No. 22-913

In the Supreme Court of the United States

RICHARD DEVILLIER, ET AL.
Petitioners,

v.

STATE OF TEXAS,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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The text of the Fifth Amendment says that just compensation is mandatory. As explained in Petitioners' opening brief, this Court has therefore treated that text as creating an enforceable right to receive just compensation. Texas's response provides no reason to abandon that longstanding approach.

This reply proceeds as follows. Part A refutes Texas's reading of *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304 (1987), which is the controlling precedent. It also surveys later decisions, which confirm that *First English* meant what it said. The next parts respond to Texas's remaining arguments. Part B addresses constitutional text and structure, Part C addresses history, and Part D addresses *Bivens*. Finally, Part E explains why the federal right to just compensation must be enforceable: States, including Texas, are not nearly so eager to pay for takings as they claim.

A. *First English* controls.

1. Texas fails to counter what *First English* said on its face: that the Fifth Amendment, of its own force, furnishes a basis for a court to award just compensation. Texas claims instead that *First English* was about other things. But a quick review of that case confirms that it settled the question in this one.

So, again, *First English*. An ordinance allegedly deprived a church of all use of its land—a regulatory taking. *Id.* at 308. The church sued in California state court for just compensation. *Ibid*. The complaint "invoked only the California Constitution," *id.* at 313 n.8, and it was not "a model of pleading

practice," Brief of United States as Amicus Curiae *9, *First English*, 482 U.S. 304, available at 1986 WL 727420 ("USFE Br."). It could be read as "assert[ing] a claim for damages under the United States Constitution," *id.*, and thus the church "succeeded in bringing the federal issue into the case," *First English*, 482 U.S. at 313 n.8. The California Court of Appeal resolved that issue when it "upheld the validity of the ordinance against the particular *federal* constitutional question [of] just compensation." *Ibid.* (emphasis added). The lower court did so because "the United States Supreme Court ha[d] not yet ruled on the question of whether a state may constitutionally limit the remedy for a taking to nonmonetary relief." USFE Br. *5.

Without a conclusive ruling from this Court, the court of appeal followed *Agins* v. *City of Tiburon*, 24 Cal. 3d 266, 273 (1979), which had held that "a landowner alleging" regulatory deprivation of "substantially all use of his land" could *only* "invalidate the ordinance as excessive regulation in violation of the Fifth Amendment" "through declaratory relief or mandamus." *Aff'd on other grounds*, 447 U.S. 255 (1980). "He [could] not … elect to sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid." *Ibid.* This rule was based on "policy considerations [suggesting] that inverse condemnation is an inappropriate and undesirable remedy." *Id.* at 275. The bottom line, as it came to this Court, was thus the same rule that Texas and the United States urge now:

Landowners could sue for injunctions to stop takings, but not for just compensation.[1]

First English rejected that rule. Aware that *Agins* had "stated that only mandamus and declaratory judgment are remedies," the Court spent seven years trying to resolve "whether a State may limit the remedies available to a person whose land has been taken without just compensation." *Agins*, 447 U.S. at 263 (1980); see also *First English*, 482 U.S. at 310 (noting four attempts).

The answer was no. Collecting a century of Fifth Amendment cases, *First English* explained that "the compensation remedy is required by the Constitution." 482 U.S. at 316. So "a landowner is entitled to bring an action in inverse condemnation." *Id.* at 315–16. "Statutory recognition was not necessary." *Id.* at 315 (quoting *Jacobs* v. *United States*, 290 U.S. 13, 16 (1933)). This rule explained this Court's decision that First English, the church, could sue for just compensation for the specific regulatory taking imposed by Los Angeles. The rule of decision—landowners can sue for just compensation directly under the Constitution—*is* the holding of *First English*.[2]

This holding was not (as Texas would have it) "lurk[ing]" somewhere in the background. Resp. Br.

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[1] Resp. Br. 13; U.S. Amicus Br. 4.

[2] *E.g.*, *Burnham* v. *Super. Ct. of Cal.*, 495 U.S. 604, 613 n.2 (1990) (plurality) (explaining that the "exclusive basis" for a judgment is a holding); see also *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.").

