No. _____

In The

Supreme Court of the United States

IN RE RICHARD DEVILLIER, ET AL.,

Petitioners.

On Petition For A Writ Of Mandamus To The United States District Court for the Southern District of Texas

PETITION FOR A WRIT OF MANDAMUS

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QUESTION PRESENTED

In *DeVillier v. Texas*, 601 U.S. 285 (2024), this Court vacated the Fifth Circuit's judgment and remanded with instructions that, "[o]n remand, DeVillier and the other property owners should be permitted to pursue their claims under the Takings Clause through the cause of action available under Texas law." *Id.* at 293. This Court's judgment directed the lower courts to conduct "further proceedings consistent with the opinion of this Court." Following remand, consistent with this Court's mandate, plaintiffs amended their complaint in the trial court to include an additional claim under Texas common law giving effect to the Takings Claus. But the district court—rather than permitting Petitioners to pursue their Takings Clause claims in federal court as this Court directed—remanded the action to the four state courts from which the State had first removed them. The question presented is:

Whether a district court defies this Court's mandate when, instead of permitting plaintiffs to pursue their federal Takings Clause claims in federal court as this Court directed, it remands the entire action to state court, stripping plaintiffs of the federal forum this Court's judgment contemplated.

PARTIES TO THE PROCEEDINGS BELOW

This case arises out of four separate state-court actions that the State of Texas removed to the Southern District of Texas, which then consolidated the cases into one action. 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 Moor Sr.; Halley Ray Moor 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; 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.

None of the petitioners has any parent corporation and no publicly held corporation holds more than 10% of the stock in any petitioner.

The following respondents are the judges of the United States District Court for the Southern District of Texas who participated in the decision below: Judge Jeffrey V. Brown and Magistrate Judge Andrew Edison.

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 MANDAMUS

Petitioners seek an extraordinary writ of mandamus issue to compel the United States District Court for the Southern District of Texas' compliance with this Court's mandate in *DeVillier v. Texas*, 601 U.S. 285 (2024). Specifically, this Court should order the Southern District to Recall and Vacate its order remanding to the state courts of Texas.

OPINIONS BELOW

The district court's order adopting the magistrate's report and recommendation, App. 1a–3a, is unreported. The recommendation of the magistrate judge, App. 4a–21a, is also unreported. The opinion of the court of appeals on remand from this Court, App. 22a–26a, is reported at 132 F.4th 746.

JURISDICTION

Two terms ago, this Court issued its decision in *DeVillier v. Texas*, 601 U.S. 285 (2024), vacating the judgment of the court of appeals and remanding for further proceedings "in accordance with [its] opinion." On remand, the United States District Court for the Southern District of Texas failed to enforce the mandate of this Court. This Court possesses jurisdiction to enforce the integrity of its decisions and mandates pursuant to the All Writs Act, 28 U.S.C. § 1651(a); *Delaware, L. & W.R. Co. v. Rellstab*, 276 U.S. 1, 4 (1928); *U.S. v. U.S. Dist. Ct. for S. Dist. of N.Y.*, 334 U.S. 258, 263–64 (1948).

This petition is timely filed soon after the date of the district court's order adopting the magistrate's report and recommendation. App. 1a–3a.

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."

The All Writs Act, 28 U.S.C. § 1651(a), provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

STATEMENT

This case returns to this Court because the district court failed to enforce this Court's mandate in *DeVillier v. Texas*, 601 U.S. 285 (2024). In the associated Opinion, this Court summarized the factual allegations:

> Richard DeVillier and more than 120 other petitioners own property north of U.S. Interstate Highway 10 between Houston and Beaumont, Texas. The State of Texas undertook several projects to facilitate the use of that portion of the highway as a flood-evacuation route. It installed a roughly 3-foot-tall barrier along the highway median to act as a dam, preventing stormwater from covering the south side of the road.
>
> In August 2017, Hurricane Harvey brought heavy rainfall to southeast Texas. The new median barrier performed as intended, keeping the

> south side of the highway open. But, it also flooded petitioners' land to the north, displacing them from their homes, damaging businesses, ruining crops, killing livestock, and destroying family heirlooms. The same thing happened during Tropical Storm Imelda in 2019.

