No. _____

In the Supreme Court of the United States

RICHARD DEVILLIER, ET AL.,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *First English Evangelical Lutheran Church* v. *County of Los Angeles*, this Court recognized that the Fifth Amendment's Takings Clause was "self-executing" and that "[s]tatutory recognition was not necessary" for claims for just compensation because they "are grounded in the Constitution itself[.]" 482 U.S. 304, 315 (1987). Since *First English*, several state courts of last resort have held that the self-executing nature of the Takings Clause requires them to entertain claims directly under the Clause without the need for statutory authorization. Two federal Circuits, the Fifth and the Ninth, disagree and have held that claims for just compensation are only available if they are legislatively authorized. The question presented is:

May a person whose property is taken without compensation seek redress under the self-executing Takings Clause even if the legislature has not affirmatively provided them with a cause of action?

PARTIES TO THE PROCEEDINGS BELOW

This case arises out of four separate state-court actions that were removed to the Southern District of Texas and consolidated. The plaintiffs in the consolidated case were: Richard Devillier; Wendy Devillier; Steven Devillier; Rhonda Devillier; David McBride; Angela McBride; Bert Hargraves; Barney Threadgill; Crystal Threadgill; Barbara Devillier; David Ray; Gary Herman; Rhonda Glanzer; Chris Barrow; Darla Barrow; Dennis Dugat; Laurence Barron; Deanette Lemon; Jill White; Beverly Kiker; Yale Devillier (individually and as personal representative of the Estate of Kyle H. Devillier); Charles Monroe; Jacob Fregia; Angela Fregia; Jerry Devillier; Mary Devillier; Zalphia Hankamer; Larry Bollich; Susan Bollich; Sheila Marino; William Meissner; Taylor McBride; Brian Abshier; Kathleen Abshier; Jina Daigle; Coulon Devillier; Halley Ray, Sr.; Halley Ray, Jr.; Sheila Moor; John Rhame; Alex Hargraves; Tammy Hargraves; William Devillier; Kyle Wagstaff; Allison Wagstaff; Kevin Sonnier; Eugenia Molthen; Bradley Moon; John Roberts; Marilyn Roberts; Savanna Sanders; Robert Brown; Tracey Brown; Josh Baker; Lee Blue; Russell Brown; Margaret Carroll; Kevin Cormier; James Davis; Melissa Davis; Maria Gallegos; Christopher Ferguson; Angela Hughes; Robert Laird; Harold Ledoux; Kacey Sandefur; Tifani Staner; Stephen Stelly; Randall Stout; Patti Stout; Chris Day; Calvin Hill; Michael Weisse; Julie Weisse; Eleanor Leonard; Ivy Hamm; Claude Roberts; Bryan Olson; Caren Nueman; Floyd Cline, Jr.; Kenneth Coleman; Haylea Barrow; Carol Roberts; Jenica Vidrine; Charles Collier; Sharon Crissey; James Brad Crone; Heather Coggin; James Coggin; Clovis Melancon; Leroy

Speights; Crossroads Asphalt Preservation, Inc.; Fesi Energy, LLC; Brian Fischer; Curtis Laird; Devon Boudreaux; Richard Belsey; Sharon Clubb; Janet Dancer; Porter May; Cindy Perez; Cecile Jimenez; Scott Hamric; Bruce Hinds; Tina Hinds; William Olivier; Esteban Lopez; Billy Stanley; Candace Abshier; Sean Fillyaw; Autumn Minton; Brandon Sanders; Rodney Badon; Charlie Carter; Myra Wellons; Jerry Stepan; Bryan Mills; Cat 5 Resources LLC; Joan Jeffrey;[1] Randy Brazil; Monica Brazil; Herbert Dillard; Kerry Dillard; Southeast Texas Olive, LLC; and Gulf Coast Olive Investments, LLC. These plaintiffs were the appellees in the Fifth Circuit below, and all of them join in this Petition. The sole defendant in the district court was the State of Texas, which was the appellant in the Fifth Circuit below.