36. It was squarely presented. Indeed, the United States specifically framed the question presented (in part) as "[w]hether the Fifth and Fourteenth Amendments, of their own force and without reliance on" 42 U.S.C. 1983, "require a state court to enter a money judgment against a governmental entity." USFE Br. *1. That question was not only presented, said the United States, it was dispositive:

> Appellants claim, *as they must in order to prevail in this Court* given the present state of the pleadings, that the Fourteenth Amendment requires of its own force that a state or federal court provide a monetary remedy against the government when it takes property.

Id. at *12 (emphasis added).

The United States' *First English* brief then spent nearly 10,000 words on that question. It argued that "the Takings Clause's prohibition of uncompensated takings does not imply a constitutionally-based compensation remedy." *Id.* at *26. Contra Resp. Br. 36 ("the issue of causes of action … was '[not] brought to the attention of the court'"). The United States repeatedly discussed the phrase "cause of action"—as in, "this Court has been reluctant to permit a cause of action in federal court directly under the Fourteenth Amendment, unaided by congressional legislation." USFE Br. *30. Contra Resp. Br. 36 ("causes of action … *at most* 'lurk[ed] in the record'").

This Court answered this heavily briefed, outcome-determinative question by rejecting "the argument of the United States that 'the Constitution does

not, of its own force, furnish a basis for a court to award money damages against the government.'" *First English*, 482 U.S. at 316 n.9. Contra Resp. Br. 36 ("causes of action … 'no[t] ruled upon'"). To say nothing of the wider discussion, that footnote, alone, resolves this case. See, *e.g.*, *Schacht* v. *United States*, 398 U.S. 58, 64 (1970) (recognizing holdings contained in footnotes).

Beyond ignoring the question resolved by this Court in *First English*, Texas also protests (at 36–37) that the defendant was a municipality, not a state. But that distinction did not factor into this Court's analysis. Nothing in *First English* suggests it hinges on a § 1983 cause of action that the church "declined to rely on," USFE Br. *9, and that the opinion never mentioned. See *Burnham*, 495 U.S. at 613 n.2 (plurality) ("Nor is it relevant for present purposes these holdings might instead have been rested on other available grounds.").

And the reasoning in *First English* was not specific to cities and counties. The crux of the opinion did not even mention municipalities, and its citations included cases with non-municipal defendants. 482 U.S. at 314–16. It overturned the rule from *Agins*, which itself had origins at the state level. See *Agins*, 24 Cal. 3d at 272–73 (relying on a takings case against the California Coastal Commission). And it rejected one of the bases for the United States' argument—"principles of sovereign immunity"—a rejection that would make no sense if this Court were limiting its holding to municipalities or § 1983. 482 U.S. at 316 n.9. Put simply, *First English* involved a city, but its analysis

applies to governments in general. That ends this case.

2. Texas also fails to address the consensus understanding of *First English*. Over the nearly four decades since this Court decided *First English*, just two courts, the Ninth Circuit and the Fifth Circuit below, have held that landowners cannot sue directly under the Takings Clause. And they got there by ignoring *First English*. See Pet. App. 2a; *Azul–Pacifico, Inc.* v. *City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992). Indeed, Petitioners can find only one published opinion—Judge Higginson's concurrence below—adopting anything like Texas's reading of *First English*.

By contrast, every court to expressly consider whether *First English* requires a cause of action for just compensation has concluded that it does. Federal courts say so.[3] State courts say so.[4]

Most importantly, this Court says so. Texas (at 39–40) has no explanation for why this Court—twice in the last five years—has reiterated this holding of *First English*. In *Knick*, the Court confirmed that

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[3] See, *e.g.*, *DLX, Inc.* v. *Kentucky*, 381 F.3d 511, 527 (6th Cir. 2004); *Mann* v. *Haigh*, 120 F.3d 34, 37 (4th Cir. 1997); *Donnelly* v. *United States*, 28 Fed. Cl. 62, 65 n.2 (1993); *Baker* v. *City of McKinney*, 601 F. Supp. 3d 124, 145 (E.D. Tex. 2022), *rev'd on other grounds*, 84 F.4th 378 (5th Cir. 2023); *Speed* v. *Mills*, 919 F. Supp. 2d 122, 128 (D.D.C. 2013).

