No. 22-52

IN THE
Supreme Court of the United States

ARIYAN, INCORPORATED, DOING BUSINESS AS DISCOUNT CORNER, ET AL.,
PETITIONERS,

V.

SEWERAGE & WATER BOARD OF NEW ORLEANS, ET AL.,
RESPONDENTS

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

Amicus Curiae Brief Of The Buckeye Institute Supporting Petitioners

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INTEREST OF THE AMICUS CURIAE

Amicus curiae The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—whose mission is to advance free-market public policy in the states.[1] The staff at The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policy solutions, and marketing those policy solutions for implementation and replication throughout the country. The Buckeye Institute is a nonpartisan, non-profit, tax-exempt organization as defined by I.R.C. section 501(c)(3). The Buckeye Institute's Legal Center files and joins amicus briefs that are consistent with its mission and goals.

The Buckeye Institute is dedicated to protecting individual liberties, and especially those liberties guaranteed by the Constitution of the United States, against government interference. The Buckeye Institute is a leading advocate of protecting private property, and the rights associated with it,

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[1] Pursuant to Rule 37.2(a), The Buckeye Institute states that it has obtained written consent from the Respondents to file this amicus brief and Petitioners have filed a blanket consent to amicus curiae briefs. Further, pursuant to Rule 37.6, no counsel for any party has authored this brief in whole or in part and no person other than the amicus has made any monetary contribution to this brief's preparation or submission. The parties were timely notified.

particularly the right to compensation when private property is taken for public use.

INTRODUCTION

Louisiana law purports to allow the State to condemn private property for public use and then—in defiance of the just compensation guarantee of the Fifth Amendment—not pay for it. That may sound stark, but that is the reality of what happened below.

Respondent Sewerage & Water Board took property from the Petitioners within the meaning of the Fifth Amendment's Just Compensation Clause—and then decided not to satisfy the judgment for it. It based its action on a Louisiana state constitutional provision allowing state agencies to ignore lawful judgments—even (as held by the Fifth Circuit Court of Appeals below) those grounded in the federal constitution.

Doing so violated not only the Just Compensation guarantee but the Supremacy Clause that sets the United States Constitution above "anything" to the contrary in state laws. No state can be allowed to set itself above the United States Constitution. Review of the Fifth Circuit decision that allowed these constitutional violations to occur is necessary.

SUMMARY OF ARGUMENT

1. The Takings Clause's Just Compensation requirement is categorical and unconditional. It's simple and unadorned language provides, "Nor shall private property be taken for public use, without just

compensation." U.S. Const., amend. V. Those words carry the same meaning today that they carried when they were written with quill and ink and affirm the equitable premise that "[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." *Arkansas Game & Fish Com'n v. United States*, 568 U.S. 23, 31 (2012). As this Court has repeatedly said, the Just Compensation provision of the Takings Clause is "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." *Id*. (quoting oft-cited language from *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Cash may not heal all wounds, but it is a substitute that is both constitutionally mandated and acceptable.

2. When our founders drafted the Constitution, they were concerned that the diffusion of power under the defunct Articles of Confederation left the central government with a serious power deficit. Indeed, this Court noted that the Constitution was adopted in order to convert the Confederation from a mere "alliance into an effective Government." *McCulloch v. Maryland*, 17 U.S. 316, 404 (1819). To remedy the acknowledged weakness, they declared directly—in what has become known as the Supremacy Clause—that "This Constitution . . . shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, *any Thing in the Constitution or Laws of any State to the Contrary notwithstanding*." U.S. Const., art. VI, cl. 2; emphasis added. Here, Louisiana has thumbed

its corporate nose at the Supremacy Clause. It has purported to declare in its state constitution that its state government need not pay its debts unless and until it is ready, see La. Const. art. XII, § 10(C), even if those debts are protected by the United States Constitution. That cannot be allowed to stand.

ARGUMENT

I.