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[1] In an apparent scrivener's error, the operative complaint below identifies one of the property owners solely as "Jeffrey." App. 6a. Ms. Jeffrey is the real party in interest.

STATEMENT OF RELATED CASES

Devillier v. *State of Texas* (Texas D. Ct. Chambers County), No. 20DCV0300 (removed to federal court June 29, 2020).

Sonnier v. *State of Texas* (Texas D. Ct. Chambers County), No. 20DCV0792 (removed to federal court December 16, 2020).

Se. Texas Olive, LLC v. *State of Texas* (Texas D. Ct. Liberty County), No. 21DC-CV-00071 (removed to federal court April 7, 2021).

Boudreaux v. *State of Texas* (Texas D. Ct. Jefferson County), No. E-207211 (removed to federal court April 7, 2021).

Devillier v. *State of Texas* (S.D. Tex.), No. 3:20-cv-00223 (still pending).

Sonnier v. *State of Texas* (S.D. Tex.), No. 3:20-cv-00379 (consolidated with case No. 20-cv-00223 May 17, 2021).

Se. Texas Olive, LLC v. *State of Texas* (S.D. Tex.), No. 3:21-cv-00104 (consolidated with case No. 20-cv-00223 May 17, 2021).

Boudreaux v. *State of Texas* (S.D. Tex.), No. 4:21-cv-01521 (consolidated with case No. 20-cv-00223 May 17, 2021).

Devillier v. *State of Texas* (5th Cir.), No. 21-40750 (judgment entered November 23, 2022).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals, App. 1a, is reported at 53 F.4th 904. The report and recommendation of the magistrate judge, App. 4a, is unreported. The district court's order adopting the magistrate's report and recommendation, App. 33a, is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 2022. Timely filed motions for rehearing were denied on January 11, 2023. This petition is timely filed on March 17, 2023. Petitioners invoke this Court's jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides, in relevant part, "nor shall private property be taken for public use without just compensation."

STATEMENT

This case arises out of a series of inverse-condemnation cases filed in Texas state courts, all alleging that a Texas highway project had caused widespread flooding. App. 4a–5a. The flooding was no accident: In an effort to make sure that the eastbound lanes of Interstate Highway 10 ("IH-10") would be available as an evacuation route in the event of a flood, the Texas Department of Transportation raised

the highway's elevation, added two additional lanes, and installed a nearly three-foot "impenetrable, solid concrete traffic barrier on the highway's centerline." App. 8a. The median barrier worked as intended, creating a weir that barricaded rainfall on the north side: Water that would otherwise have flowed south into the Gulf of Mexico stopped dead at Highway 10. *Ibid.* Texas's plan worked, at least in that it ensured that part of the road remained navigable even in flood conditions. App. 8a–9a. But it was not without cost. Keeping the south side of IH-10 dry meant keeping the north side of IH-10 wet and, in times of heavy rainfall, flooded entirely. App. 9a.

Alleging that this flooding of their land worked a taking under the constitutions of both the United States and Texas, a group of local landowners filed an inverse-condemnation suit against the State of Texas in state district court, directly invoking both the Texas and United States Constitutions. App. 4a–5a. Texas promptly removed the case to federal court. App. 5a. Other state-court lawsuits followed based on the same basic claim that the weir in the middle of IH-10 had also flooded other land. *Ibid.* Texas removed those, too. *Ibid.* The cases were then consolidated into a single action comprising some 77 distinct property-owner plaintiffs. App. 5a–6a.

Having removed the cases to its preferred forum, Texas moved to dismiss, arguing (in relevant part) that the property owners could not bring their inverse-condemnation claims directly under the Fifth Amendment. App. 12a. Takings claims, said Texas, could be brought only under 42 U.S.C. 1983, and since

Texas, which is not a "person," cannot be sued under that statute, they could not be brought at all. *Ibid.*[2]

The magistrate judge's report and recommendation advised that the motion, in relevant part, should be denied for three reasons. App. 12a–18a. First, the magistrate observed that Texas's position would allow states to take private property and leave aggrieved property owners without any federal constitutional remedy at all. App. 14a–15a. This "eviscerates hundreds of years of Constitutional law in one fell swoop." App. 15a.

