

No. 22-52

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In The  
**Supreme Court of the United States**

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ARIYAN, INC., DBA DISCOUNT CORNER, et al.,

*Petitioners,*

v.

SEWERAGE & WATER BOARD  
OF NEW ORLEANS, et al.,

*Respondents.*

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**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Fifth Circuit**

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**BRIEF OF *AMICUS CURIAE*  
OWNERS' COUNSEL OF AMERICA  
IN SUPPORT OF PETITIONERS**

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**QUESTION PRESENTED**

A fundamental element of just compensation is “certain payment of the compensation without unreasonable delay.” *Bragg v. Weaver*, 251 U.S. 57, 62 (1919). In 2013, the Sewerage & Water Board of New Orleans inversely condemned the properties of 70 home and business owners for a flood control project. The property owners obtained state court judgments starting in 2018. Louisiana law prohibits enforcement of judgments against state and local governments – even just compensation judgments – which go unpaid unless government voluntarily appropriates the funds. The Sewerage Board has refused to do so, in some cases for years. The question presented is:

May the government, consistent with the Fifth and Fourteenth Amendments’ self-executing command of Just Compensation for takings of private property, indefinitely delay paying just compensation?

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**INTEREST OF *AMICUS CURIAE***<sup>1</sup>

Owners' Counsel of America (OCA) is an invitation-only network of the nation's most experienced eminent domain and property rights attorneys. Its members join together to advance, preserve, and defend the rights of private property owners and to further the cause of liberty, because the right to own and use property is "the guardian of every other right." *See* James W. Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (3d ed. 2008). OCA is a non-profit organization sustained solely by its members. Only one member is admitted from each state. OCA members have been counsel for parties or *amici* in most of this Court's landmark property and takings cases over the past fifty years, and OCA members have authored or edited treatises, books, and articles on property law, takings, and just compensation, including editing the leading eminent domain treatise *Nichols on Eminent Domain*.

Prompt payment of just compensation is a fundamental right protected by the Fifth and Fourteenth Amendments, which state law may not impede or restrict. OCA has a unique viewpoint and we believe this brief will be helpful to the Court.



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<sup>1</sup> Rule 37 disclosure: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel and no person, or entity, other than *amicus* funded its preparation and submission.

## SUMMARY OF ARGUMENT

This case presents an opportunity for the Court to enforce the fundamental principle that just compensation must be paid within a reasonable time of a taking. The Just Compensation Clause requires more than an unenforceable suggestion to pay. This Court time and time again has affirmed the self-executing nature of just compensation. And yet, as this case demonstrates, property owners remain subject to the whims of condemnors when it comes time to pay that compensation. Louisiana law cannot usurp the Fifth and Fourteenth Amendments' right to timely compensation and federal courts are empowered to enforce that civil right. A mere promise to pay without some federal judicial enforcement tool in back of it leaves landowners vulnerable to municipal bankruptcy, redevelopment agency and utility company insolvency, or as here, the bare politics in the legislature.

This brief makes three points:

1. The lower courts are split on whether the Just Compensation Clause is self-executing, and whether anything can impede the requirement of full and prompt payment of compensation.
2. Property rights, including the right to timely compensation, are federal civil rights and federal courts have the power to enforce them to remedy any constitutional violation.
3. Timely payment of compensation is a well-established principle required by the Just Compensation Clause.

Absent enforceability of the requirement of timely payment, the Just Compensation Clause is rendered hollow.

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## ARGUMENT

### I. THIS CASE PROVIDES A VEHICLE TO ADDRESS THE CIRCUIT SPLIT ON THE INVIOABILITY OF JUST COMPENSATION

As the Petition highlights, this Court has not addressed a key issue of whether anything can prevent the payment of full compensation, or otherwise inhibit the mandate of the Just Compensation Clause. On this issue, the Fifth Circuit here joined the Ninth Circuit, which in *Cobb v. City of Stockton*, 909 F.3d 1256 (9th Cir. 2018), held that just compensation claims, can receive less, or none, of their just compensation by operation of bankruptcy laws. Very recently, the First Circuit, relying on the self-executing nature of just compensation, held the opposite and refused to allow bankruptcy law to impede full payment of just compensation. *Fin. Oversight & Mgmt. Bd v. Cooperativa de Ahorro*, No. 22-1119, 2022 U.S. App. LEXIS 19736, at \*5 (1st Cir. July 18, 2022). A ruling from this Court resolving the split and requiring reasonably prompt payment of just compensation would dramatically lower the risk of condemnors violating the Fifth Amendment by nonpayment of just compensation. Granting the Petition also will allow the Court to emphasize the payment required by the Just Compensation Clause and