[4] See, *e.g.*, *Whitehead Oil Co.* v. *City of Lincoln*, 515 N.W.2d 401, 405 (Neb. 1994); *Manning* v. *Mining & Minerals Div.*, 144 P.3d 87, 91 (N.M. 2006); *SDDS, Inc.* v. *State*, 650 N.W.2d 1, 9 (S.D. 2002); *Boise Cascade Corp.* v. *State ex rel. Or. State Bd. of Forestry*, 991 P.2d 563, 567 (Or. Ct. App. 1999).

First English "reject[ed] the view that 'the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government.'" *Knick* v. *Twp. of Scott*, 139 S. Ct. 2162, 2172 (2019) (quoting *First English*, 482 U.S. at 316 n.9). Examining the history of the Takings Clause, the Court then explained exactly what that statement meant: Just as state courts had "recognize[d] implied rights of action for damages under the state equivalents of the Takings Clause," *First English* "joined the state courts in holding that the compensation remedy is required by the Takings Clause itself." *Id.* at 2176.

The discussion of the Takings Clause in *Maine Community Health Options* v. *United States*, 140 S. Ct. 1308, is similar. Texas (at 38) seizes on that opinion's language that the Takings Clause does not "expressly create a right of action." 140 S. Ct. at 1328 n.12 (citing *First English*). Which is true; the Fifth Amendment does not end with, "which a Citizen may seek in a Case." But the point of the discussion in *Maine Community Health* is that landowners can sue under the Takings Clause anyway, even without "magic words explicitly inviting suit." *Ibid.* The Clause creates a cause of action through its "obligation to pay" because otherwise that obligation would be "meaningless." *Ibid.*

If Texas's reading of *First English* were correct, one would expect Texas to be able to explain why this Court has repeatedly gotten it so wrong. It cannot.

Nor can Texas explain why property owners can sue under the Tucker Act. See *United States* v. *Causby*, 328 U.S. 256 (1946). As Petitioners have explained, the Tucker Act itself does not provide any

cause of action. It "provides the standard procedure for bringing [Takings] claims," *Knick*, 139 S. Ct. at 2170, but it "simply opens those courts to plaintiffs already possessed of a cause of action." *Nat'l Mut. Ins. Co. of D.C.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 594 n.22 (1949) (plurality). See also Pet. Br. 15–16, 41. The act does not "create substantive rights," and its existence does not mean "every claim invoking the Constitution is cognizable under" it. *Me. Cmty. Health*, 140 S. Ct. at 1327 (quotation omitted). So, even with the Tucker Act, takings cases against the federal government must stand on a separate cause of action. Petitioners say (like this Court has said) this cause of action comes from the Takings Clause. Cf. *Knick*,139 S. Ct. at 2174 ("A claim for just compensation brought under the Tucker Act … *is* a Fifth Amendment takings claim."). Texas identifies no alternatives. Resp. Br. 43–44. It instead defers to the United States itself, which, in turn, offers only the unconvincing theory that no cause of action under the Tucker Act plus no cause of action under the Takings Clause somehow adds up to a cause of action under "the combination" of both. U.S. Amicus Br. 20–22. This strange arithmetic provides no coherent basis for continuing to allow takings claims under the Tucker Act—let alone for allowing them while barring directly analogous claims under the Fourteenth Amendment.

* * *

Texas's argument was briefed in *First English*, dispatched in *First English*, and buried by the cases discussing *First English*. As Texas does not ask the Court to overrule *First English*—let alone refute

Petitioners' arguments for keeping it—the Court can stop here. *E.g.*, *United States* v. *IBM*, 517 U.S. 843, 856 (1996) ("The principles that animate our policy of *stare decisis* caution against overruling a longstanding precedent on a theory not argued by the parties.").

B. Texas's text-and-structure arguments are wrong.

Even if the slate were blank and *First English* had not rejected much of Texas's lead argument, it would still fail. The Constitution's text and structure do not bar a cause of action.