Second, the magistrate observed that the Takings Clause, which (unlike other constitutional provisions) expressly dictates a remedy, has long been treated differently by this Court, pointing to this Court's repeated reaffirmations that the Takings Clause "creates a substantive right to just compensation that springs to life when the government takes private property." App. 15a (citing *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 315 (1987)). The magistrate relied heavily on this Court's admonition in *First English* 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" and that this right does not depend on "[s]tatutory recognition" for its existence. App. 16a (quoting *First English*, 482 U.S. at 315) (quotation marks omitted).

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[2] Neither States nor State agencies are "persons" subject to suit under Section 1983. *Will* v. *Mich. Dep't of State Police*, 491 U.S. 58, 70–71 (1989).

And, finally, the magistrate noted that state courts nationwide have followed this Court's admonitions and held that inverse-condemnation claims can be brought directly under the Fifth Amendment. App. 17a (collecting cases). For these reasons, the magistrate concluded that the Fifth Amendment provides a mandatory remedy and that, at least in cases like this one where the State affirmatively chooses to avail itself of the jurisdiction of the federal courts, federal courts are empowered to entertain claims seeking that remedy. App. 17a–18a.[3]

The district court adopted the magistrate's recommendation in its entirety. App. 34a. Texas then successfully sought leave to appeal that order under 28 U.S.C. 1292(b), which allows for interlocutory appeals of controlling questions of law. App. 37a.[4]

On appeal, the Fifth Circuit reversed, addressing only whether inverse condemnation claims can proceed directly under the Fifth Amendment to the United States Constitution in the

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[3] The magistrate judge also rejected the State's other affirmative defenses, which are not at issue here. App. 18a; 20a–23a.

[4] The interlocutory appeal addresses only the federal Takings Clause claim, not the analogous claim under the Texas Constitution. The federal claim matters because, in Texas's view, the Texas Constitution will find a taking only where the government specifically intends to flood a particular piece of property. *Cf. City of Robinson v. Rodriguez*, No. 10-21-00075-CV, 2021 WL 4595743, at *3 (Tex. App. Oct. 6, 2021) ("However, the Rodriguezes provide no evidence of an intentional act on the part of the City designed to confer a public benefit that the City knew would cause damage to the Rodriguezes'[ ] property."). Federal takings jurisprudence, by contrast, asks both whether "the invasion [was] intended" *and* whether it was "the foreseeable result of authorized government action." *Ark. Game & Fish Comm'n* v. *United States*, 568 U.S. 23, 39 (2012).

absence of a Section 1983 cause of action. In a published opinion, it held that they cannot. App. 2a.

While the opinion is published, it is brief. The Fifth Circuit disposed of the issue in a single substantive sentence: "Because we hold that the Fifth Amendment Takings Clause as applied to the states through the Fourteenth Amendment does not provide a right of action for takings claims against a state, we VACATE the district court's decision and REMAND for further proceedings." *Ibid.* (footnote omitted). In reaching this conclusion, the panel did not grapple with any of the authorities holding otherwise (from this Court or others) that the magistrate judge had relied on below. Instead, it cited two cases: *Hernandez* v. *Mesa*, 140 S. Ct. 735 (2020), in which this Court declined to allow a *Bivens* cause of action for Fourth or Fifth Amendment violations arising from a cross-border shooting, and *Azul-Pacifico, Inc.* v. *City of Los Angeles*, 973 F.2d 704 (9th Cir. 1992), which asserts that a Takings Clause plaintiff has "no cause of action directly under the United States Constitution." App. 2a n.1. On January 10, the panel made minor amendments to the opinion and, the next day, denied the parties' motions for rehearing. App. 41a.

This petition timely followed.