THE U.S. CONSTITUTION PROVIDES A FLOOR OF PROTECTION—STATES CANNOT PROVIDE LESS

Our Constitution provides a baseline of minimal protection to all the rights of all citizens, with individual states having the discretion to provide *more, but never less* protection. *Simmons v. South Carolina*, 512 U.S. 154, 174 (1994); *see West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943). Justice Kavanaugh explained it this way recently: "the Constitution sets a floor for the protection of individual rights. The constitutional floor is sturdy and often high, but it is a floor. Other . . . government entities generally possess authority to safeguard individual rights above and beyond the rights secured by the U.S. Constitution." *American Legion v. American Humanist Assn.,* 139 S.Ct. 2067, 2094 (2019) (Kavanaugh, J., concurring).

Thus, if there is a role for state courts and state laws, this is it: providing *more* protection than the U.S. Constitution mandates. As Professor Akhil Amar summarized it, "the federal constitution

stands as a secure political safety net—*a floor below which state law may not fall*."[2]

As this Court plainly expressed it, "The American people have declared their Constitution and the laws made in pursuance thereof to be supreme." *McCulloch*, 17 U.S. at 432.) Beyond that, as the Court classically held in *Marbury v. Madison*, 5 U.S. [1 Cr.] 137, 177 (1803), it is the Court's job to see that other levels of government remain true to the Constitution. That would include protecting the rights of property owners from the depredations of state and local government. Here, that is done by providing protection against state agencies and officials, regardless of what state law might otherwise say. U.S. Const., art. VI, cl. 2. "It is basic to this constitutional command that all conflicting state provisions be without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *Mutual Pharmaceutical Co., Inc. v. Bartlett*, 570 U.S. 472, 480 (2013).

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[2] Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1100 (1988) (emphasis added). See *Bracy v. Gramley*, 520 U.S. 899, 904 (1997) ("the Due Process Clause . . . establishes a constitutional floor"); see also Gideon Kanner, *Just How Just is Just Compensation?* 48 NOTRE DAME L. REV. 786, 784 (1973): "it seems safe to say that the Constitution—or at least the Bill of Rights—was the product of the framers' fear of an overreaching government, and their desire to protect individual citizens from governmental excesses. . . . [T]he purpose of the . . . Bill of Rights [] was to protect the people from the government, not vice versa."

As this Court held more than a century ago, "The Constitution and laws of a State, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void." *Cohens v. Virginia*, 19 U.S. [6 Wheat.] 264, 380-81 (1821). Moreover, "where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme." *McCulloch*, 17 U.S. at 426. See also 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 14-15 (rev. ed. 1932) (noting that "a supremacy of the Constitution and laws of the Union 'without a supremacy in the exposition and execution of them would be as much a mockery as a scabbard put into the hands of a soldier without a sword in it.'" (quoting James Madison).

II.

STATE STATUTES AND REGULATIONS CANNOT TRUMP THE FIFTH AMENDMENT

It should go without saying that a state cannot enact statutes or regulations that conflict with the U.S. Constitution. It should, but it is evidently necessary to say aloud because the Fifth Circuit seemed to have little trouble holding that this Louisiana provision could run roughshod over the private property rights involved here.

The Constitution is clear:

> "This Constitution . . . shall be the supreme law of the land; and the Judges in every State shall be bound thereby, *any Thing in the constitution or Laws of any State to the*

> *Contrary notwithstanding*." U.S. Const., art. VI, cl. 2 (emphasis added).

The founders of this republic understood history—particularly the problems that arose because of the amorphous nature of the national governmental structure. Early on, this Court concluded that the Supremacy Clause was adopted in order to ensure that the central government did not suffer from the weaknesses that undercut the earlier attempt at union under the Articles of Confederation, acknowledging that "the conflicting powers of the General and State Governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled" *McCulloch*, 17 U.S. at 405:

> "The American States, as well as the American people, have believed a close and firm Union to be essential to their liberty and to their happiness. They have been taught by experience that this Union cannot exist without a government for the whole, and they have been taught by the same experience that this government would be a mere shadow, that must disappoint all their hopes, unless invested with large portions of that sovereignty which belongs to independent States. Under the influence of this opinion, and thus instructed by experience, the American people, in the conventions of their respective States,

> adopted the present Constitution." *Cohens*, 19 U.S. at 380-81.[3]

What Louisiana seeks to establish in this case is the primacy of the State's desire to avoid paying a constitutionally mandated judgment. Such a conclusion, as this Court held in *Cohens*, "would prostrate . . . the [federal] government and its laws at the feet of every State in the Union." *Id.* at 385. The Court would not allow it then. Nor should it now. To do so would make the clear words of the Just Compensation Clause of the Fifth Amendment "empty and unmeaning declamation." *McCulloch*, 17 U.S. at 433.