resolve the real risk of delayed payment – or even non-payment – which faces owners whose property has already been taken.

*Fin. Oversight & Mgmt. Bd* concerned the bankruptcy of the Commonwealth of Puerto Rico. The debtor proposed to treat Puerto Rico’s liability for just compensation claims (for condemnation and inverse condemnation) as unsecured debt, thus subject to reduced payment. *Id.* at \*5. The debtor cited this Court’s decision in *Knick v. Township of Scott*, 139 S. Ct. 2162, 2171 (2019) arguing that the decision meant that the right to compensation was “untethered” from the taking which made it like any other unsecured creditor claim. *Id.* at \*18. The First Circuit affirmed that bankruptcy law could not impede the full payment of just compensation for property already taken:

Recognizing that the “right to full compensation arises at the time of the taking,” does not imply that the subsequent denial of that compensation does not also raise Fifth Amendment concerns. We decline to read *Knick* as changing the Fifth Amendment right to receive just compensation into a mere monetary obligation that may be dispensed with by statute.

*Id.* at \*\*18-19 (internal citation omitted). The court continued:

Just compensation then does not serve only as a remedy for a constitutional wrong; it serves also as a structural limitation on the government’s very authority to take private property

for public use. As the Court has stated, “where the government’s activities have already worked a taking . . . , no subsequent action by the government can relieve it of the duty to provide compensation.” Simply put, the Fifth Amendment contemplates a “*constitutional obligation to pay just compensation.*”

*Id.* at \*\*22-23 (emphasis added, internal citation omitted).

In contrast, the Ninth Circuit in *Cobb*, held that a government’s obligation to pay just compensation for takings is like any other unsecured debt. In that case, the City of Stockton filed an eminent domain action and used its powers of “quick take” to obtain possession of land to build a road. 909 F.3d at 1260. As was his right, the landowner withdrew the deposited compensation pending future adjudication of his actual just compensation award. *Id.* at 1261. Ultimately, the eminent domain action was dismissed for failure to proceed to trial and title to the property did not pass to the City of Stockton. *Id.* The landowner brought an inverse condemnation suit seeking just compensation for the taking since the road involved in the condemnation action was in fact built. *Id.* Before Cobb’s claim went to judgment in state court, Stockton petitioned for protections under the Bankruptcy Code. *Id.* at 1262. The confirmed plan treated the landowner’s claim as general unsecured debt and allowed the just compensation claim to be adjusted in the plan. *Id.* On appeal, the Ninth Circuit held that a landowner’s inverse condemnation claim following a failed condemnation lawsuit,

was an “unsecured monetary debt claim” capable of adjustment in a municipal bankruptcy reorganization, *id.* at 1267, and treated the landowner as if he was any other creditor subject to equitable mootness. *Id.* at 1263.

Cobb argued that the Takings Clause exempted his unsecured claim from reorganization. *Id.* at 1266. The Ninth Circuit disagreed, holding:

The Takings Clause is only implicated in bankruptcy if the creditor has actual property rights. In other words, the creditor must have an *in rem* right under nonbankruptcy law to look to specific items of property in order for the debt to be paid ahead of unsecured creditors. If the purported property interest is, in reality, just a contractual or statutory right for monetary relief, then the debt can be adjusted in bankruptcy.

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As the bankruptcy court pointed out, if the inverse condemnation claim had been reduced to a judgment, it would be subject to adjustment in bankruptcy, therefore it is not logical to say that an unliquidated claim for greater compensation cannot be adjusted in bankruptcy.

*Id.* at 1266-67.