REASONS FOR GRANTING THE PETITION

The Constitution of the United States specifically mentions only two remedies. One is habeas corpus. See Art. I, § 9, cl. 2. The other is the Fifth Amendment's guarantee of just compensation when private property is taken for public use. Some courts—including this Court—have read that guarantee of a remedy as a guarantee of a remedy, holding that the Fifth Amendment is "self-executing"

and that property owners may therefore sue for compensation without first obtaining legislative permission. Two courts, the Ninth Circuit and (now) the Fifth Circuit have disagreed, holding that the just-compensation right is protected only as a matter of legislative discretion and that federal takings claims can therefore be brought only pursuant to 42 U.S.C. 1983—which, as to State defendants, means they cannot be brought at all.

This split of authority—essentially one between courts that follow this Court's takings jurisprudence and courts that ignore it—warrants this Court's intervention. Among other things, the division of authority matters because it invites the sort of gamesmanship illustrated by this case. Had this case been litigated in Texas state court (where it was filed), Texas courts would have recognized a federal takings claim without requiring the plaintiffs to invoke Section 1983. But by removing the federal claim to federal court, Texas has changed the substantive law governing the case and extinguished the claim. That is a split of authority with real, outcome-determinative effects on individual rights, which makes the question presented important.

And this case is a remarkably straightforward vehicle for resolving that question. The decision below was an interlocutory appeal of the question presented, which was sought by Texas itself in a case that Texas itself removed to federal court. The Fifth Circuit resolved that question on interlocutory appeal because it is a controlling question of law, and this Court can—and should—do the same. The petition for certiorari should therefore be granted.

I. Lower Courts Disagree About Whether The Takings Clause Provides A Mandatory Remedy.

This Court has repeatedly, for decades, held that the Fifth Amendment's just-compensation remedy is self-executing—that is, that the remedy stems directly from the Constitution and cannot be limited by the exercise of legislative discretion. Many lower courts have followed this Court's directives and held that they must entertain claims arising directly under the Takings Clause. But two federal courts of appeals—the Ninth and the Fifth Circuits—hold otherwise. The petition should be granted to resolve this split of authority.

A. This Court has repeatedly identified the Takings Clause's just-compensation requirement as "self-executing."

1. The simplest basis on which to conclude that a landowner may bring an inverse-condemnation claim arising directly under the Takings Clause is that this Court has long 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[.]'" *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 315 (1987). *First English* is particularly instructive here. In that case, a property owner filed suit alleging that a Los Angeles ordinance worked a taking, and the California courts held that no damages remedy was available for regulatory takings. *Id.* at 308–09.

This Court reversed, holding that a damages remedy for takings of private property is mandatory.

The Court's analysis began with the text of the Takings Clause, which (unlike other provisions in the Bill of Rights) is not prohibitory—"it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *Id.* at 314–15. The consequence of this constitutional design is that "a property owner 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 . . . ." *Id.* 315 (quoting *United States* v. *Clarke*, 445 U.S. 253, 257 (1980)). Put simply, these claims for just compensation "are grounded in the Constitution itself[.]" *Ibid.* And these claims could proceed of their own force: "'Statutory recognition was not necessary'" for a claim to proceed because suits for just compensation "*were [ ] founded upon the Constitution of the United States*." *Ibid.* (quoting *Jacobs* v. *United States*, 290 U.S. 13, 16 (1933).

The United States had urged this Court to take a contrary view—to instead hold that "'the Constitution does not, of its own force, furnish a basis to award money damages against the government.'" *Id.* at 316 n.9 (quoting Brief for United States as Amicus Curiae 14). But the Court directly rejected that argument, pronouncing it "refute[d]" by a line of cases stretching back to 1893. *Ibid.*; see also *id.* at 316 (collecting cases). Contrary to the arguments of the United States, the only lesson that could be drawn from this Court's precedents was that "it is the Constitution that dictates the remedy for interference with property rights amounting to a taking." *Id.* at 316 n.9.

2. This Court's opinion in *First English* is not an outlier. Over a century of unbroken precedent demonstrates that this Court has "never tolerated" a rule under which "the government [can] appropriate private property without just compensation so long as it avoids formal condemnation." *Cedar Point Nursery* v. *Hassid*, 141 S. Ct. 2063, 2076 (2021); accord *Knick* v. *Township of Scott*, 139 S. Ct. 2162, 2172 (2019) ("In the event of a taking, the compensation remedy is required by the Constitution.").