Devillier, 601 U.S. at 288. After being flooded twice, Petitioners filed four separate lawsuits across three counties in Texas state courts asserting inverse condemnation claims against the State under both the Texas Constitution and the Takings Clause of the Fifth Amendment.

The State removed the four cases to federal court, where they were consolidated before Judge Jeffrey V. Brown of the Southern District of Texas. After consolidation, petitioners filed a First Amended Master Complaint, and the State moved to dismiss. Magistrate Judge Andrew Edison issued a Memorandum and Recommendation that the State's motion be denied, and Judge Brown adopted that recommendation in its entirety. The district court certified its order for interlocutory appeal pursuant to 28 U.S.C. § 1992(b), which the Fifth Circuit granted.

On January 10, 2023, the Fifth Circuit vacated the district court's order and held 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." *DeVillier v. Texas*, 53 F.4th 904, 904 (5th Cir. 2023)

(*per curiam*).[1] Rehearing en banc was denied. Two judges on the original panel (Judges Higginbotham and Higginson) filed opinions concurring with the Fifth Circuit's denial of the rehearing en banc, and Judge Oldham dissented, joined by Judges Smith, Elrod, Englehardt, and Wilson.

Judge Higginbotham's concurrence framed the decision as jurisdictional: in the absence of a "jurisdictional grant such as 42 U.S.C. § 1983," federal courts have no power to hear Takings Clause claims against States. *DeVillier v. Texas*, 63 F.4th 416, 417-20 (5th Cir. 2023) (Higginbotham, J., concurring in denial of reh'g en banc). Under his view, the "pathway for enforcement" in state takings cases runs exclusively through the state courts to this Court. *Id.* at 418-19.

This Court granted certiorari "to decide whether a property owner may sue for just compensation directly under the Takings Clause." *DeVillier*, 601 U.S. at 290. Writing for a unanimous court, Justice Thomas declined to answer the question presented on the grounds of constitutional avoidance. The Court explained that the question presented "assumes the property owner has no separate cause of action under

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[1] In its original opinion filed November 23, 2022, the Fifth Circuit went further than its revised opinion: after holding that the Takings Clause provides no right of action against a state, the court vacated the district court's decision "for want of jurisdiction" and remanded "with instructions to return this case to the state courts." App. 170a. Both Petitioners and the State of Texas moved for rehearing. The panel then issued its revised opinion, simply remanding to the district court "for further proceedings." *Devillier v. State*, 53 F.4th 904, 904 (5th Cir. 2023).

which to bring a claim based on the Takings Clause," and that premise was unsupported on the record before the Court because the State had represented that the rights afforded under the Takings Clause were protected by Texas common law. *Id.* at 288. At oral argument, the State had represented that its "state-law inverse-condemnation cause of action provides a vehicle for takings claims based on both the Texas constitution and the Takings Clause," and that it would not oppose amendment of the complaint to add such a claim. *Id.* at 293 (citing Tr. of Oral Arg. 40-41, 59-61, 64). On that basis, the Court vacated the Fifth Circuit's judgment and remanded "for further proceedings consistent with this opinion," so that "DeVillier and the other property owners . . . be permitted to pursue their claims under the Takings Clause through the cause of action available under Texas law." *Ibid.*

After the Court's mandate issued, Petitioners amended their complaint consistent with this Court's directive. App. 160a–167a. Count 6 of the operative complaint asserts a Texas common-law cause of action seeking compensation for violation of the Fifth Amendment Takings Clause "in addition to, and in the alternative to," Petitioners' existing direct federal claim.