## **II. PROMPT PAYMENT OF JUST COMPENSATION IS A FEDERAL CIVIL RIGHT, ENFORCEABLE IN FEDERAL COURT**

The Fifth Amendment's Just Compensation Clause's bedrock protection is 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." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Actual payment of just compensation is included in the Fifth Amendment's protection. *See, e.g., Sweet v. Rechel*, 159 U.S. 380, 401 (1895) (means for securing payment must be such that owner will not be put to risk of unreasonable delay); *Bragg v. Weaver*, 251 U.S. 57, 62 (1919) (compensation due without unreasonable delay); *Hays v. Port of Seattle*, 251 U.S. 233, 238 (1920) (Constitution requires payment without unreasonable delay); *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 677 (1923) (just compensation mandate fulfilled when public is pledged to reasonably prompt payment and there is provision for enforcing that pledge).

### **A. Federal Courts are Empowered to Enforce Federal Constitutional Rights**

As the vindicator of federal civil rights, federal courts should not be closed to claims that a local government unreasonably delayed just compensation after a taking. As this Court has said, property rights should enjoy the same privileged constitutional status in federal courts as the other rights enshrined in the



Bill of Rights. *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994) (“We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.”).

Here there is no question of whether a taking has occurred, nor any dispute as to the amount of compensation. Accordingly, the only issue that was brought to federal court was whether the Sewerage Board had unreasonably delayed payment of just compensation. And the Fifth Circuit held that federal courts have no power to hear, much less remedy, that claim. Yet, in other civil rights cases, the Fifth Circuit has not been cowed by government’s delays, but approved use of any “weapon” at a court’s disposal to enforce civil rights judgments: “[t]he defendants have made it abundantly clear that they intend to resist the judgment until the bitter end. Given such obstinance, we think it beyond peradventure that the remedy fits the wrong.” *Gates v. Collier*, 616 F.2d 1268, 1271-72 (5th Cir. 1980). “If statutory authority is needed for the court’s actions, it may be found in Fed.R.Civ.P. 70.” *Id.*<sup>2</sup>

As the Fifth Circuit decisions following *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) showed, federal courts

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<sup>2</sup> See generally D. Bruce La Pierre, Enforcement of Judgments Against States and Local Governments: Judicial Control over the Power to Tax, 61 Geo. Wash. L. Rev. 301 (1993).

are able to redress constitutional violations committed by state and local institutions.<sup>3</sup>

In a similar vein, this Court recently remedied three decades of unfair and doctrinally unsupportable rulings that kept landowners from asserting their federal constitutional property rights in federal court. In *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), this Court overruled the requirement – first adopted in *Williamson County v. Hamilton Bank*, 473 U.S. 172 (1985) – that property owners seek and be denied compensation in state courts before having a ripe federal claim. *Knick* let these claims come back to federal court and emphasized what was lost by the Fifth Circuit here, that the right to compensation arises at the taking, and “no subsequent action by the government can relieve it of the duty to provide compensation.” *Knick*, 139 S. Ct. at 2171. State law simply cannot relieve or unreasonably postpone the duty to pay compensation, and federal courts should have the power to hear claims of unpaid or delayed payments and remedy those violations of the Fifth Amendment.

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<sup>3</sup> See Frank T. Read, *The Bloodless Revolution: The Role of the Fifth Circuit in the Integration of the Deep South*, 32 *Mercer L. Rev.* 1149 (1981), available at [https://digitalcommons.law.mercer.edu/cgi/viewcontent.cgi?article=2239&context=jour\\_mlr](https://digitalcommons.law.mercer.edu/cgi/viewcontent.cgi?article=2239&context=jour_mlr); see also *Remembering Judge Elbert P. Tuttle*, available at <https://www.ca11.uscourts.gov/remembering-judge-elbert-p-tuttle>.