As this Court emphasized in *Knick*, these modern cases rest on a solid foundation. In *Knick*, the Court pointed to *Jacobs* v. *United States*, 290 U.S. 13 (1933), which "made clear that, no matter what sort of procedures the government puts in place to remedy a taking, a property owner has a Fifth Amendment right to compensation as soon as the government takes his property without paying for it." 139 S. Ct. at 2170 (citing *Jacobs*, 290 U.S. at 16). And "the same reasoning applies to takings by the States." *Ibid.* That reasoning—that government takings give rise to a right to compensation—has been repeatedly acknowledged throughout this Court's history. Even in pre-incorporation cases like *Pumpelly* v. *Green Bay Company*, this Court favorably cited the idea that it was a "settled principle of universal law that the right to compensation is an incident to the exercise of [the] power" to take private property. 80 U.S. 166, 178 (1871) (quoting *Sinnickson* v. *Johnson*, 17 N.J.L. 129, 145 (1839)). And in *Chicago, Burlington and Quincy Railroad* v. *Chicago*, this Court approvingly quoted Justice Jackson's opinion (riding circuit) in *Scott* v. *Toledo*, which held that the Fourteenth Amendment necessarily forbade states from "appropriate[ing] private property for the public benefit or to public

uses without compensation to the owner[.]" 166 U.S. 226, 239 (1897) (quoting *Scott* v. *Toledo*, 36 F. 385, 395–96 (C.C.N.D. 1888)). In short, whether the government is building a street (as in *Scott*) or causing a flood (as in *Pumpelly*), property owners have long been unquestionably entitled to compensation for the taking of their property.

B. Lower courts take this Court at its word and hold that courts are required to entertain claims arising directly under the Takings Clause.

1. Unsurprisingly, this Court's repeated admonitions that the just-compensation requirement is "self-executing" has led many lower courts to treat the requirement as self-executing. The highest courts of New Mexico, Nebraska, and South Dakota all squarely hold that the language of the Takings Clause means that the federal just-compensation remedy is mandatory and that inverse-condemnation claims therefore can be brought without statutory authorization. A host of other state courts of last resort, along with other lower courts, have adopted this same principle in various contexts.

Begin with New Mexico. See *Manning* v. *Mining & Minerals Div. of the Energy, Mins. and Nat. Res. Dep't*, 144 P.3d 87 (2006). In *Manning*, the plaintiffs sued directly under the federal Constitution because they lacked a cause of action—the defendant agency did not have the power of condemnation and so, it said, could not be sued in inverse condemnation. *Manning*, 144 P.3d at 91–92. The New Mexico Supreme Court disagreed, holding that this Court's precedents required it to recognize a takings claim brought directly under the "self-executing" Takings

Clause. *Id.* at 95–98. To be sure, the court said, most of the rights secured under the Fourteenth Amendment require Congress to create a remedy to vindicate them. *Id.* at 97. But the just-compensation requirement of the Fifth Amendment is a remedy specifically required by the Constitution, which means that "[t]he Takings Clause creates an individual right to the remedy of just compensation." *Ibid.*

The same is true in Nebraska, which holds that "[a] landowner is entitled to bring an action in inverse condemnation as a result of the self-executing character of the takings clauses of the U.S. and Nebraska Constitutions." *Henderson* v. *City of Columbus*, 827 N.W.2d 486, 493 (Neb. 2013). Indeed, Nebraska's highest court has recognized and distinguished between inverse-condemnation claims brought directly under the Takings Clause and civil-rights claims brought pursuant to 42 U.S.C. 1983, even when those claims are brought in the same case. *Whitehead Oil Co.* v. *City of Lincoln*, 515 N.W.2d 401, 405, 409 (Neb. 1994).

