore 1855 no general statute gave the consent of the United States to suit on claims for money damages." *United States v. Mitchell*, 463 U.S. 206, 212 (1983). This meant that "a citizen's only means of obtaining recompense from the Government was by requesting individually tailored waivers of sovereign immunity, through private Acts of Congress." *Lib. of Cong. v. Shaw*, 478 U.S. 310, 316 n.3 (1986).

Providing just compensation through private bills was no small undertaking. Private bills "account[ed] for over one-sixth of all the unpublished records of the House of Representatives of the first seventy-nine Congresses," and "[m]ore than 500,000 private claims were brought before Congress between 1789 and 1909." Charles E. Schamel, *Untapped Resources: Private Claims and Private Legislation in the Records of the U.S. Congress*, PROLOGUE, Spring 1995, https://www.archives.gov/publications/prologue/1995/spring/private-claims-1.html. Indeed, from "1789 to 1813, private legislation accounted for 24 percent of the laws enacted," and in "ten Congresses, private legislation accounted for over 75 percent of all legislation passed." *Id.* Congress initially addressed this volume by delegating to the Treasury Department the power to investigate claims. *Id.* But even then, when the Department "rejected a claim, the claimant's only recourse was to appeal directly to Congress." *Id.* As a result, for nearly a century, both the House of Representatives and the Senate each had an entire standing committee dedicated to "Private Land Claims." *Id.* Litigation had nothing to do with it.

Numerous framers of the Constitution, moreover, participated in the enactment of such private bills. For

example, before the Takings Clause was even ratified, the First Congress enacted a bill compensating a company whose goods were destroyed when a brig caught fire. *An Act for the relief of Thomas Jenkins and Company*, ch. 20, 6 Stat. 2 (1790). Shortly after ratification, Congress passed a bill compensating the trustees of a grammar school for "the use and occupation of the said school, and the damages done to the same by the troops of the United States, during the late war," with the amount of "compensation [to] be ascertained by the accounting officers of the treasury." *An Act to compensate the corporation of trustees of the public grammar school and academy of Wilmington, in the state of Delaware, for the occupation of, and damages done to, the said school, during the late war*, ch. 21, 6 Stat. 8 (1792). Congress passed a similar bill during the Adams Administration, this time to provide compensation to what would become Brown University. *An Act for the relief of the corporation of Rhode Island college*, ch. 24, 6 Stat. 40 (1800). During the Jefferson Administration, Congress paid compensation for the loss of the use of a ship. *An Act for the relief of John Coles*, ch. 7, 6 Stat. 51 (1804). And during the Madison Administration, Congress compensated a group of property owners for "damages done to their property by a detachment of troops of the United States, under an order from the war department." *An Act for the relief of William Robinson, and others*, ch. 26, 6 Stat. 146 (1815).

The views of the First Congress are not lightly brushed aside. *See, e.g.*, *Seila Law, LLC v. CFPB*, 140 S. Ct. 2183, 2198 (2020). Here, however, it was not just the First Congress that recognized the propriety of using private bills to provide just compensation. It was every Congress for generations. Neither Petitioners nor

the dissenting judges below explain why it makes sense for Congress to have spent countless hours resolving alleged takings—often leaving property owners unsatisfied but lacking any further recourse—if a cause of action already existed. *See* 2 WILSON COWEN ET AL., THE UNITED STATES COURT OF CLAIMS: A HISTORY 45 (1978). In assessing Petitioners' theory, the Court should not ignore "common sense" or forget the lesson taught by "Sir Arthur Conan Doyle's 'dog that didn't bark.'" *Church of Scientology of Cal. v. IRS*, 484 U.S. 9, 17-18 (1987).

2. In fact, it was not until Congress's enactment of the Tucker Act in 1887—almost a full century after the founding—that Congress waived sovereign immunity for, and allowed the Court of Claims to hear, cases "founded upon the Constitution." Act of Mar. 3, 1887, ch. 359, 24 Stat. 505. As the "business of the Federal Legislature" grew, congressional resolution of requests for private bills became impractical. *Richmond*, 496 U.S. at 430. "Congress [thus] created the Court of [Federal] Claims" in 1855, *Mitchell*, 463 U.S. at 212-13—"not from the Judiciary Article of the Constitution, article 3, but from the Congressional power 'to pay the debts … of the United States', article 1, §8," *Sherwood*, 312 U.S. at 587.