1. Texas first observes that "[n]othing in the Clause tells the federal government how it must go about providing th[e] just compensation." Resp. Br. 14. Set aside that the Court rejected this argument in *First English*.[5] Under settled law, a cause of action can exist even without an explicit provision "that the right or duty … is enforceable through a suit." *Me. Cmty. Health*, 140 S. Ct. at 1328 (quoting *United States* v. *Navajo Nation*, 556 U.S. 287, 290 (2009)). If the government has an "obligation to pay money"—which, under the Takings Clause, everyone agrees it does—that obligation typically implies a "remedy for the defaulted amount." *Id.* at 1328 n.12. That is why this Court, in *Maine Community Health*, specifically

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[5] Compare USFE Br. *15 ("the Clause … does not address the question of the appropriate remedy"), with *First English*, 482 U.S. at 316 n.9 (holding United States' argument "refute[d]"). Also compare Resp. Br. 15 ("Congress gets to decide."), with USFE Br. *30 ("[D]iscretion is largely entrusted to the Congress not the courts." (quotation omitted)) and with *Agins*, 24 Cal. 3d at 276 ("[I]t seems a usurpation of legislative power for a court to force compensation.").

connected "the money-mandating inquiry" with landowners' ability to sue under the Takings Clause. *Ibid.*

That ability (contra Texas) does not tell any "government how it must go about providing … just compensation." Resp. Br. 14. The states (and Congress) remain largely free to "use private bills" "or other appropriate means." *Id.* at 15.[6] (Had Texas done so before it flooded Petitioners' land, there would of course be no case today.) Petitioners claim only a backstop: When a State refuses to pay just compensation, it may be made to answer in court.

2. Next is the Appropriations Clause. According to Texas, Congress's exclusive control over the Treasury means courts cannot award just compensation. Resp. Br. 17–20. *First English* rejected this argument, too.[7] But even if it hadn't, the argument has no connection to the real world. Congress *has* appropriated money for final judgments. 31 U.S.C. § 1304(a). And it did so explicitly "so that agencies would pay less post-judgment interest on awards." Congressional Research Service, The Judgment

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[6] Similarly, Texas cites a handful of 19th-century cases holding that the legislature may decree that the amount of just compensation be ascertained by commissioners rather than by a jury. Rep. Br. 16–17. Perhaps. But whether the *Seventh* Amendment requires a jury to resolve the quantum of just compensation is a different question from whether the *Fifth* Amendment requires just compensation when it has been withheld.

[7] See USFE Br. *18 ("This provision independently bars a court from ordering the payment of money out of the Federal Treasury unless Congress has created a damage remedy."); see also *Agins*, 24 Cal. 3d at 276 ("[T]he expenditure of public funds would be, to some extent, within the power of the judiciary.").

Fund: History, Administration, and Common Usage 4 (March 7, 2013). That a court might issue a judgment that must be satisfied by a congressional appropriation is neither new nor controversial.[8]

And Texas simply dances past the radical implications of its argument, which necessarily requires courts (out of respect for the separation of powers) to issue sweeping injunctions unwinding uncompensated takings or even ejecting the United States military from its garrisons.[9] Yet those orders, too, require the expenditure of government funds: The military cannot move its garrisons for free.

Ultimately, Texas's separation-of-powers arguments are a distraction. The judiciary enters judgments, and the other branches of government choose how to respond to them—by paying money or by incurring some other consequence like post-judgment interest. Continuing to recognize a cause of action under the Takings Clause requires nothing different.

3. Next is sovereign immunity. (To be clear, Texas does not *invoke* immunity, Resp. Br. 31 n.4, but

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[8] Again, Texas's cases provide it no support. *Langford* v. *United States*, 101 U.S. 341, 343 (1879), did not hold "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.'" Resp. Br. 19. *Langford* specifically held open the possibility the Court of Claims could award compensation anyway. 101 U.S. at 343–44. Then it held that the Court of Claims did not have jurisdiction to hear claims founded on the ultra vires torts of United States officers. *Id.* at 344. And *Kohl* v. *United States*, 91 U.S. 367 (1875), simply holds that direct condemnation actions invoke federal jurisdiction.

