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

BRIEF FOR *AMICI CURIAE* ILYA SOMIN AND CATO INSTITUTE IN SUPPORT OF PETITIONERS

ANASTASIA P. BODEN
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 216-1414
aboden@cato.org

CAROLINE C. LINDSAY
Counsel of Record
HILGERS GRABEN PLLC
332 S. Michigan Ave.,
Suite 121 #5612
Chicago, IL 60604
(402) 313-3480
clindsay@hilgersgraben.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF *AMICI CURIAE*

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, files *amicus* briefs, conducts conferences, and produces the annual Cato Supreme Court Review. This case interests Cato because the right to just compensation when property is taken is fundamental.[1]

Ilya Somin is a professor of law at the Antonin Scalia Law School at George Mason University, B. Kenneth Simon Chair in Constitutional Studies at the Cato Institute, and the author of numerous works on takings and constitutional property rights, including The Grasping Hand: *Kelo v. City of New London* and the Limits of Eminent Domain (rev. ed. 2016). His *amicus* briefs and writings on takings law have been cited in decisions by the United States Supreme Court, lower federal courts, state supreme courts, and the Supreme Court of Israel.

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In its important decision in *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), this Court reversed *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985)—a ruling that required takings plaintiffs with claims against state and local governments to first exhaust state-court remedies before seeking relief in federal court. The Court recognized that this state-litigation requirement created an impermissible "Catch-22" in which plaintiffs could not "go to federal court without going to state court first; but if [they went] to state court and los[t], [their] claim[s were] barred in federal court." *Knick*, 139 S. Ct. at 2167 (citing *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005) (holding that such state court judgments had preclusive effect in subsequent federal litigation)). As a result, the rule "relegate[d] the Takings Clause 'to the status of a poor relation' among the provisions of the Bill of Rights," which were otherwise "guaranteed a federal forum." *Knick*, 139 S. Ct. at 2169–70 (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994)).

In reversing *Williamson County*'s atextual exhaustion requirement, *Knick* established the important principle that takings plaintiffs are entitled to their day in federal court. Now, less than four years later, the Fifth Circuit has nullified that entitlement in a mere three-sentence per curiam decision that fails to even acknowledge *Knick* or *any* of this Court's Takings Clause precedents. By holding that Fifth Amendment takings claims against states are simultaneously

removable to federal court under 28 U.S.C. § 1441 and nonjusticiable in federal court due to the purported lack of a federal cause of action, the Fifth Circuit resurrected the precise sort of Catch-22 eliminated by this Court in *Knick* and has effectively barred takings claims against states from both state *and* federal court.

The holding below demonstrates at best a massive neglect of this Court's precedents and at worst an egregious resistance to them. Those decisions, along with the text and history of the Takings Clause, make clear that no statutory cause of action is required to bring a federal takings claim against a state government. In holding otherwise, the Fifth Circuit has engaged in the widescale judicial nullification of a fundamental constitutional protection for millions of Americans. The Court should reverse.

ARGUMENT

I. This Court's Precedents, Including the Recent Decision in *Knick v. Township of Scott*, Require Reversal of the Decision Below.

This Court has long recognized the "self-executing character" of the Takings Clause. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987); see *Knick*, 139 S. Ct. at 2171 (quoting *First English*, 482 U.S. at 315) (the Takings Clause is "self-executing . . . with respect to compensation"). Indeed, "it has been established at

least since *Jacobs v. United States*, 290 U.S. 13 (1933), that claims for just compensation are grounded in the Constitution itself." *Id.* (citation omitted). Under these precedents, a plaintiff's invocation of the Fifth Amendment is sufficient to support a cause of action against a state or local government for an uncompensated taking.