So too in South Dakota, where the state's highest court has held that the just-compensation remedy is "self-executing [and therefore] does not depend on statutory facilitation." *SDDS, Inc.* v. *State*, 650 N.W.2d 1, 9 (S.D. 2002). South Dakota landowners have an absolute right to bring federal takings claims in state court, even where no statutory authorization exists. *Cf. Benson* v. *State*, 710 N.W.2d 131, 140 (S.D. 2006).

Other high courts, at least in dicta, say the same thing. In Texas, where this case was originally filed, the state's highest court has squarely

acknowledged that both the federal and state takings clauses operate to "waive[ ] the government's immunity from lawsuits" and "require the government to compensate property owners when it takes their property for public use," a waiver of the immunity "that otherwise often insulates the public treasury from claims for damages." *City of Baytown* v. *Schrock*, 645 S.W.3d 174, 176 (Tex. 2022). Connecticut follows the same rule, recognizing that a plaintiff whose claims are otherwise barred by sovereign immunity nonetheless retains the right to "seek just compensation for the state's taking of its property." *First Union Nat'l Bank* v. *Hi Ho Mall Shopping Ventures, Inc.*, 869 A.2d 1193, 1197–98 & n.3 (Conn. 2005). And New Jersey's Supreme Court has held that its state tort-claims act cannot bar inverse-condemnation claims under the Fifth Amendment because the federal "constitutional prohibition against unconstitutional takings is self-executing." *Greenway Dev. Co.* v. *Borough of Paramus*, 750 A.2d 764, 770 (N.J. 2000). Other lower courts agree as well. *E.g.*, *Baker* v. *City of McKinney*, 601 F. Supp. 3d 124, 145 (E.D. Tex. 2022) ("Accordingly, the Court holds that, because the Fifth Amendment is self-executing, [plaintiff's] claim under the Fifth Amendment Takings Clause is not dependent upon the § 1983 vessel."); *Speed* v. *Mills*, 919 F. Supp. 2d 122, 128 (D.D.C. 2013) ("[T]he Supreme Court has held that takings claims can be stated directly under the Fifth Amendment, without recourse to a statutory remedy, because of 'the self - executing character of the constitutional provision with respect to compensation . . . .'"); *Boise Cascade Corp.* v. *State ex rel. Or. State Bd. of Forestry*, 991 P.2d 563, 568 (Or. Ct. App. 1999).

2. These courts are not alone in their understanding of this Court's precedents. At least two federal circuits, in the context of explaining the interplay between the Takings Clause and the Eleventh Amendment, have directly stated that the Takings Clause allows for inverse-condemnation claims outside the context of Section 1983. In *DLX, Inc.* v. *Kentucky*, the Sixth Circuit held that the Eleventh Amendment protected Kentucky from being sued in federal court against its will but "that the Fifth Amendment Takings Clause is a self-executing remedy, notwithstanding sovereign immunity." 381 F.3d 511, 527 (6th Cir. 2004). In other words, the Eleventh Amendment might act as a barrier to filing suit in federal court, but property owners nonetheless had a right to bring a claim against the State arising directly under the Fifth Amendment, and Kentucky courts "would have [ ] to hear that federal claim." *Ibid.* Accord *Amen* v. *Dearborn*, 718 F.2d 789, 792 & n.4 (6th Cir. 1983) (authorizing suit against municipality directly under the Fifth and Fourteenth Amendments).

The Fourth Circuit, too, holds that the Eleventh Amendment bars Takings Clause suits directly against states in federal court "when the State's courts remain open to adjudicate such claims." *Zito* v. *N.C. Coastal Res. Comm'n*, 8 F.4th 281, 286 (4th Cir. 2021) (quotation marks omitted). The Fourth, though, unlike the Sixth, has not squarely addressed whether the inverse-condemnation remedy is mandatory—that is, "whether a State can close its doors to a takings claim [or] whether the Eleventh Amendment would ban a takings claim in federal court if the State courts were to refuse to hear such a claim." *Id.* at 286 n.4. But it nonetheless recognizes

that those claims—wherever they must be brought in the first instance—exist.