Even then, Congress did not give the Court of Claims authority to address takings until the enactment of the Tucker Act in 1887.[2] It instead required "property

[2] Notably, the Tucker Act was not initially understood to provide jurisdiction for *every* claim under the Takings Clause; rather, the Court determined that "some element of contractual liability must lie in the foundation of every [Tucker Act] action." *Schillinger*, 155 U.S. at 167. In other words, a "claimant's cause of action" had to "arise out of [an] implied contract," not the Constitution. *United States v. Great Falls Mfg. Co.*, 112 U.S. 645, 656-57 (1884); *see also Hooe v. United States*, 218 U.S. 322, 335

owners" to continue petitioning "for private relief," for which "Congress was neither compelled to act, nor to act favorably." COWEN, *supra*, at 45. Congress's refusal to place takings claims in the Court of Claims prompted this Court to lament "that Congress has made no provision by any general law for ascertaining and paying … just compensation." *Langford*, 101 U.S. at 343. Yet Congress's determination was respected, and it was free to "prescribe[] in what tribunal or by what agents the taking and the ascertainment of the just compensation should be accomplished." *Kohl v. United States*, 91 U.S. 367, 375 (1875).

Mindful of this history, Justice Scalia observed that "[n]o one would suggest that, if Congress had not passed the Tucker Act, the courts would be able to order disbursements from the Treasury to pay for property taken under lawful authority (and subsequently destroyed) without just compensation." *Webster*, 486 U.S. at 613 (Scalia, J., dissenting) (citing, *inter alia*, *Schillinger*, 155 U.S. at 166-169). The majority did not disagree, and Petitioners advance no reason why this Court should do so now.

D. The Fourteenth Amendment Also Does Not Create a Cause of Action for Takings.

Nothing about the Fourteenth Amendment, which extended the Takings Clause to the States in 1868, requires a different conclusion. To start, the presumption, which the text nowhere rebuts, is that because there was no cause of action against the federal government, no cause of action lies against the States.

(1910). Today, the Court recognizes that the Tucker Act provides jurisdiction for many monetary claims against the government. *Mitchell*, 463 U.S. at 212, 216.

This flows from the "well-established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government." *McDonald*, 561 U.S. at 766 n.14. At the time of the Fourteenth Amendment's ratification—and almost twenty years thereafter—takings claims continued to be resolved not by litigation but by private legislation. Indeed, the same Congress that ratified the Fourteenth Amendment continued to enact private bills. *See, e.g.*, *An Act for the Relief of Samuel Tibbetts*, ch. 391, 15 Stat. 427 (1868).

In fact, not only does the Fourteenth Amendment not support Petitioners' theory, it further undercuts it. Rather than creating a cause of action, §5 of the Fourteenth Amendment empowers Congress to create remedies against the States for constitutional violations, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976), including, where appropriate, to "authorize private individuals to recover money damages against the States," *Bd. of Tr. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001). That §5 is conditional—Congress *may* subject the States to suit but doesn't have to—confirms that the Fourteenth Amendment neither creates nor incorporates a federal cause of action for use against the States.

Likewise, as Judge Higginson explained, even were this Court to conclude that an implied cause of action should be created to implement the Fifth Amendment as a matter of judge-made doctrine, it would not follow that such a cause of action would travel with the Takings Clause itself through incorporation. Supp.Pet.App.54a. If the contrary were true, *Bivens* would be incorporated against the States in connection with the Fourth Amendment—a prospect that Petitioners do not mention, much less defend.

E. Separation-of-Powers Principles Bar Judicial Creation of a Takings Cause of Action.

Because the Takings Clause does not itself create a cause of action, much less one enforceable against the States, the only remaining question is whether the Court should recognize one anyway. It should not.

1. For more than 40 years, the Court has refused to create any new constitutional damages claims, labeling that a "'disfavored' judicial activity," *Hernandez*, 140 S. Ct. at 742 (quoting *Abbasi*, 582 U.S. at 135)—no matter how sympathetic the facts involved or the policy arguments advanced, *id.* at 743. Indeed, the Court has "gone so far as to observe that if 'the Court's three *Bivens* cases [had] been … decided today,' it is doubtful that [the Court] would have reached the same result." *Id.* at 742-43 (first alteration in original) (quoting *Abbasi*, 582 U.S. at 134). This is so because courts lack "authority to recognize any causes of action not expressly created by Congress." *Id.* at 742. In short, the Court has "sworn off the habit of venturing beyond Congress's intent" and has repeatedly and firmly rejected any "invitation to have one last drink" from that well. *Sandoval*, 532 U.S. at 287.