The Court recently reiterated this principle in *Knick*. There, the Court eliminated *Williamson County*'s arbitrary requirement that a property owner litigate an inverse-condemnation claim in state court before he can file a takings claim against local and state governments in federal court. In so doing, the Court concluded that this exhaustion requirement could not be reconciled with the "self-executing nature" of the Takings Clause, which provides that "[a] property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it." *Knick*, 139 S. Ct. at 2167, 2171 (citing *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987)). To ensure "[f]idelity to the Takings Clause" and "restor[e] takings claims to the full-fledged constitutional status the Framers envisioned when they included the Clause among other protections in the Bill of Rights," the Court overruled *Williamson County. Knick*, 139 S. Ct. at 2170.

Knick stands for the important principle that just-compensation claims enjoy the same status as other constitutional claims and that takings plaintiffs are thus entitled to their day in federal court. See Ilya Somin, Knick v. Township of Scott: *Ending a "Catch 22"*

that Barred Takings Cases from Federal Court, 2018–19 CATO SUPREME CT. REV. 153, 157–71 (2019) (discussing this crucial aspect of *Knick* in detail). Yet, in a one-paragraph per curiam decision that doesn't so much as cite *Knick*, the Fifth Circuit defied this directive.

According to the cursory decision below, Fifth Amendment takings claims against states cannot be heard in federal court because Congress has not created a statutory cause of action for such claims. Pet. App. 2a. Yet despite this purported absence of a federal cause of action, the Fifth Circuit permitted the case—which was originally filed in state court—to be removed to federal court under 28 U.S.C. § 1441(a) on the basis that plaintiffs' federal takings claims arose under federal law pursuant to 28 U.S.C. § 1331. Pet. Supp. App. 73a. As Judge Oldham explained in his dissent from denial of rehearing en banc, this holding "reduces the Takings Clause"—as applied to the states—"to nothing": if such a claim is filed in federal court, it must be dismissed with prejudice for a lack of a federal cause of action, and if the claim is brought in state court, it suffers the same fate, because when the State inevitably removes the case, "the federal court must assert jurisdiction and dismiss the claim with prejudice." Pet. Supp. App. 78a.

In other words, the Fifth Circuit has resurrected precisely the sort of Catch-22 that this Court eliminated in *Knick*. In fact, this one is worse. Under *Williamson County*, federal takings claims against states were effectively isolated from federal review. But under the Fifth Circuit's decision below, federal takings

claims against states are effectively isolated from *any* judicial review—state *or* federal. At least takings plaintiffs in the earlier regime were generally provided a forum for their claims in state court, and an opportunity for eventual federal review via a petition for certiorari to this Court.[2] As Judge Oldham aptly noted in his dissent from denial of rehearing en banc: A "certiorari petition provides relatively little protection for a federal takings claim, which is one reason [this Court] overturned *Williamson County*. But at least it was something." Pet. Supp. App. 78a. The Fifth Circuit's decision does not even leave takings plaintiffs with that.

The ruling below has thus resurrected the double standard eliminated by this Court in *Knick*: takings claims against states are now deprived of judicial review in a way that is not true of any comparable constitutional claim. While plaintiffs are guaranteed a federal forum for vindicating states' violations of their rights to be free from unreasonable searches and seizures or to worship freely, for example, they are left without recourse when it comes to their constitutional right to just compensation for takings. In holding that plaintiffs cannot enforce this right in federal court absent a statutory cause of action, the Fifth Circuit has once more relegated the Takings Clause " 'to the status

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[2] Some plaintiffs were not so fortunate. At least one circuit permitted the same sort of removal shenanigans blessed by the Fifth Circuit here. See *Warner v. City of Marathon*, 718 F. App'x 834, 838 (11th Cir. 2017) (dismissing takings claim removed under 28 U.S.C. § 1441 for failure to comply with *Williamson County*'s exhaustion requirement).

of a poor relation' among the provisions of the Bill of Rights." 139 S. Ct. at 2169 (citation omitted).