In sum, a Takings Clause claim brought under the Fifth Amendment rather than Section 1983 would certainly be viable in state courts across the country. It would almost certainly be viable if it were removed to the Fourth or Sixth Circuits. But, as discussed below, two federal jurisdictions disagree and hold that the claim brought here fails because Section 1983 is the sole vehicle by which a property owner may vindicate his rights under the Takings Clause.

C. The Fifth and the Ninth Circuits disagree.

Two courts of appeals split from the consensus described above and hold that property owners may not vindicate their right to just compensation unless Congress has expressly authorized them to sue under Section 1983. Neither court, however, has ever explained how its rule squares with this Court's instructions in *First English* or any of this Court's other Takings Clause jurisprudence.

The first decision on this side of the split came from the Ninth Circuit. *See Azul-Pacifico, Inc.* v. *City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992) ("*Azul-Pacifico II*"). But *Azul-Pacifico II* was itself a departure from the Ninth Circuit's original rule, as articulated in its first opinion in the very same case.

When the Ninth Circuit first considered the *Azul-Pacifico* matter, it held (1) that the challenged rent-control ordinance worked a physical taking and (2) that the Takings Clause's just-compensation remedy was self-executing. *Azul-Pacifico, Inc.* v. *City of Los Angeles*, 948 F.2d 575 (1991) ("*Azul-Pacifico I*"),

vacated by Azul-Pacifico II, 973 F.2d 704. Relying on this Court's Takings Clause cases, the *Azul-Pacifico I* panel held that "[t]he Constitution itself provides both the cause of action and the remedy" for an uncompensated taking of private property, and "[t]his is equally true of an action against a state subdivision." *Azul-Pacifico I*, 948 F.2d at 586. "If there was any doubt on this score it was removed by the Supreme Court in *First English*." *Ibid*.

The panel's first holding, about the rent-control ordinance, was not long for this world. Shortly thereafter, this Court decided *Yee* v. *Escondido*, in which it analyzed a similar rent-control ordinance as a regulatory, rather than physical, taking. 503 U.S. 519, 532 (1992). The Ninth Circuit panel promptly granted rehearing and changed course in light of *Yee*. *Azul-Pacifico II*, 973 F.2d at 705. But it did not simply follow *Yee* and analyze the ordinance through the rubric of regulatory takings. Instead, it now held (without citing this Court's Takings Clause cases) that "a litigant complaining of a violation of a constitutional right must utilize 42 U.S.C. § 1983[,]" even for a Takings Clause claim. *Ibid*.

This change went unexplained. Nothing in *Yee* abrogates *First English* or suggests that the Fifth Amendment is not self-executing. And nothing in the authorities cited by *Azul-Pacifico II* addresses *First English* either. To the contrary, at least one of *Azul-Pacifico II*'s citations points in just the opposite direction, noting that "the propriety of allowing actions directly against municipalities directly under the Constitution may depend on the specific right being protected" and that the Ninth Circuit had already "recognized the possibility of an action against a local government for the uncompensated

taking of property[.]" *Molina* v. *Richardson*, 578 F.2d 846, 853 n.14 (9th Cir. 1978).[5]

None of these flaws prevented the Fifth Circuit from expressly adopted *Azul-Pacifico II*'s rule in its published opinion below. App. 2a. But it, too, did so without real explanation. The opinion provides a single sentence of analysis: "[W]e hold that the Fifth Amendment's Takings Clause as applied to the states through the Fourteenth Amendment does not provide a right of action for takings claims against a state." *Ibid.* It cites none of the cases holding to the contrary. It does not cite or try to harmonize its decision with this Court's Takings Clause cases. It does not explain why it adopts a position that *First English* declared "refuted." 482 U.S. at 316 n.9. Instead, it cites only two cases: *Azul-Pacifico II* and *Hernandez* v. *Mesa*, 140 S. Ct. 735 (2020), in which this Court declined to extend a *Bivens* remedy to the context of a cross-border shooting. But the premise of the cases that find the just-compensation remedy to be self-executing is that the Takings Clause (by specifying a remedy) is materially different from other constitutional rights. Nothing in the Fifth Circuit's opinion or any of the cases it cites explains why that court disagrees.