2. Consistent with the Court's reluctance to recognize causes of action that Congress has not enacted, courts should "not recognize an implied constitutional cause of action if 'there is any reason to think that Congress might be better equipped to create a damages remedy.'" Supp.Pet.App.56a (quoting *Egbert*, 142 S. Ct. at 1803). Here, Judge Higginson recognized at least "four warning signs" that the judiciary "would 'arrogate legislative power' by implying a cause of action against the states in the Takings Clause of the Fifth Amendment

as incorporated by the Due Process Clause of the Fourteenth Amendment." *Id.*

First, "[a]n alternative remedial structure already exists in state inverse-condemnation law." *Id.* For example, Texas litigants have long pursued takings claims—including to enforce the Takings Clause—via state causes of action.[3] Texas, moreover, is not an outlier in this regard; *every* State allows such litigation, either directly or through mandamus. Supp.Pet.App.49a. Petitioners do not identify a single State that refuses to provide just compensation. At most, they point (at 44) to Louisiana, which—following the pattern used by the United States for 100 years—apparently still uses private bills. *See, e.g.*, *Ariyan, Inc. v. Sewerage & Water Bd. of New Orleans*, 29 F.4th 226, 228 (5th Cir. 2022) ("[T]he [Louisiana] Legislature or the political subdivision must make a specific appropriation in order to satisfy the judgment."). If Congress is unhappy with this state of affairs, it has not said so. Per Occam's razor, the States are providing just compensation.

Second, Congress has created a cause of action to enforce the Takings Clause against local governments, but not the States. The negative-implication canon thus applies. *See, e.g.*, *Jennings v. Rodriguez*, 538 U.S. 281, 300 (2018) (stating that "[t]he expression of one thing implies the exclusion of others (*expressio unius est*

[3] Some amici—but not Petitioners—argue that the Fifth Circuit has created a "Catch-22" by allowing States to remove takings claims to federal court only for federal courts to dismiss them with prejudice for lack of a cause of action. If this case had proceeded in state court, there would *still* be a merits question of whether a cause of action exists—under §1983 or otherwise. *Cf. Haywood*, 556 U.S. at 735. Jurisdiction is, however, a separate question than whether Petitioners pleaded a plausible federal claim.

exclusio alterius)" (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107 (2012)). Furthermore, the Court has held that takings claims are governed by the same "general rule[s]" as "any other claim grounded in the Bill of Rights." *Knick*, 139 S. Ct. at 2172-73. And for any other claim grounded in the Bill of Rights, this Court would not recognize an implied cause of action to sue the States directly under the Constitution. Instead, "[p]rivate rights of action to enforce federal law must be created by Congress." *Sandoval*, 532 U.S. at 286.

Third, the Court is increasingly reluctant to recognize *Bivens* claims against federal officers due to separation-of-powers concerns, *see, e.g.*, *Hernandez*, 140 S. Ct. at 741-43, which are only amplified here. At least *Bivens* claims concern the same sovereign: A federal court is recognizing a federal cause of action against a federal officer. Petitioners, however, want a federal court to recognize a federal cause of action against a *State*. Where the Constitution does not require a cause of action, and Congress has not enacted one, this Court cannot disregard the fact that the States are separate sovereigns. The Court will not construe ambiguous statutes to apply to the States. *See Will*, 491 U.S. at 65. The Court should be even more reluctant to do so when it comes to the Constitution, especially because the Takings Clause is not ambiguous. Congress can always change a statute; because the same cannot be said in the constitutional context, judicial creation of a cause of action raises greater separation-of-powers concerns.

Fourth, there is no way to "predict the systemwide consequences" of Petitioners' theory. Supp.Pet.App.57a. State courts have years of experience resolving takings claims against States; federal courts do not. That is

significant because takings cases often involve mixed questions of state and federal law. Supp.Pet.App.50a. Moreover, Petitioners' theory prompts other questions, not least of which: What about the federal government? Will property owners be able to file in federal district court rather than in the Court of Federal Claims? Or would sovereign immunity bar such claims—thus casting insuperable doubt on Petitioners' theory that the Fifth Amendment's framers implicitly intended such a cause of action in the first place?