By effectively foreclosing federal takings claims against states, the Fifth Circuit defied not only this Court's decision in *Knick*, but decades of this Court's takings precedents. Indeed, this Court "has consistently applied the Takings Clause to the states, and in so doing recognized, at least tacitly, the right of a citizen to sue the state under the Takings Clause for just compensation." *Manning v. Mining & Minerals Div. of the Energy, Minerals & Nat. Res. Dep't*, 144 P.3d 87, 90 (N.M. 2006) (citing *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 306–09 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606, 614–15 (2001); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027–30 (1992)). The single-paragraph decision below grapples with none of these decisions.

In his concurrence in the denial of rehearing en banc below, Judge Higginbotham argued that the reasoning of *Knick* applies only to cases brought under 42 U.S.C. § 1983. Pet. Supp. App. 46a–47a. But *Knick* itself squarely forecloses such a limited reading. There, this Court rejected the Township's characterization of the state-litigation requirement as a § 1983-specific rule, noting that "the *Williamson County* opinion, which did not even quote §1983[,] . . . applied with equal force to takings by the Federal Government, not covered by §1983." *Knick*, 139 S. Ct. at 2175 n.6 (citing *Williamson County*, 473 U.S. at 195).

Judge Higginbotham also advanced various arguments to the effect that it is desirable to confine most takings cases to state courts because of the latter's special expertise in property law issues. Pet. Supp. App. 48a–50a. These types of arguments, which were offered at length by the dissent in *Knick*, 139 S. Ct. at 2187–89 (Kagan, J., dissenting), have already been rejected by this Court once. And for good reason. "[M]any other constitutional rights cases also routinely involve issues on which state judges might have superior expertise." Somin, 2018–19 CATO SUPREME CT. REV. at 164–66 (collecting examples); Ilya Somin, *Federalism and Property Rights*, 2011 U. CHI. LEGAL F. 53, 80–84 (same). "Outside the context of the Takings Clause, few argue that this possibility justifies relegating constitutional claims to state courts." Somin, 2018–19 CATO SUPREME CT. REV. at 164.

In a separate concurrence in the denial of rehearing en banc, Judge Higginson asserted that this Court's precedent actually support the panel decision, relying on a single footnote in *Maine Community Health Options v. United States*, 140 S. Ct. 1308 (2020). There, the Court stated that "the Constitution did not 'expressly create [] a right of action [] when it mandated just compensation for Government takings of private property for public use.'" *Id.* at 1328 n.12. But that case, unlike this one, involved a statutory right of action (namely, a Tucker Act claim against the federal government). See *id.* at 1331. For that very reason, the Court expressly declined to decide whether plaintiffs could bring their claims under the Takings Clause

itself absent a statutory cause of action. *Id.* at 1331 n.15. By contrast, when this Court was faced with a takings claim lacking a statutory cause of action in *First English*, it determined that the Takings Clause provided an independent cause of action. See 482 U.S. at 315–16. Nothing in the dictum of footnote 12 of the Court's decision in *Maine Community Health Options* could reasonably be construed as abrogating or overruling that earlier decision. And it certainly did not overrule *Knick*.

II. The Text and History of the Takings Clause Make Clear That It Creates a Direct Cause of Action against the States.

Even if these well-established precedents did not dictate reversal of the decision below, the provision's text and history would. The Fifth Amendment's Takings Clause provides a direct cause of action against state governments no less than other provisions of the Bill of Rights do. And nothing in the text or history of the Constitution suggests otherwise. See Somin, 2018–19 CATO SUPREME CT. REV. at 160–62.

To be sure, plaintiffs bringing claims under other provisions of the Bill of Rights are limited in their ability to recover damages against states. See *Edelman v. Jordan*, 415 U.S. 651, 674–77 (1974) (holding that 42 U.S.C. § 1983 does not provide a cause of action for damages against states). But that is because the provisions themselves do not provide for such a remedy. In contrast, retrospective compensation is the explicit

and exclusive remedy for violations of the Fifth Amendment's Taking Clause.