McCulloch was both clear and forceful about how the Supremacy Clause permeated all provisions of the Constitution. It referred to that provision as "a principle which so entirely *pervades* the Constitution, is so *intermixed* with the materials which compose it, so *interwoven* with its web, so *blended* with its texture, as to be incapable of being separated from it without rending it into shreds." *McCulloch*, 17 U.S. at 426 (emphasis added). Indeed, when individual rights are incorporated into the Constitution (through the Bill of Rights), they become part of the Constitution and thus are

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[3] This Court was keenly aware of the deficiencies of the Articles of Confederation, noting pointedly how national directives "were habitually disregarded [as being] a fact of universal notoriety. With the knowledge of this fact, and under its full pressure, a convention was assembled to change the system." *Id.* at 388. A key part of that change was the Supremacy Clause. *Id.* at 381.

"supreme" over any state provision. See *Barnette*, 319 U.S. at 638-39.

The unifying principle is that "the Constitution and the laws made in pursuance thereof are supreme; that they control the Constitution and laws of the respective States, and cannot be controlled by them." *McCulloch*, 17 U.S. at 426.

The 7th Circuit expressed the true rule with simple elegance:

> "The Constitution and the laws of the United States are the supreme law of the land. [Citing *McCulloch*.] Because of the Supremacy Clause of the United States Constitution, Article VI, Clause 2, *states may not enact laws or regulations which are contrary* to federal law." *Youakim v. Miller*, 562 F.2d 483, 494 (7th Cir. 1977) (emphasis added).

The Supremacy Clause stands as a barrier to all state laws that trench on the rights of private property owners. The offending Louisiana law is invalid—at least as applied here.

III.

THE FIFTH CIRCUIT DISREGARDED THE IMPORTANCE OF THE FEDERAL CIVIL RIGHTS ACT (42 U.S.C. § 1983)

Pursuant to the Fourteenth Amendment, Congress acted to provide protection for rights guaranteed by the U.S. Constitution when it enacted 42 U.S.C. § 1983. Petitioners invoked this statutory remedy in federal court when the State of Louisiana

ignored its constitutional obligation to compensate them for property taken for public use. (See App. K-4.)[4] They asked the federal courts to compel Louisiana to abide by the federal constitutional guarantee of prompt payment of just compensation for property acquired by eminent domain. The lower courts refused. That was error.

Section 1983 was intended to provide "a uniquely federal remedy" *Mitchum v. Foster*, 407 U.S. 225, 239 (1972) with "broad and sweeping protection" *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543 (1972) (quoting with approval) so that individuals in a wide variety of factual situations are able to obtain a federal remedy when their federally protected rights are abridged *Burnett v. Grattan*, 468 U.S. 42, 50, 55 (1984). The Civil Rights Act of 1871, after all, guarantees "a federal forum for claims of unconstitutional treatment at the hands of state officials," *Knick v. Township of Scott*, 139 S.Ct. 2162, 2167 (2019) (quoting with approval). "[T]he property owner has suffered a violation of his Fifth Amendment rights when the government takes his property without just compensation, and therefore may bring his claim in federal court under § 1983 at that time." *Id*. at 2177.

The point of involving the federal courts was not lost on this Court. In the Court's stirring words:

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[4] In similar fashion, this Court's recent decision in *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021) was brought under section 1983 to preclude the application of a state regulation that violated the Fifth Amendment.