Finally, if the Court recognizes a new cause of action, that will not be the end of it. Without any legislative guidance, federal courts will next have to decide additional questions, such as how long the limitations period should be, whether affirmative defenses like laches are available (and which ones and under what circumstances), and what pleading rules apply. And that is even before getting to questions about sovereign immunity. Does the Takings Clause's supposed cause of action supersede a State's immunity and, if so, how much of that immunity and under what circumstances?[4] Texas, for example, concedes that it waived its immunity from *suit* by removing Petitioners' cases to federal court. Whether it has waived its immunity from *liability* is a separate question. *See, e.g.*, *Trant v. Oklahoma*, 754 F.3d 1158, 1172 (10th Cir. 2014); *Stroud v. McIntosh*, 722 F.3d

[4] Several amici argue that, in fact, there is no sovereign immunity for this supposed implied cause of action, and Petitioners note (at 16 n.4) that they do not concede that sovereign immunity applies. Because Petitioners do not raise an argument on this issue and the Fifth Circuit did not address it, Texas also does not address the issue here, but reserves its rights to do so; the question of state sovereign immunity is a separate issue with its own history and precedent that would require separate briefing.

1294, 1301 (11th Cir. 2013); *Lombardo v. Pa. Dep't of Pub. Welfare*, 540 F.3d 190, 198 (3d Cir. 2008); *Meyers ex rel. Benzing v. Texas*, 410 F.3d 236, 255 (5th Cir. 2005). Rather than starting down this path, the Court should conclude as Judge Higginbotham did: "We have a Congress. It wrote §1983. It can accomplish what is proposed, but it is telling that it has not. This move is above our paygrade." Supp.Pet.App.50a.

II. Petitioners' Arguments Are Unpersuasive.

Petitioners insist that to refuse to find a cause of action that is neither "explicitly" included in, Pet.Br.17, nor "implied[ly]" provided by, *id.* at 34, but still somehow part of the Fifth Amendment would allow the States to trample on property rights. Their arguments are unpersuasive. The Takings Clause has functioned for more than 230 years without such an implied cause of action. There is no need to fix what is not broken.

A. Petitioners Mistake Texas's Position.

Petitioners' theory starts from a mistaken premise: that Texas's position has anything to do with the substance of their right to just compensation under the Takings Clause. It does not.

Petitioners, for example, spend pages seeking to prove that the "[Takings] Clause 'creates a substantive right to just compensation that springs to life when the government takes private property.'" *Id.* at 4 (quoting Pet.App.15a). Among other things, Petitioners discuss "the adoption of Magna Carta in 1215" and commentary from "St. George Tucker to James Madison," and argue that "the Takings Clause was specifically invoked as a reason for adopting the Fourteenth Amendment." *Id.* at 9.

But no one disputes that "the Constitution itself *substantively requires compensation*." *Id.* at 10. Nor does Texas claim that "the government [can] appropriate private property without just compensation so long as it avoids formal condemnation." *Contra id.* at 13-14 (quoting *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2076 (2021)).[5] And everyone acknowledges "that 'no matter what sort of procedures the government puts in place to remedy a taking, a property owner has a Fifth Amendment entitlement to compensation as soon as the government takes his property without paying for it.'" *Id.* at 14-15 (quoting *Knick*, 139 S. Ct. at 2170). In short, Texas wholeheartedly agrees that "the Constitution's plan of ordered liberty centered on respect for property rights and specifically on the right to just compensation when that property is taken." *Id.* at 24.

The dispute here, however, is about whether the Takings Clause itself permits the Court to constitutionalize a particular *method* to vindicate that substance—namely, a federal cause of action against the States. But this Court has specifically warned not to conflate "whether a statute confers a private right of action with the question whether the statute's substantive prohibition reaches a particular form of conduct." *Gomez-Perez v. Potter*, 553 U.S. 474, 483 (2008). If anything, the history of the Takings Clause demonstrates why: A substantive right can be vindicated through means other than a private suit, and certainly does not require suit under a federal cause of action. *See supra* Part I.C. Recognizing that point does not make

[5] Texas disputes that Petitioners have *established* a taking. But that issue has never been litigated.

this case "unnecessarily complicated," Pet.Br.34, but rather respects the Constitution's separation of powers.

It is no response that "federal courts can enforce the federal Constitution," *id.*, or that some—or maybe even all—of the Constitution is "*self-executing*," *id.* at 37. Texas agrees with those legal truisms as well. But neither answers the question presented: What does the Constitution require? Under established case law—which Petitioners nowhere acknowledge, let alone ask the Court to overturn—not even a self-executing constitutional provision requires a private cause of action. *See Armstrong*, 575 U.S. at 326 (holding that no cause of action arises from the Supremacy Clause); *see supra* pp. 21-22. And until 1887, there was no private litigation against the federal government for takings even though the Fifth Amendment has applied since 1791.