[9] *Meigs* v. *M'Clung's Lessee*, 13 U.S. (9 Cranch) 11, 16, 18 (1815).

says the idea of immunity should still weigh against a cause of action.) This argument, too, runs headlong into *First English*.[10] Regardless, the argument "confuses the doctrine of sovereign immunity with the requirement that a plaintiff state a cause of action." *Larson* v. *Domestic & Foreign Com. Corp.*, 337 U.S. 682, 692–93 (1949). Sovereign immunity is a "logically distinct" concept. *Hui* v. *Castaneda*, 559 U.S. 799, 807 (2010). Thus, Justice Scalia's belief that takings suits against the federal government would fail without the Tucker Act's waiver of immunity is simply not relevant. Resp. Br. 2, 26 (quoting *Webster* v. *Doe*, 486 U.S. 592, 613 (1988) (Scalia, J., dissenting)). This Court, one day, may address whether the Takings Clause abrogates State sovereign immunity.[11] But there is no occasion to weigh in now. Texas chose the federal forum, Pet. Supp. App. 68a, and declined to assert immunity before this Court, Resp. Br. 31 n.4.

4. Fourth is jurisdiction. Texas (at 20) argues that the Takings Clause does not imply a cause of action because Article III does not explicitly create a forum to hear it. But, as with immunity, this conflates distinct issues. Cf. *Mont.-Dakota Utils. Co.* v. *Nw.*

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[10] 482 U.S. at 316 n.9 ("The Solicitor General urges that … principles of sovereign immunity [establish] that the Amendment itself is … not a remedial provision. The cases … refute the argument …").

[11] Petitioners certainly think that it does. See, *e.g.*, Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 Wash. & Lee L. Rev. 493 (2006). But resolving that question will require the Court to wait for a state party whose courts, unlike Texas's, actually hold that it is immune from takings claims. Cf. *City of Baytown* v. *Schrock*, 645 S.W.3d 174 (Tex. 2022).

Pub. Serv. Co., 341 U.S. 246, 249 (1951) ("[T]he question whether jurisdiction exists has been confused with the question whether the complaint states a cause of action."). A lack of jurisdiction at most means there might be nowhere to hear a claim. It does not mean that there is no claim. After all, jurisdiction does not automatically exist for plaintiffs to seek injunctions against unconstitutional acts, including unconstitutional takings if compensation is unavailable. *E.g.*, *Ex parte Young*, 209 U.S. 123, 155–56 (1908); *Knick*, 139 S. Ct. at 2168; see also, *e.g.*, *Meigs*, 13 U.S. at *16 (ejectment). Without federal-question jurisdiction, those claims could not be brought in federal court either—but they still *exist*, the same as just-compensation claims do.

5. Fifth, Texas turns to *Armstrong* v. *Exceptional Child Center, Inc.*, which held that there is no implied cause of action under the Supremacy Clause. 575 U.S. 320 (2015). But different clauses are different. *Armstrong* does not discuss the Takings Clause, which mandates the payment of money while the Supremacy Clause does not. So *Armstrong* did not consider the "money-mandating" inquiry from cases like *Maine Community Health*, 140 S. Ct. at 1329 (collecting cases predating *Armstrong*), let alone consider takings cases like *First English* and *Jacobs* v. *United States*, 290 U.S. 13 (1933). On top of that, actions under the Supremacy Clause fundamentally concern federal statutes, which Congress controls. So it makes sense that Congress, not private litigants, would control enforcement of those statutes. *Armstrong*, 575 U.S. at 325–26. The Takings Clause, which applies directly to takings by governments at every level, is different.

6. Finally, Texas invokes § 5 of the Fourteenth Amendment for the proposition that Congress may create remedies to enforce that Amendment. Resp. Br. 26–27. Of course it can. But nothing in § 5 allows Congress to change the scope of § 1, which deliberately creates judicially enforceable individual rights. Pet. Br. 36–37; see also *City of Boerne* v. *Flores*, 521 U.S. 507, 524 (1997) (noting that § 1 "confers substantive rights against the States, which, like the provisions of the Bill of Rights, are self-executing"). Congressional inaction cannot take away the Fifth Amendment's compensation mandate any more than it could take away any other constitutional protection.

Texas's structural arguments are wrong. Most were rejected in *First English*. All are unconvincing. If there is a foundational idea on which this case turns, it comes not from *Armstrong* v. *Exceptional Child Center* but from *Armstrong* v. *United States*: The Takings Clause was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." 364 U.S. 40, 49 (1960).