On September 25, 2024 (after having the case sit idle for months), the Fifth Circuit—without briefing or argument—ordered the district court to remand the action to state court. *DeVillier v. Texas*, 132 F. 4th 739, 739 (5th Cir. 2023) (*per curiam*). Petitioners promptly filed an emergency motion to recall the mandate. The Fifth Circuit granted the motion and

directed the parties to submit letter briefs "explaining what this Court should now do in light of the Supreme Court's decision." App. 27a–28a.

After briefing and a status conference, the Fifth Circuit issued a new order remanding to the district court "for further proceedings consistent with the decision of the Supreme Court" but added a comment on subject matter jurisdiction: "[t]he withdrawal of our previous order should not be interpreted as a rejection of the validity of returning the litigation to state court. Instead, it leaves that decision to the district court." *Devillier v. Texas*, 132 F.4th 746, 747 (5th Cir. 2024) (*per curiam*).

Judge Higginbotham concurred to the *per curiam* order, stating that, in his view, "[i]t is now settled that in providing rights of action for takings by the state, Texas is discharging its obligations under the Fifth Amendment and the state removal is now without jurisdictional legs to stand on." *Ibid.* (Higginbotham, J., concurring).

Within a week of the Fifth Circuit's order, the State moved to remand the case to state court. On January 5, 2026, after briefing and argument, Magistrate Judge Edison issued a Memorandum and Recommendation that the consolidated cases be remanded to the state courts of Chambers, Jefferson, and Liberty Counties. App. 20a–21a. Petitioners timely filed objections. App. 3a. On April 9, 2026, Judge Brown adopted Magistrate Judge Edison's Memorandum and Recommendation "in its entirety as the holding of the court" and ordered the cases remanded. *Ibid.*

This petition timely followed.

REASONS FOR GRANTING THE PETITION

This Court protected Petitioners' substantive federal rights without deciding whether the Takings Clause itself provides a procedural vehicle for bringing those claims by identifying an alternative path—the Texas state-law inverse-condemnation cause of action. The Court ordered that Petitioners "be permitted to pursue their claims under the Takings Clause" in the existing federal proceeding. *DeVillier*, 601 U.S. at 293. The district court has now remanded the case to state court, disregarding that instruction entirely. Because the remand order on a substantive basis is insulated from appellate review under 28 U.S.C. § 1447(d), a writ of mandamus to execute the mandate of this Court is the only remedy.[2]

The Court has long recognized that mandamus relief is appropriate where a lower court "does not proceed to execute the mandate, or disobeys or mistakes its meaning." *United States v. Fossatt*, 62 U.S. 445, 446 (1858). Where a lower court "mistakes or misconstrues the decree of this Court, and does not give full effect to the mandate, its action may be controlled. . . by a writ of mandamus to execute the

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[2] Although concluding that a claim under the U.S. Constitution does not give rise to federal subject matter jurisdiction is plainly wrong, Petitioners do not seek substantive review of the district court's jurisdictional analysis except to the extent that analysis contravenes this Court's Opinion in *Devillier v. Texas*, 601 U.S. 285 (2024), and the mandate that followed. Petitioners seek only to correct the district court's order insofar as it "mistakes or misconstrues the decree of this [Court], and does not give full effect to the mandate." *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255–56 (1895). Limited to this extent, § 1447(d) does not bar mandamus in this instance. *See* Section III, *supra*.

mandate of this Court." *General Atomic Co. v. Felter*, 436 U.S. 493, 497 (1978) (*per curiam*) (internal quotation marks omitted). Where, as here, the lower court "has again done precisely what [this Court] held that it lacked the power to do," *id.* at 496, this Court's precedents dictate that the lower court should be instructed to "conform" to this Court's "previous judgment." *Id.* at 497. Mandamus is necessary to ensure this Court's mandate is followed.

I. Issuance of a Writ of Mandamus is Necessary to Compel the District Court's Compliance with this Court's Mandate.

The All Writs Act authorizes this Court to issue writs "necessary or appropriate in aid of [its] respective jurisdiction[] and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). Under this Court's rules, a petition for such a writ must show (1) that it will be in aid of this Court's appellate jurisdiction, (2) that exceptional circumstances warrant the exercise of this Court's discretionary powers, and (3) that adequate relief cannot be obtained in any other form or from any other court. Sup. Ct. R. 20.1.