B. Petitioners Misunderstand Precedent.

One of the few questions on which Petitioners *do* join issue with the Fifth Circuit's decision as explained by two members of the panel is whether this case is controlled by precedent—*First English* in particular. Petitioners are mistaken, however, about what *First English* decided.

1. The central focus of Petitioners' argument is *First English*, particularly the Court's observation that, as just discussed, the Takings Clause is "self-executing." *E.g.*, Pet.Br.11. Petitioners misunderstand what that means.

Under the state law at issue in *First English*, the only available remedy for a regulatory taking was prospective relief that would force the regulator to initiate condemnation proceedings or return the property without any compensation, should the government

choose the latter. 482 U.S. at 308-09. The law provided no compensation for the period between the taking and the regulator's decision whether to pay for the property or return it. *Id.* at 312-13. The question before the Court thus was whether the Takings Claus "require[s] compensation as a remedy for 'temporary' regulatory takings." *Id.* at 310. The Court answered yes based on its "frequently repeated … view" that, in the event of a taking, the Constitution requires compensation. *Id.* at 316.

Given that context, the Court's statements about "the self-executing character of the constitutional provision with respect to compensation," *id.* at 315, do not support Petitioners' argument. The Court held that the right to compensation accrues as soon as the government takes property, rather than when the government chooses not to institute eminent domain. In other words, the Takings Clause's just-compensation requirement applies as soon as the taking occurs and so does not depend on some future act. *Id.*; *see also* BLACK'S LAW DICTIONARY 1633 (11th ed. 2019) (explaining that a self-executing instrument is "effective immediately without the need of any type of implementing action"). Thus, when this Court described the Takings Clause as "self-executing," it was addressing the substantive question of when the government's conduct triggers the right to compensation. *First English*, 482 U.S. at 315.

Whether the Takings Clause contains an implied cause of action was not at issue in *First English*. Indeed, due to the procedural posture of the case, the Court had no occasion to determine whether the plaintiffs had a valid cause of action at all. *First English* came to this Court through its 28 U.S.C. §1257 jurisdiction to review a "[f]inal judgment[] or decree[] rendered by the highest

court of [the] State." The California judgment at issue did not address whether the Fifth Amendment gave rise to a cause of action because the plaintiffs in *First English* did not mention the Takings Clause in their complaint, which "invoked only the California Constitution." 482 U.S. at 313 n.8. And this Court had jurisdiction only to the extent that "the state court … considered and decided the constitutional claim" when the issue was raised in the process of adjudicating that state claim. *Id.* That unconventional posture explains why *First English* makes no mention of any federal cause of action.

If, moreover, the plaintiff somehow had needed to invoke a federal cause of action to pursue its state-law claim, §1983 was available. *First English* was prosecuted against Los Angeles County, which is a proper §1983 defendant. *See Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 690 (1978). In fact, when the cause-of-action issue briefly arose during oral argument, plaintiff's counsel invoked §1983—but only after reiterating that it "hasn't been brought up" because "what we've been arguing about in this case is the substantive right to just compensation." Oral Arg. Tr. 22, *First English*, 482 U.S. 304 (No. 85-1199).

For both of those reasons, the issue of causes of action—and especially a constitutional cause of action against the States—*at most* "lurk[ed] in the record" and was "neither brought to the attention of the court nor ruled upon." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004). Indeed, because no State was a party to the litigation, and no one raised any argument about §1983's exclusion of States as proper defendants, the case cannot be read as supporting the notion that a federal cause of action against States exists whether Congress wants it or not. Nothing about the issue in this

case was sufficiently addressed (if, indeed, it was addressed at all) such that *First English* can "be considered … to constitute precedent[]" here. *Id.*

For related reasons, Petitioners are wrong to equate (at 13) Texas's position with that of the United States' amicus argument in *First English* that "the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government." 482 U.S. at 316 n.9. Given that the defendant was not a State, the United States unsurprisingly said nothing about whether a State would be a proper defendant under §1983, or whether there was some other statute authorizing takings claims directly against a State. Rather, it focused on whether the Takings Clause required monetary, as opposed to merely equitable, relief in the context of temporary regulatory takings by an entity subject to suit under §1983. *See* Br. for the United States as Amicus Curiae Supporting Appellee, *First English*, 482 U.S. 304 (No. 85-1199), at *26. The Court rejected the United States' argument because the Takings Clause "dictates the *remedy* for interference with property rights amounting to a taking"—just compensation. *First English*, 482 U.S. at 316 n.9 (emphasis added). Nothing about that discussion, however, speaks to the issue here.