C. History supports Petitioners.

As with text and structure, Texas is also wrong to argue that history weighs against Petitioners. Because the Takings Clause undisputedly "creates a duty of just compensation," Resp. Br. 17, and because, under the "obligation to pay" standard, that duty creates a right of action, *Me. Cmty. Health*, 140 S. Ct. at 1328 n.12, the burden is on Texas to show that a remedy-free Takings Clause "is consistent with this Nation's historical tradition," *N.Y. State Rifle & Pistol*

Ass'n, Inc. v. *Bruen*, 597 U.S. 1, 33–34 (2022). This it cannot do.

Texas's top line is that "[t]he historical sources" show that "takings violations were remedied through non-judicial proceedings, common law trespass action[s] … or … equitable relief." Resp. Br. 45 (quotation omitted). At this point, it may not surprise the Court to hear that this argument appeared in *First English*. USFE Br. *19–20. Nevertheless. These sources do not mean what Texas thinks they do.

To be sure, Petitioners agree that "[a]t the time of the founding" (although not the Reconstruction) "there were no general causes of action through which plaintiffs could obtain compensation for property taken for public use." *Knick*, 139 S. Ct. at 2175–76. But there were no general causes of action at all—only the various technical "forms of action."[12] Add in the lack of federal-question jurisdiction and the limited scope of the original Takings Clause, and the lack of early takings cases is unsurprising. Yet, even with those limitations, what the cases show is federal courts holding federal officials liable in trespass,[13] ejecting government officials from land taken without compensation,[14] and enforcing an implied promise to

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[12] 1 Joseph Story, Commentaries on Equity Jurisprudence, as Administered in England and America 26 (2d ed. 1839) (describing the forms).

[13] *E.g.*, *Mitchell* v. *Harmony*, 54 U.S. (13 How) 115, 135 (1851).

[14] See *Meigs*, 13 U.S. at 16, 18; see also *United States* v. *Lee*, 106 U.S. 196, 219–22 (1882).

pay for what the government took.[15] In other words, faced with a bedrock property right and no way to enforce it directly, courts bent over backwards to enforce property rights anyway. State courts, of course, long did the same.[16] Then "state courts began to recognize implied rights of action" directly "under the state equivalents of the Takings Clause," *Knick*, 139 S. Ct. at 2176, and, ultimately, this Court established that federal "claims for just compensation are grounded in the Constitution itself," *First English*, 482 U.S. at 315 (referring to *Jacobs*, 290 U.S. at 16). It would be extraordinary to conclude from this history that landowners should *lose* a remedy under the Takings Clause.[17]

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[15] See *United States* v. *Great Falls Mfg. Co.*, 112 U.S. 645, 657–58 (1884); *United States* v. *Russell*, 80 U.S. 623, 630 (1871).

[16] See *Hooper* v. *Burgess* (Md. Provincial Ct. 1670), *reprinted in* 57 Archives of Maryland, Proceedings of the Provincial Court 1666–1670, at 571, 574 (J. Hall Pleasants ed., 1940); see also *Eaton* v. *Boston, Concord & Montreal R.R.*, 51 N.H. 504, 517 (1872); *Gardner* v. *Vill. of Newburgh*, 2 Johns. Ch. 162, 166 (N.Y. Ch. 1816); Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 Vand. L. Rev. 57, 72 (1999). State constitutional interpretation hardly has "no bearing" on the federal clause. Resp. Br. 44–45. This Court assesses historical state law, often extensively, in determining the breadth of federal protections. *E.g.*, *Dobbs* v. *Jackson Women's Health Org.*, 597 U.S. 215, 245–55 (2022); *Bruen*, 597 U.S. at 46–70; *Timbs* v. *Indiana*, 139 S. Ct. 682, 687–89 (2019).

[17] It would also mean that the lack of direct just-compensation claims at the Founding trumps the widespread adoption of those claims by Reconstruction. See *Bruen*, 597 U.S. at 37–38 (noting debate on when meaning is assessed).