> "We yet like to believe that *wherever the Federal courts sit*, human rights under the Federal Constitution are *always* a proper subject for adjudication, and that *we have not the right to decline* the exercise of that jurisdiction simply because the rights asserted *may be adjudicated in some other forum*." *McNeese v Board of Education*, 373 U.S. 668, 674, n.6 (1963) (emphasis added; quoting with approval).

But "decline" is precisely what the lower federal courts did here when they were beseeched to compel Louisiana to comply with a clear guarantee of the U.S. Constitution.

The theory of protecting federal rights in federal courts dates to the founding of the Republic (i.e., it predates adoption of either the 14th Amendment or Section 1983).

Even while upholding the breadth of Eleventh Amendment immunity, the Court acknowledged that the Fourteenth Amendment authorized legislation that would allow suits against states (i.e., section 1983) regardless of claims of sovereign immunity:

> "We have held also that in adopting the Fourteenth Amendment, the people required the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution, so that Congress may authorize private suits

> against nonconsenting States pursuant to its § 5 enforcement power. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). By imposing explicit limits on the powers of the States and granting Congress the power to enforce them, the Amendment 'fundamentally altered the balance of state and federal power struck by the Constitution.' *Seminole Tribe*, 517 U.S., at 59. When Congress enacts appropriate legislation to enforce this Amendment, *see City of Boerne v. Flores*, 521 U.S. 507 (1997), federal interests are paramount, and Congress may assert an authority over the States which would be otherwise unauthorized by the Constitution. *Fitzpatrick*, *supra*, at 456." *Alden v. Maine*, 527 U.S. 706, 756 (1999).

When the Fifth Circuit refused to enforce the plain words of the Just Compensation Clause through the Supremacy Clause, it violated the plain meaning and intent of section 1983.

IV.

WHEN THE GOVERNMENT'S INTERESTS ARE FINANCIAL, ITS ACTIONS MUST BE VIEWED WITH SKEPTICISM

Underlying the Court's conclusion that Constitutional decisions necessarily impinge on the "freedom and flexibility" of government agencies *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 (1987) was undoubtedly the Court's repeated recognition that, when the governmental interest is financial (as in

delaying indefinitely—perhaps forever—the payment of compensation constitutionally due the Petitioners), its actions must be viewed warily. *See United States v. Winstar Corp.*, 518 U.S. 839, 896 (1996) ("statutes tainted by a governmental object of self-relief . . . in which the Government seeks to shift the costs of meeting its legitimate public responsibilities to private parties"); *United States v. Good Real Property*, 510 U.S. 43, 55-56 (1993) (admonishing that careful examination "is of particular importance . . . where the Government has a direct pecuniary interest in the outcome of the proceeding"); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 (1977) ("complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money").

To allow the State to determine when—and even whether—to pay a condemnation judgment that was designed to substitute money for the property taken leaves the property owner (now bereft of both the property and its compensatory substitute) "to rely exclusively upon the generosity of the judgment debtor," as the Fifth Circuit expressed it.[5]

Bluntly, "[t]he political ethics reflected in the Fifth Amendment reject confiscation as a measure of justice." *United States v. Cors*, 337 U.S. 325, 332 (1949). But by delaying payment indefinitely,

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[5] Shades of poor Blanche DuBois and her reliance on the kindness of strangers in A Streetcar Named Desire.

"confiscation" is precisely what the State effectively accomplished here.

In *Nollan v. South Carolina Coastal Council*, 483 U.S. 825 (1987) the Court warned government regulators not to attempt to evade the Constitution's strictures through inventive wordplay. *Id.* at 841. Particular care was said to be needed because "there is heightened risk that the purpose is avoidance of the compensation requirement . . . ." *Id.* at 841.

Compensation, of course, permeates this case. It is the entire reason why the Petitioners sought the assistance of the Fifth Amendment's Just Compensation Clause.

CONCLUSION

It cannot be the law that a state can enact its own constitutional provision that allows it to evade a guarantee established in the federal constitution. Yet that is what the Fifth Circuit allowed Louisiana to do. Certiorari should be granted and the result overturned.

Respectfully Submitted,

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