Petitioners' discussion of stare decisis thus misses the point: *First English* does not hold that the Takings Clause creates a cause of action against States notwithstanding Congress's decision not to include States as defendants under §1983. The case was about something different—"the California Supreme Court's [rule] that damages are unavailable to redress a 'temporary' regulatory taking." *Id.* at 312.

2. Petitioners' invocation (at 13-15) of *Jacobs v. United States*, 290 U.S. 13, 16 (1933), upon which *First English* relied, is equally inapposite. *Jacobs* addressed the scope of the just-compensation right and, specifically, the amount of compensation the Fifth Amendment requires in a Tucker Act suit against the United States. *See id.* When this Court explained that the suits at issue were "founded on the Constitution of the United States," it did so in holding that "[t]he 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." *Id.* The Court would not address the availability of a cause of action against the federal government directly under the Fifth Amendment for nearly another century—when the Court recognized that there is *no* express cause of action to be found in the Constitution. *Me. Cmty. Health Options*, 140 S. Ct. at 13278 n.12

Ignoring that part of the Court's decision, Petitioners lean (at 16-17) into *Maine Community Health*, a case in which the Court concluded that private parties may sue the United States where Congress obligated the United States to pay a certain amount of money. 140 S. Ct. at 1329. Yet there is nothing "odd," Pet.Br.17, about concluding that when Congress chooses to impose an obligation but *not* to use one of "several blueprints for conditioning and limiting obligations," it intended to subject the government to liability, 140 S. Ct. at 1329, while also concluding that the Takings Clause does not create its own cause of action. Again, Texas does not dispute that the Takings Clause creates a duty to pay compensation or that Congress *could*, subject to

principles of sovereign immunity, create a cause of action to vindicate that right—only whether it has done so.[6]

3. Petitioners fare no better with respect to cases they claim (at 14) "reaffirm[ed]" *First English*. *Knick*, for example, merely reiterated *First English*'s holding about the scope of the substantive right: "that a property owner acquires an irrevocable right to just compensation immediately upon a taking." 139 S. Ct. at 2172. *Knick* relied on *First English* to reject the rule that "a taking does not give rise to a federal constitutional right to just compensation at that time, but instead gives a right to a state law procedure that will eventually result in just compensation." *Id.* at 2171 (describing *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)). Indeed, *First English* stands for the principle that "the Fifth Amendment right to compensation automatically arises at the time the government takes property without paying for it." *Id.* at 2171. Once more, Texas does not disagree. But like *First English*, there was no reason for *Knick* to say anything about whether the Takings Clause gives rise to a federal cause of action (much less one against the States), as the plaintiff in *Knick* brought her case under §1983. *Id.* at 2168; *see also id.* at 2174 n.5.

As in *Knick*, the landowners in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), proceeded under §1983. *Id.* at 694. The primary issue was whether the landowners' cause of action sounded in tort and was therefore properly submitted to a jury. *Id.* And when this Court stated that the Constitution

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[6] Petitioners also rely (at 16) on Justice Scalia's dissent in *Bowen v. Massachusetts*, 487 U.S. 879 (1988), but the cause of action in *Bowen* came from the Administrative Procedure Act, *id.* at 902 (applying 5 U.S.C. §704).

requires condemning governments to provide "a forum" to seek just compensation, it was not mandating a *judicial* forum to vindicate that right. *Id.* at 714. To the contrary, as early as 1810, the Court acknowledged non-judicial fora, and for nearly a century Congress resolved takings claims in a legislative forum. *See supra* pp. 17, 23-26. Even putting history to one side, this is obviously not the case to determine whether the Takings Clause requires a judicial forum. Texas provided one, after all—complete with a takings cause of action. The only question in this case is whether, in a judicial forum, Petitioners may bring a claim under the Fifth Amendment rather than that state cause of action.