Whatever the reasons for it, though, the split exists. Binding precedent in two courts of appeals holds that property owners are entitled to a federal just-compensation remedy only via Section 1983 or

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[5] Later Ninth Circuit cases similarly assume, without holding, that a takings remedy must exist outside the context of Section 1983. *Seven Up Pete Venture* v. *Schweitzer*, 523 F.3d 948, 954 (9th Cir. 2008) ("[T]he self-executing character of the Takings Clause" creates an "obligation by the states to provide a specific remedy for [federal] takings in their own courts[.]").

via the discretionary largesse of a state government. Other decisions (most importantly those of this Court) hold otherwise and say that the federal just-compensation remedy is mandatory. The petition for certiorari should be granted to resolve this question.

II. The Question Presented Is Important.

The question presented is important because property rights are important. "The Founders recognized that the protection of private property is indispensable to the promotion of individual freedom." *Cedar Point Nursery* v. *Hassid*, 141 S. Ct. 2063, 2071 (2021). This Court cases repeatedly emphasize the point: "'[I]n a free government almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen.'" *Chi., Burlington & Quincy R.R.* v. *City of Chicago*, 166 U.S. 226, 236 (1897) (quoting 2 Story Const. § 1790). A rule that allows the taking of private property without compensation "sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights." *United States* v. *Lee*, 106 U.S. 196, 221 (1882). The question presented, quite simply, is whether the Constitution gives states the discretion to "sanction[ ]" that "tyranny."

But the question presented is also important because this division of authority invites gamesmanship. This case is a perfect illustration. In Texas state courts, aggrieved property owners may bring inverse-condemnation claims directly under the Fifth Amendment. *City of Baytown* v. *Schrock*, 645 S.W.3d 174, 178 (Tex. 2022). Indeed, under this

Court's decision in *First English*, it is almost certainly *mandatory* for Texas courts to recognize these claims. But if Texas defendants elect to remove that federal claim to *federal* court, it is instantly extinguished. App. 2a. In other words, the existence of a judicial forum to vindicate that Texas property owner's federal right to just compensation is entirely in the discretion of the government's attorneys.[6]

But federal rights exist, or they do not. Federal remedies are mandatory, or they are not. And this Court is meant to be the final arbiter of what rights are enforceable and what remedies are mandatory. Allowing the current circuit split to persist vests those decisions in the hands of litigants rather than courts. The petition for certiorari should therefore be granted.

III. This Case Is A Good Vehicle.

This case is a good vehicle to resolve the question presented. Respondent has already, by seeking an interlocutory appeal, conceded that the question presented is a controlling question of law here. And it is the only question addressed in the

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[6] The point of removal jurisdiction, of course, is to provide a federal forum for federal claims, not to allow government defendants to tactically avoid the adjudication of those federal rights. See, *e.g.*, *Lapides* v. *Board of Regents*, 535 U.S. 613, 621 (2002) (rejecting Georgia's Eleventh Amendment position because it "would permit States to achieve 'unfair tactical advantage[ ]'" through removal (quoting *Wisconsin Dep't of Corrections* v. *Schacht*, 524 U.S. 381, 393-94 (1998) (Kennedy, J., concurring)); see also *Arrigoni Enterprises, LLC v. Town of Durham*, 136 S. Ct. 1409 (2016) (Thomas, J., dissenting from denial of cert.) (criticizing strategic removal of Takings Clause cases as "gamesmanship [that] leaves plaintiffs with *no* court in which to pursue their claims").

published opinion below. Moreover, the question presented is narrow. The Court need not address whether states may generally be sued in federal court under the Takings Clause because Texas, having removed this case, is in federal court of its own volition (which, Texas has conceded, waives its immunity from suit). It need not decide even whether Texas must ultimately pay damages because, at the motion-to-dismiss stage, the only question is whether Petitioners can state a claim directly under the Takings Clause at all. There is no barrier to this Court's granting the petition, determining whether property owners must rely on legislative grace to enforce their rights under the Takings Clause, and remanding for further proceedings. The petition should therefore be granted.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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