### **B. Self-Executing Character of the Fifth Amendment Requires Prompt Payment**

The Petition should be granted to affirmatively state that the Just Compensation Clause has primacy over any conflicting state law. Or, to put it more simply, that just compensation judgments must be paid. Here, with a blessing from the Fifth Circuit, a Louisiana agency flouted lawful, binding, and valid judgments directing just compensation payments to landowners found to have suffered a taking. Ignoring the payment mandate of the Fifth Amendment, the agency subjected the prevailing landowners to a murky and uncertain prospect of payment from the legislative process. Governmental appropriations, owned by the most political of the three branches of government, is a discretionary governmental process. But just compensation is mandatory, not discretionary. Amend. V (“nor shall private property be taken for public use, without just compensation”). As such, the Fifth Amendment provides no guarantee of just compensation if a legislature cannot be compelled to satisfy the judgements awarding such just compensation.

This Court has termed the compensation protections of the Fifth Amendment as “self-executing” repeatedly. *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2171 (2019) (“Because of ‘the self-executing character’ of the Takings Clause ‘with respect to compensation,’ a property owner has a constitutional claim for just compensation at the time of the taking”); *First English Evangelical Lutheran Church v. Cty. of L.A.*, 482 U.S. 304, 315 (1987) (“We have recognized that a landowner

is entitled to bring an action in inverse condemnation as a result of the self-executing character of the constitutional provision with respect to compensation. . . .”) (internal quotation marks omitted); *United States v. Clarke*, 445 U.S. 253, 257 (1980) (same); *Kirby Forest Indus. v. United States*, 467 U.S. 1, 5 n.6 (1984) (same); *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 654 (1981) (Brennan, J., dissenting) (“This Court has consistently recognized that the just compensation requirement in the Fifth Amendment is not precatory: once there is a ‘taking,’ compensation must be awarded.”). Simply put, it is the uncompensated aspect of a taking, whether by a regulation going “too far” or interfering with investment-backed expectations or by a dilatory legislature not paying judgments, which violates the Fifth and Fourteenth Amendments.<sup>4</sup>

Claims by a condemnor, post-taking, that it needs additional taxes or assessments to pay just compensation judgments should fall on deaf ears. As property rights professor Gideon Kanner wrote:

[A]s a matter of both principle and law, it is difficult to accept the notion that the condition of the public purse delimits a specific constitutional provision explicitly set out in the Bill of Rights. Are we to take it that an impecunious municipality can get a free pass to violate its constitutional obligations and acquire private property for less than the law requires?

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<sup>4</sup> *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2074 (2021) (the growers’ complaint states a claim for an *uncompensated* taking in violation of the Fifth and Fourteenth Amendments).

Wouldn't that, by parity of reasoning, also imply that a wealthy community enjoying a fiscal surplus should have to pay for all of condemnees' demonstrable losses including those that are ordinarily non-compensable under current law, plus perhaps a solatium payment, as has been done at times in other countries? It seems to me that the definitive answer to arguments of municipal poverty was delivered by the U.S. Supreme Court as a matter of constitutional principle, when it observed, in *Watson v. City of Memphis*, that "vindication of conceded constitutional rights cannot be made dependent on any theory that it is less expensive to deny than to afford them."<sup>5</sup>

### C. Fifth Circuit Was Wrong to Rely on *Folsom*

The Fifth Circuit relied almost exclusively on a misreading of this Court's opinion in *Folsom v. Mayor & Adm'rs*, 109 U.S. 285 (1883). This Court should grant the Petition to distinguish *Folsom* or reject its continued viability. In that case, the Louisiana supreme court overturned a writ of mandamus directing the City of New Orleans to impose taxes to pay for tort judgments arising from property damage suffered in the New Orleans riots of 1873. *State ex rel. Folsom Bros. v. Mayor & Adm'rs of New Orleans*, 32 La. Ann. 709, 718 (1880). The court concluded that complying with the writ

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<sup>5</sup> Gideon Kanner, Making Laws and Sausages: A Quarter-Century Retrospective on *Penn Central Transportation Co. v. City of New York*, 13 Wm. and Mary Bill of Rts. J. 679, 761 (2005).

would violate the 1879 Louisiana constitution, which established a limit on the taxes that could be assessed. *Id.* at 715.<sup>6</sup>