In *Seaboard Air Line Railway Co. v. United States*, 261 U.S. 299 (1923), moreover, Congress did precisely what Congress did not do here: provide a federal cause of action. *See id.* at 304 (discussing the Lever Act). The Court's statement that "[j]ust compensation is provided for by the Constitution and the right to it cannot be taken away by statute," *id.*, is thus correct but irrelevant. No one disputes that just compensation is required, and no statute purports to take that right away. The only dispute is whether that right can be vindicated through an implied cause of action in the *absence* of a statute creating a cause of action against the States.

4. Finally, Petitioners appeal (at 29) to what they perceive as historical examples of takings claims being pursued without express mention of §1983. Each case they cite, however, involved equitable relief. *See Dohany v. Rogers*, 281 U.S. 362, 367 (1930); *Del., L. & W. R.R. Co. v. Town of Morristown*, 276 U.S. 182, 188, 197 (1928); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926); *Cuyahoga River Power Co. v. City of Akron*, 240 U.S. 462, 463 (1916); *Village of Norwood v. Baker*, 172

U.S. 269, 292 (1898). Petitioners are correct (at 29) that these equitable suits were, in a sense, "predicated directly upon the Constitution." But that does not mean that the Constitution created its own cause of action for damages (the issue here)—only that it provided the substantive rule of decision for *non-monetary* relief.

Nor are Petitioners' citations of other cases involving injunctive relief convincing. The Court in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), for example, expressly grounded its analysis in equity. *Id.* at 491 n.2. *Ex parte Young*, 209 U.S. 123 (1908), also involved injunctive relief, which is typically available when damages are *not*. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 269 (1997). Petitioners here, however, argue that a putative implied federal cause of action entitles them to damages. Absent a federal cause of action from Congress, that remedy is unavailable under federal law and may be pursued only under a state cause of action.

C. Petitioners Misread the Constitution.

Although relying almost entirely on their faulty view of precedent, Petitioners also hint at two arguments as to constitutional structure. Neither is persuasive.

1. Petitioners attempt (at 9, 18) to analogize the Takings Clause to habeas corpus. The Suspension Clause, however, is *sui generis*. It provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended" absent certain conditions. U.S. Const. art. I, §9, cl. 2. Anyone reading the Constitution at the founding would have recognized that "the Writ of Habeas Corpus" required judicial proceedings, not some other mechanism. After all, "writ" is a medieval term for "court's written order." BLACK'S, *supra*, at 1927 ("bef. 12c"). Yet as far as Texas is aware, there has never been

a "writ of just compensation." Even if such a thing existed, the Fifth Amendment did not refer to it, but instead left the question of how to provide just compensation to Congress. Furthermore, as the United States explains (at 29-30), the premise of Petitioners' argument is flawed because it is far from settled that a court in fact can issue a writ of habeas corpus without statutory authorization.

2. Largely based on the role of federal courts, Petitioners suggest (at 34-37) that for every constitutional wrong, there is a federal judicial remedy. Indeed, they claim (at 19) that "[i]f government *must* pay just compensation, it follows that courts of competent jurisdiction may *order* it to pay when it hasn't." But Texas pays just compensation. Regardless, "of course the maxim is not true." Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161, 169 (2008). For example, the Court "held that Marbury had a right to his commission, but [it] refused to give Marbury any remedy." *Id.* (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)). It thus "is simply untenable that there must be a judicial remedy for every constitutional violation." *Webster*, 486 U.S. at 613 (Scalia, J., dissenting) (collecting numerous examples). Instead, the Constitution often leaves even obligations to pay money to the political branches, whose members "take the same oath to uphold the Constitution that [courts] do, and sometimes … are left to perform that oath unreviewed, as [courts] always are." *Id.*

D. Petitioners Misinterpret History.

As noted above, Petitioners' brief has much to say about how the substantive right protected by the Takings Clause dates all the way back to the Magna Carta. *See supra* pp. 32-33. But little if any of it is

relevant to the question here: whether that right *must* be enforceable through a supposed cause of action directly under the Takings Clause against the States. When Petitioners' analysis does touch on that issue, it demonstrates the opposite: Property owners have historically pursued claims to just compensation in the way they pursued any other claims—using common-law, equitable, or statutory causes of action. Petitioners' historical analysis thus harms more than it helps their cause.