Indeed, the 19th-century history so strongly favors compensation that Texas almost entirely avoids it. Texas complains that the cases awarding compensation "post-date ratification of the Fourteenth Amendment." Resp. Br. 45 (emphasis omitted). Some do. But many pre-date it as well: *Clayburgh* v. *City of Chicago*, 25 Ill. 535 (1861), recognized a suit seeking to compel Chicago to pay just compensation for a taking. *Henry* v. *Dubuque and Pacific Railroad Company*, 10 Iowa 540 (1860), similarly upheld an award of just compensation, rejecting the idea that a property owner was "confined" to injunctive relief. *Id.* at 545. And even the cases recognizing a compensation remedy post-ratification did so without any suggestion "that their holding was novel." Brauneis, *supra*, at 110.

At bottom, Texas has not offered a historical tradition that overrides the language in the Takings Clause. Instead, the history favors Petitioners. Yes, before the Founding, property owners had to look to the legislature for just compensation. But the Founding era was marked by a "proliferation of just compensation clauses [that] may have been due to a more general loss of faith in legislatures." Brauneis, *supra*, at 107 & n.220. And American history shows an unflagging dedication to the idea that just compensation is an enforceable right—a right whose enforcement was shaped by the vagaries of jurisdiction or pleading requirements, but an enforceable right all the same. Once those jurisdictional and pleading requirements were relaxed, the history shows an unsurprising enforcement of that right, including by this Court in decisions like *Jacobs* through *Causby* and on to *First*

English itself. Texas provides no reason to move backwards.

D. This is not a *Bivens* case.

Texas's last major argument is to equate this case with *Bivens*. Resp. Br. 28–32. But that characterization is false. *Bivens* cases are about whether courts should *create* a constitutional remedy. *Bivens* itself contains all of one sentence on text and one sentence on history, and then turns to an analysis of "special factors" of policy. *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, 395–97 (1971). Perhaps a litigant could make a text-and-history argument that some remedies are required by some provisions of the Constitution, see Vazquez Amicus 15–24, but that is not the argument addressed in *Bivens*. It is, however, the argument here, beginning with the very text of the Takings Clause. As shown above, the Fifth Amendment itself requires a remedy. This case does not, therefore, rest on, extend, or even implicate *Bivens*.

The differences are confirmed by the acts and remedies at issue in *Bivens* cases versus takings cases. For one, *Bivens* cases seek consequential damages. Petitioners do not. They seek just compensation—the fair market value of the property interest taken—not "consequential damages" flowing from a wrongful act. *United States* v. *50 Acres of Land*, 469 U.S. 24, 33 (1984). For two, unlike *Bivens* cases, this case does not involve the question of how to fashion a remedy for a past instance of unlawful behavior by state actors. It instead involves a deliberate taking—a permissible policy decision, but one that creates an obligation to provide compensation. Rather than providing damages to offset a past wrongful act,

awarding just compensation fulfills a present constitutional obligation. See *Knick*, 139 S. Ct. at 2170 ("[A] property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it.").

Later descriptions of *Bivens* cases also confirm that this is not one of them. After all, this Court recently noted that it has expanded the *Bivens* remedy only twice. See *Egbert* v. *Boule*, 596 U.S. 482, 490–91 (2022) (listing *Davis* v. *Passman*, 442 U.S. 228 (1979) and *Carlson* v. *Green*, 446 U.S. 14 (1980)). *First English* was not mentioned because it is not a *Bivens* case. That is why Justice Rehnquist could dissent in *Davis* and *Carlson* less than a decade before Chief Justice Rehnquist wrote *First English*. See Nat'l Ass'n Realtors Amicus 13–16.

Because this is not a *Bivens* case, Texas's special-factors-type analysis (at 29–32) is simply not relevant. The Constitution controls. But Texas's analysis is also unconvincing on its own terms.

- As to alternatives under state law: "The availability of any particular compensation remedy, such as an inverse condemnation claim under state law, cannot infringe or restrict the property owner's federal constitutional claim—just as the existence of a state action for battery does not bar a Fourth Amendment claim of excessive force." *Knick*, 139 S. Ct. at 2171.[18]

[18] Inasmuch as Texas is talking about the alternative of state courts hearing federal claims, Petitioners can only observe that they tried that here.

- As to § 1983: It is inapplicable to some entities (as here), and, in any event, Congress can't ratchet down rights through statutes.[19]

- As to separate sovereigns: the Takings Clause already applies to the States. *Chicago, Burlington & Quincy R.R. Co.* v. *City of Chicago*, 166 U.S. 226 (1897).