This Court affirmed, holding that municipalities were immune from execution under the Louisiana constitution's maximum tax provisions. *Folsom v. Mayor & Adm'rs*, 109 U.S. 285, 290 (1883). The majority concluded the right to reimbursement for riot-caused damages to be provided, and taken away, at the pleasure of the legislature. *Id.* at 287. This Court ultimately cabined its holding to the nature of the claim before it, noting that an "ordinary judgment of damages for a tort" was not before it. *Id.* at 290. *Folsom* did not involve judgments arising from just compensation, contract, or even tort. Justice Bradley concurred. He concluded that a tort judgment, unlike the judgments in *Folsom*, were property and to abrogate the remedy for enforcing the judgment, would "deprive the owner

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<sup>6</sup> In 1868, with a convention inclusive of African American delegates, Louisiana adopted a constitution which included a provision guaranteeing all schoolchildren admittance to the public schools "without distinction of race, color, or previous condition." La. Const. of 1868, art. 135. It also provided, "There shall be no separate schools or institutions of learning established exclusively for any race by the State of Louisiana." Finally, it provided, "nor vested rights divested unless for purposes of public utility and for adequate compensation made." La. Const. of 1868, art. 110.

After Reconstruction ended. Louisiana convened a constitutional convention and in 1879, adopted a new constitution. La. Const. of 1879. It removed the protections of African American schoolchildren and included a cap on the property taxes that could be assessed by municipalities or parishes. La. Const. of 1879, art. 209.

of his property within the meaning of the Fourteenth Amendment.” *Id.* at 291 (Bradley, J., concurring). But he also agreed that the cause of action was not contract or tort, but rather on the grounds that remedies for mob violence was “purely matters of legislative policy” which could be repealed at any time. *Id.* at 291 (Bradley, J., concurring).

Justice Harlan dissented, concluding that the judgments were property whether founded in contract or otherwise. *Id.* at 293-94 (Harlan, J., dissenting). Withholding of payment constituted destruction of the “value” of the property in violation of the Constitution. *Id.* at 294 (Harlan, J., dissenting) (A judgment’s “value as property depends in every legal sense upon the remedies which the law gives to enforce its collection. To withhold from a citizen who has a judgment for money the judicial means of enforcing its collection . . . is to destroy the value of the judgment as property.”).

*Folsom* cannot be read so broadly as to permit just compensation judgment holders to be deprived of timely compensation. That case involved a judgment for property damages arising from a riot. The decision did not pass on the application of the 1879 constitution’s Art. 209 on just compensation judgments. Indeed, the same 1879 constitution required that just compensation precede takings. La. Const. of 1879, art. 156 (“Private property shall not be taken nor damages for public purposes without just and adequate compensation being *first* paid.”) (emphasis added). There is no way to harmonize a provision saying that payment be made *first* with the Fifth Circuit’s decision in *Ariyan, Inc. v. Sewerage & Water Board of New Orleans*, 29

F.4th 226 (5th Cir. 2022). *See Folsom*, 109 U.S. at 293 (Harlan, J., dissenting) (“[T]he State Constitution of 1879 cannot be applied to these judgments without bringing it into conflict with that provision of the Constitution, which declares that no State shall deprive any person of property without due process of law. That these judgments are property within the meaning of the Constitution cannot, it seems to me, be doubted.”). Further, unlike here, the Louisiana supreme court never placed Art. 209 as superior to the requirements of the U.S. Constitution.<sup>7</sup> If Art. 209 is causing violations of the Just Compensation Clause, then Louisiana constitutional law required that Art. 209 yield to the Fifth Amendment.

### III. THE JUST COMPENSATION CLAUSE REQUIRES TIMELY PAYMENT

#### A. Possession Requires Payment or Deposit

One of the critical protections landowners have in eminent domain actions are statutes that protect landowners when they lose possession of their lands,

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<sup>7</sup> On the interplay between the 1879 constitution’s Art. 209 and the U.S. Constitution, the Louisiana supreme court stated:

This [taxing power limitation is binding on all levels of State government], and must be sacredly observed and enforced, *save and except in such cases only where it is found to contravene the paramount law of the land and the restrictions imposed by that law upon the power of the States.*

*Witkowski v. Bradley*, 35 La. Ann. 904, 905 (La. 1883) (emphasis added).



whether pre-judgment, i.e., quick take, or after payment of just compensation.