1. The Tucker Act forms a central piece of Petitioners' theory. In their view (at 15-16), it proves that the Fifth Amendment *must* create a cause of action because claimants have brought takings claims using the Tucker Act even though that Act is "only a jurisdictional statute" and does not itself "create any substantive right enforceable against the United States for money damages." Pet.Br.15 (quoting *United States v. Testan*, 424 U.S. 392, 398 (1976)). As the United States explains, however, the Tucker Act provides jurisdiction and a waiver of sovereign immunity that allows suit when *some other* statute "can fairly be interpreted as mandating compensation" by the federal government—even if the statute doesn't spell out the exact elements of a private cause of action. U.S.Br.20 (quoting *Eastport Steamship Corp. v. United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967) (en banc)).

The Tucker Act, moreover, was enacted in 1887, more than 50 years before *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). During that period, federal courts had greater leeway to create common-law causes of action. "Congress," thus, "undoubtedly assumed that the federal courts would 'raise up causes of action,' in the manner of a common-law court." *Me. Cmty. Health*

Options, 140 S. Ct. at 1334 (Alito, J., dissenting) (cleaned up). The Court has recognized the same with respect to the Alien Tort Statute, which is also "a jurisdictional statute creating no new causes of action." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004). Because it, like the Tucker Act, predates *Erie*, its historical context suggests that its "jurisdictional grant is best read as having been enacted on the understanding that the *common law* would provide a cause of action." *Id.* at 713 (emphasis added).

2. Petitioners also suggest (at 24) that by referencing the federal courts in his defense of the Bill of Rights, James Madison understood the Takings Clause to create a cause of action. They insist (at 25-26) that Madison understood the Fifth Amendment's "affirmative right to just compensation" to be enforceable by federal courts. Yet the Constitution did not obligate Congress to create lower federal courts at all, *Patchak*, 583 U.S. at 252, and Madison personally signed private bills. *See supra* p. 24. There is no basis to say that his comments—which were not about the Takings Clause specifically but rather the entire Bill of Rights[7]—are proof of an implied constitutional cause of action that he apparently never mentioned, would have been barred by sovereign immunity regardless, and that (perhaps unsurprisingly) lay dormant for a century even under Petitioners' theory. *See supra* pp. 22-25.

3. Petitioners also discuss (at 30-33) state-court cases, none of which are relevant. Many relate to state

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[7] James Madison, Amendments to the Constitution, June 8, 1789, *Founders Online*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Madison/01-12-02-0126.

law and thus have no bearing on the U.S. Constitution's Takings Clause. *E.g.*, *People ex rel. Utley v. Hayden*, 6 Hill 359, 360 (N.Y. Sup. Ct. 1844); *Gedney v. Inhabitants of Tewksbury*, 3 Mass. 307, 309 (1807); *McClenachan v. Curwen*, 6 Binn. 509, 511 (Pa. 1802). Moreover, many other cases *postdate* ratification of the Fourteenth Amendment—sometimes by many years. Pet.Br.32-33. As a result, they provide little insight into how the ratifiers of either the Fifth Amendment or the Fourteenth Amendment would have understood the meaning of those Amendments. The historical sources touching on *that* question all lead to the conclusion that when both of those Amendments were ratified, takings violations were remedied through non-judicial proceedings, "common law trespass action[s] against the responsible corporation or government official," or (in some circumstances) equitable relief. *Knick*, 139 S. Ct. at 2176 (citing state court decisions).

E. Petitioners' Policy Arguments Fail.

Petitioners' policy arguments—typically couched (at 40-44) as reasons not to overturn *First English*—should not sway the Court from the constitutional text because (among other reasons) they are much ado about nothing. Petitioners do not point to a single State where just compensation is being denied—least of all Texas, which since its inception has been famously protective of property rights. *See, e.g.*, T.R. FEHRENBACH, LONE STAR: A HISTORY OF TEXAS AND THE TEXANS 282 (1968) ("Land was Texas' great, and only resource; it was assuming sacred proportions at law."). Consistent with that philosophy, Texas courts have heard takings claims for over a hundred years without this Court finding a cause of action under the Fourteenth Amendment. Given that history, it is unsurprising that Petitioners cite

nothing to support their view (at 42-43) that if this Court were to rule in favor of Texas, its courts would stop adjudicating such cases—let alone that Texas would start "seiz[ing] property with impunity." Pet.Br.41.

That silence is deafening. Because there is no pattern of constitutional violations, not even Congress could abrogate Texas's sovereign immunity, which is analytically distinct from whether a cause of action exists. *See Allen v. Cooper*, 140 S. Ct. 994, 1004-05 (2020). In the unlikely event that changes, Congress could act. By any measure, the sky will not fall if the Court holds that unless and until Congress creates a federal takings cause of action against the States, there is none.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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