This Court has recognized that mandamus provides appropriate relief when a lower court misconstrues or misapplies its mandate. *U.S. v. U.S. Dist. Ct. for S. Dist. of N.Y.*, 334 U.S. 258, 264 (1948) ("It is, indeed, a high function of mandamus to keep a lower tribunal from interposing unauthorized obstructions to enforcement of a judgment of a higher court.").

Once this Court has decided and remanded a case, whatever was before the Court and disposed of by its decree is finally settled. *Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 425, 427–28 (1978) (*per curiam*). A lower court is "bound" by this Court's mandate and "must carry it into execution." *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895). It cannot vary the mandate, grant further relief beyond what was remanded, or revisit any matter the appellate court resolved. *Ibid.* Where a lower court misconstrues the mandate or fails to give it full effect, this Court may issue a writ of mandamus to compel compliance. *Id.* at 255–56; *see also, e.g.*, *In re Potts*, 166 U.S. 263, 268 (1897); *United States v. United States District Court*, 334 U.S. 258, 263-264 (1948).

That obligation extends beyond the mandate's literal terms and reaches its underlying purpose. In *U.S. v. Terminal R.R. Ass'n of St. Louis*, 236 U.S. 194 (1915), this Court held that a district court's decree failed to give "proper effect" to its mandate even though the decree was formally responsive to it. *Id.* at 205. The decree was susceptible to a reading that stripped the defendant of lawful operations the prior decision had never intended to curtail. *Id.* at 205-07. Because the lower court misread the mandate in a way that undermined the very purpose the prior decision was designed to serve, modification was required. *Ibid.*; *see also Utah Pub. Serv. Comm'n v. El Paso Nat. Gas Co.*, 395 U.S. 464, 476–77 (1969) (vacating a divestiture decree that was formally connected to the mandate's terms but preserved arrangements inconsistent with its purpose of restoring competition). Just as the *Terminal Road* district court turned a mandate aimed at remedying

unlawful conduct into a basis for prohibiting lawful operations the prior decision assumed would continue, the district court here has turned a mandate designed to preserve Petitioners' federal forum into a basis for eliminating it entirely.

Where this Court's prior disposition necessarily resolved a question—even one not explicitly discussed—the lower court has no authority to reopen it. For example, in *NAACP v. Alabama ex rel. Patterson*, 360 U.S. 240 (1959), this Court overruled a contempt judgment a state court had issued against the NAACP on the basis that the NAACP had failed to comply with a production order and remanded for "proceedings not inconsistent with this opinion." *Id.* at 242. On remand, the Alabama Supreme Court "again affirmed" the contempt judgment by asserting for the first time that the NAACP had actually failed to comply with *other* aspects of the production order as well, and that this independent noncompliance justified the original judgment. *Id.* at 242-43. This Court reversed, holding the State was bound by its "previously taken position," and the court below was "foreclosed from re-examining the grounds of [this Court's] disposition." *Id.* at 244. Similarly, in *United States v. Haley*, 371 U.S. 18 (1962), this Court issued mandamus after a district court attempted to reopen the question of this Court's jurisdiction over a prior appeal. *Id.* at 19–20. The Court held that its earlier per curiam decision had "necessarily decided" the jurisdictional question, and the district court was therefore foreclosed from revisiting it. *Ibid.*

As explained below, the district court reopened the jurisdictional determination, even though it was

necessarily resolved by the Court's Opinion. A writ of mandamus is necessary to ensure the district court's compliance with this Court's mandate in *DeVillier v. Texas*, 601 U.S. 285 (2024).