In *Kirby Forest Industries v. United States*, 467 U.S. 1 (1984), this Court outlined the principle that title and possession of property flow with the tender of payment to the landowner. *Id.* at 4. Condemnors who choose to not pay the award can move for dismissal. *Id.* The landowner either has payment or it has its land. For example, if the Federal Government seeks to “quick take” property, the head of the government agency has to make an “irrevocable commitment” to pay the ultimate award. 40 U.S.C. § 3115. Many states, recognizing the constitutional right to prompt payment of just compensation for takings, have enacted similar legislation. See Alaska Stat. § 09.55.400 (deposit); Cal. Code Civ. Proc. § 1255.010 (deposit before judgment); N.J. Stat. § 20:3-18 (deposit). Provisions like these make the government put up collateral for the proposed real estate transaction to secure landowners from the risk of governmental or agency intransigence or insolvency, while simultaneously protecting their right to timely just compensation.

Statutes such as these shift burden of payment for eminent domain takings from the individual landowner to the public as a whole, so that no one individual landowner has to bear a disproportionate share of the cost of citizenship. Just as state governments nationwide have enacted statutory schemes to ensure payment of just compensation in eminent domain takings, similar protections are necessary to ensure the constitutionally protected right to just compensation is

afforded to landowners who have had their land taken by inverse condemnation.

### **B. Failure to Pay Compensation Triggers Repossession**

Another landowner protection found in eminent domain codes is the automatic abandonment or termination of eminent domain proceedings for failure to pay just compensation. The timeframe for such action varies ranging from 20 days to several years. 2011 Fla. Statutes § 73.11; Haw. Rev. Stat. § 101-25. These laws are an implicit recognition of the need for finality and certainty for landowners.

### **C. Prompt Payment in Inverse Condemnation Cases Protects Landowners from Condemnor Default**

Prompt payment of just compensation is required to avoid the risk that a landowner does not receive that which was due to him. Several constitutional provisions compel payment including the Just Compensation Clause and the Due Process Clause.<sup>8</sup>

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<sup>8</sup> *See, e.g.*, 1A Nichols on Eminent Domain § 4.8 (2022) (“It may be parenthetically stated at this point that determination of the question of compensation is not required by ‘due process’ in advance of the acquisition, provided that adequate provision is made for certain payment without unreasonable delay. ‘Due process’ is satisfied, under such circumstances, whenever adequate provision is made for the ascertainment of compensation pursuant to regular processes of law and for its payment, when ascertained, in due course of procedure.”).

Many government agencies, quasi-government agencies, redevelopment agencies, and pipeline and public utility companies are granted the ability take or damage land, but may not have the financial resources to pay for the condemnation or regulatory activities. As such, federal courts must have the ability to enforce just compensation judgments to avoid making condemnees the “unwilling financiers of public acquisitions.” *Redevelopment Agency v. Gilmore*, 700 P.2d 794, 806 (Cal. 1985). After all, this Court recognizes that landowners are entitled to have the full equivalent of the value of such use at the time of the taking paid *contemporaneously* with the taking. *Phelps v. United States*, 274 U.S. 341, 344 (1927). Requiring prompt payment of just compensation removes the risk of nonpayment and provides assurances that a landowner will not be deprived of both her property AND compensation for years on end.

Consider the case of *Community Redevelopment Agency v. Force Electronics*, 55 Cal. App. 4th 622 (Ct. App. 1997). In that case, a California redevelopment agency condemned, took possession of, and demolished the improvements of a landowner. Then, the agency was unable to pay the full just compensation award. California law provided that if an award was unpaid after thirty days, a landowner could repossess the property or could opt to be paid by installment plan. *Id.* at 626. The redevelopment agency pleaded financial hardship and moved to pay the judgment over ten years with installments. *Id.* at 627. The trial court granted the agency’s motion to pay in installments. *Id.*