- Finally, Texas's warning of "systemwide consequences" of recognizing a Takings Clause cause of action overlooks that courts recognize one already. As Petitioners have discussed, courts nationwide expressly recognize claims arising directly under the Fifth Amendment. To the extent Texas's parade of horribles about laches or sovereign immunity had any basis in reality, one would expect those horribles to already be on the march. They are not. Instead, lower courts (including the Court of Federal Claims) adjudicate these claims every day, which means continuing to recognize the Takings Clause cause of action will not

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[19] Also, the argument is yet another do-over from *First English*. See USFE Br. *30–34 ("Congress's enactment of 42 U.S.C. 1983 has eliminated any need for this Court to explore implicit constitutional remedies to be applied against governmental bodies[.]").

unleash anything new.[20] Texas wants to disturb the status quo, not Petitioners.

The bottom line? This is not a *Bivens* case. Petitioners are not asking the Court to hold that for every right there is a remedy. See Resp. Br. 42. Instead, the Court need only hold that where there *is* a remedy, it can be enforced.

E. Federal remedies demand federal enforcement.

Finally, a word on Texas's suggestion that none of this matters because Petitioners cannot "identify a[] State that refuses to provide just compensation for a taking." *Id.* at 29. Of course they can. States routinely try to evade their obligations under the Fifth Amendment. California did so successfully for years before this Court stopped it with *First English*. In the years since, other states have tried the same, only to be stopped by their own courts' faithful application of *First English*. *Supra* n.4. And Texas—now, today, in this case—is doing its level best to avoid the Fifth Amendment. Seventeen states want to join in, filing an amicus brief insisting that when, where, and whether they pay for property they take is entirely up to them. States Amicus Br. 20 (asserting state power "to decide the nature, scope, and proper forum" for just compensation). One of them, Oregon, is here apparently because it wants to escape its own courts'

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[20] The question of nationwide takings claims against the federal government would turn on whether the Tucker Act and the Little Tucker Act together impliedly limit jurisdiction under 28 U.S.C. § 1331. See Resp. Br. 31; States Amicus Br. 20–21. Whatever the answer is, Congress is free to change it.

recognition of *First English*. See *Boise Cascade Corp.*, 991 P.2d at 567.

Texas's repeated incantations of its respect for property rights must be weighed against its conduct here. Petitioners filed federal and state takings claims in state court—a forum that Texas, now, seems to concede would have adjudicated both on the merits. See Resp. Br. 4.[21] Texas invoked the jurisdiction of the federal courts and promptly sought to dismiss the federal claim—precisely because it believed itself entitled to a more favorable legal standard under state law. *See* Pet. at 4 n.4. And, so far, its plan has worked: If the Fifth Circuit's decision remains in place, Petitioners can never litigate a federal takings claim to judgment. If they lose under state law, they lose.

A victory for Texas would mean more of the same. It is simply not true that everything would proceed apace in state court. There is, as Texas has shown, removal. But set that aside. The whole reason state courts entertain claims based on the Fifth Amendment is that they believe the Takings Clause provides a cause of action. If this Court holds that it does not, state courts will believe that, too. And other states, as Texas did here, will seek every opportunity to extinguish their obligations under the Takings

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[21] To the extent Texas now concedes that plaintiffs properly brought claims "on the basis of the Fifth Amendment" in state court (Resp. Br. 4), it is unclear on what basis Texas moved to dismiss Petitioners' claims based on the Fifth Amendment. In any event, Texas courts recognize claims based on the Fifth Amendment for the same reason other lower courts do: This Court (along with the Fifth Amendment's text, history, and tradition) says they must.

Clause. At best, 50 separate jurisdictions will adopt 50 different approaches to enforcing (or ignoring) a constitutional obligation that everyone agrees exists. It will be, to borrow from Judge Oldham's "thoughtful"[22] dissent, "as if the People never bothered to ratify the federal Takings Clause in the first place." Pet. Supp. App. at 78a.

But the People did ratify it—and this Court, up to now, has enforced it. There is no reason to stop.

CONCLUSION

The Court should reverse.

Respectfully submitted.

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[22] *O'Connor* v. *Eubanks*, 83 F.4th 1018, 1029 (6th Cir. 2023) (Thapar, J., concurring).

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