The constitutional text is clear on this point. It reads, in relevant part: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. Notably, it does not prohibit the government from taking private property for public use—indeed, the provision is predicated on the assumption that such takings will occur. Rather, the clause proscribes such takings "*without just compensation*," thus creating a guarantee not to be free from government action but to be compensated for such action should it occur. *Id.* (emphasis added).

Because the Fifth Amendment has been incorporated against the states, the right to just compensation applies equally to property owners whose property is taken by state governments. "Indeed, historical evidence indicates that protecting constitutional property rights against abuses by state governments was one of the main reasons the Bill of Rights was incorporated against the states in the first place." Somin, 2018–19 CATO SUPREME CT. REV. at 161 (collecting sources). Specifically, the framers of the Fourteenth Amendment were concerned about the threat posed by ex-Confederate forces in southern state legislatures to the property rights of former slaves and white unionists. Thus, Rep. John Bingham, a leading framer of the Fourteenth Amendment, emphasized that the Takings Clause must be applied against the states to protect "citizens of the United States, whose property, by State legislation, has been wrested from them, under

confiscation." *Id.* at 161–62 (citing Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction (1998)).

In his opinion below, Judge Higginson opined that, although the Takings Clause, generally, was incorporated against state governments, any "damages remedy" for "just compensation" was not. Pet. Supp. App. 53a–55a. But there is no historical evidence that the Fourteenth Amendment somehow incorporated only part of the Takings Clause against the states while excluding the express entitlement to just compensation. Such a bifurcated approach would essentially gut this Fifth Amendment right, because without a just-compensation remedy there can be no remedy at all.

III. Affirming the Decision Below Would Effectively Nullify a Fundamental Constitutional Protection for Millions of Americans.

If the ruling below is affirmed, state governments will be free to seize private property and then refuse to pay compensation, without fear of having their actions challenged in either state or federal court. Such a decision would render the Takings Clause a dead letter and effectively nullify the property rights of millions of Americans across the country.

Even in the extremely unlikely event that the states would decide not to take full advantage an affirmance by removing all federal takings claims against them to federal court, the foreclosure of a federal forum alone has substantial practical ramifications. Indeed, the right to bring takings claims in federal court is a

vital tool to avoid potential bias in state courts. See Somin, 2018–19 CATO SUPREME CT. REV. at 155. This is especially true considering that, in the vast majority of states,[3] judges are elected by popular vote and are therefore likely to maintain close ties to the political actors adopting the very regulations being challenged by takings plaintiffs. See *id.* at 182; see *also* Ilya Somin, Stop the Beach Renourishment *and the Problem of Judicial Takings*, 6 DUKE J. CONST. L. & POL'Y 91, 99–110 (2011).

Moreover, in Louisiana, the right to bring takings claims in federal court is not just a vital tool—it is the *only* tool for property owners to vindicate their fundamental constitutional rights. This is because Louisiana does not provide a state-law remedy for uncompensated takings. See *Ariyan, Inc. v. Sewerage & Water Bd. of New Orleans*, 29 F.4th 226 (5th Cir. 2022), *cert. denied*, 143 S. Ct. 353 (2022).

A judgment from this Court affirming the decision below would constitute a widescale judicial nullification of a fundamental constitutional right in contravention of decades of this Court's precedents, not to mention the text and history of the Takings Clause itself. This Court should reverse the judgment below and restore the property rights of the millions of Americans affected by the Fifth Circuit's erroneous decision.

[3] Only seven of the fifty states do not select any judges by popular election. See Ballotpedia, Judicial Election Methods by State, https://ballotpedia.org/Judicial_election_methods_by_state.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

November 17, 2023

ANASTASIA P. BODEN
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 216-1414
aboden@cato.org

CAROLINE C. LINDSAY
Counsel of Record
HILGERS GRABEN PLLC
332 S. Michigan Ave.,
Suite 121 #5612
Chicago, IL 60604
(402) 313-3480
clindsay@hilgersgraben.com