The court of appeals concluded that the purpose of the statute requiring payment of a final condemnation judgment within 30 days is “to make the government meet its constitutional obligation to pay just compensation when it has condemned private property. If the government does not have the money for acquiring the property, its option is to abandon the condemnation.” *Id.* at 632. Further, “[i]f the government refuses to abandon, the property owner may effectively force an implied abandonment by using the procedure spelled out in [the California statute].” *Id.* Thus, the court held given that the statute provides for the condemnee’s election to regain possession of the property, a statute allowing the government to satisfy a just compensation judgment in installment payments would be unconstitutional. *Id.* (“It is only the fact that the condemnee has the choice to proceed [with installment payments] or to repossess the property that save the constitutionality of Government Code section 970.6 procedure as applied to an eminent domain judgment.”) Neither choice is satisfying. Repossessing property after public construction projects is costly, accepting installment payments (even with interest) rarely aligns with landowner’s carrying costs.

Prompt payment should be constitutionally mandatory given that most land has carrying costs like mortgage interest, property taxes, and insurance and no landowner will receive the “full and perfect equivalent” of the land lost to governmental acquisition if she receives no payment to address those carrying costs.

#### **D. Prompt Payment Requirement is a Modest Tool to Obtain Compliance**

This Court's adoption of a mandatory payment deadline with a tool for enforcement would obviate the need to recognize more drastic remedies or judgment execution. Some states have adopted the rule that condemnation judgments be paid in a reasonable time. *See Des Moines v. Des Moines War Co.*, 218 F. 939, 942 (S.D. Iowa 1914); *Chicago v. Barbican*, 80 Ill. 482, 486 (Ill. 1875) (recognizing that equity would stay any attempt to possess the property without payment); *Brown v. Kennebec Water Dist.*, 79 A. 907, 909 (Me. 1911) (payment within reasonable time or landowner may recover damages). Some states have adopted statutory payment requirements. *See Hamacher v. People*, 29 Cal. Rptr. 513, 515 (1963) (thirty days to pay by statute); *Florida C. & P.R. Co. v. Bear*, 31 So. 287, 288 (Fla. 1901) (ten days by statute);<sup>9</sup> *Big Lost River Irrigation Co. v. Davidson*, 121 P. 88, 94 (Idaho 1912) ("Under the statute, if the value of the property is not paid within thirty days, the defendant is given the right to enforce its payment by execution as in civil cases, and if it cannot be collected in that manner, then the court is authorized and empowered to annul the proceedings and restore the defendant to possession."). To be sure, some states have not adopted a payment deadline. *See Jones v. Hammer*, 255 P. 955, 959 (Wa. 1927) (18 month delay between judgment and payment does not void the judgment absent some statutory or constitutional

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<sup>9</sup> This was changed to twenty days. 2011 Fla. Statutes § 73.11.

specified time); *Cnty. Board of School Trustees v. Boram*, 186 N.E.2d 275, 279 (Ill. 1962) (failure to pay, even without a court deadline, constitutes abandonment).

In addition, some states preclude any enforcement of judgments outright. *Higginbotham Ex'x v. Commonwealth*, 66 Va. 627, 641 (Va. 1974) (courts decide whether judgment should be rendered, not paid); *Heath v. City of Alexandria*, 52 So. 3d 86, 87-88 (La. Ct. App. 2010) (constitution does not provide judiciary with the ability to execute judgments); *State ex rel. Attorney Gen. v. Young*, 9 N.W. 737, 742-43 (Minn. 1881); Christina Bohannon, Beyond Abrogation of Sovereign Immunity: State Waivers, Private Contracts, and Federal Incentives, 77 N.Y.U.L. Rev. 273, 299-300 (2002). Some draw a distinction between discretionary appropriations and ministerial ones, permitting enforcement of ministerial obligations. *Jazz Casino Co., LLC v. Bridges*, 223 So. 3d 488, 495 (La. 2017) (refunds of overpaid taxes are ministerial and agency can be ordered to pay). California permits court orders requiring state officials to repurpose appropriated funds. *Mandel v. Myers*, 29 Cal. 3d 531, 540 (Cal. 1981). If the legislature tried to condition an appropriation to circumvent that, the courts have the power to strike down the offending condition. *Id.* at 546.



**CONCLUSION**

This Court should grant the Petition and review the judgment of the United States Court of Appeals for the Fifth Circuit.

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