II. The District Court's Deviation from this Court's Mandate Presents an Exceptional Circumstance Warranting Review.

The district court clearly and substantially departed from the mandate of this Court by ordering remand of the case to Texas state courts after finding there is no subject matter jurisdiction over Petitioners' federal constitutional claims. The effect of the district court's error is to deny Petitioners the right to proceed in the federal forum to which the State itself removed them and to which this Court recognized they are entitled—and to deliver to the State the "unfair tactical advantage" this Court has warned against. *See Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 621 (2002).

A. The Court's *DeVillier* Opinion necessarily resolved the issue of federal jurisdiction.

This Court's opinion leaves no room for the conclusion that its avoidance of the direct-cause-of-action question divested the district court of subject-matter jurisdiction. The text of the opinion confirms that its reasoning contemplated that Petitioners' federal constitutional rights would be addressed: "Texas law provides a cause of action that allows property owners to vindicate their rights under the Takings Clause." *DeVillier*, 601 U.S. at 293 (emphasis added). And, as the state-law cause of action allows the vindication of the Takings Clause, the Court

vacated the Fifth Circuit's judgment "so that Devillier's claims may proceed under Texas' state-law cause of action." *Ibid.* (emphasis added). The Opinion did not need to reach the question presented (whether the Takings Clause provides a cause of action in its own force), because that question "assumes the property owner has no separate cause of action under which to bring a claim based on the Takings Clause." *Ibid.* (emphasis added). The Court, in its Opinion, found that assumption unsupported based on the State's assertion, at oral argument, that Texas common law provides a cause of action through which property owners may seek just compensation "based on both the Texas Constitution and the Takings Clause." *Ibid.* The State's motion—and the District Court's order—on remand ignores this central point in direct contradiction to the Opinion.

At each step, the Opinion distinguished between the federal substantive right from the procedural vehicle used to vindicate it—and not once did the Court suggest that the existence of a state-law procedural vehicle divests the substantive claim of its federal character.[3] The procedural vehicle needed not be further defined given the available state-law vehicle. But the federal character of the claim remained constant: the federal rights, provided by the Takings Clause, were to be vindicated. If anything,

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[3] Indeed, the Court rejected the question presented because it "assumes the property owner has no separate cause of action under which to bring a claim based on the Takings Clause." *DeVillier*, 601 U.S. at 292; *see ibid.* (noting "constitutional concerns do not arise when property owners have other ways to seek just compensation").

the Opinion demands the opposite interpretation that the district court reached because the Court expressly rejected "[t]he premise that Texas left DeVillier with no cause of action to obtain the just compensation guaranteed by the Takings Clause." *DeVillier*, 601 U.S. at 293 (emphasis added).

More to the point of deviation from the Court's Opinion, the State represented to the Court (and the Court relied on that representation in its Opinion) that the case could continue in the district court repeatedly at oral argument. *Devillier*, 601 U.S. at 293. For example, Justice Sotomayor asked, "if [Petitioners] go back down and say to the district court, this has been remanded to the district court, all we want is just compensation under the Texas Constitution and the Fifth Amendment under [*Baytown v. Schrock*, 645 S.W.3d 174 (Tex. 2022)], that's okay and you're not going to resist that?" App. 92a. The State affirmed, "we would not resist that, Your Honor." *Ibid*. The State also told the Court that the federal Takings Clause claim could be pursued "under the Texas cause of action in a Texas court or here. . . in federal court." App. 71a. And the Chief Justice asked the State to clarify that the substantive right at issue is "a federal right, right?" *Ibid*. Again, the State agreed. App. 72a. When Justice Gorsuch asked whether the State would oppose leave to amend, the State answered: "On behalf of the State of Texas, we would not oppose that in the district court." App. 88a. On remand, Petitioners did exactly what the Opinion contemplated. But the State moved—and the district court ordered—the exact opposite.

The jurisdictional question was not lurking in the case unnoticed in the background. Before reaching this Court, it was the central issue on which the Fifth Circuit decided the case and on which the en banc court divided.[4] As such, the Court was squarely presented with the argument that federal courts lack jurisdiction over Petitioners' Takings claims, and its disposition—vacating the Fifth Circuit's judgment and remanding for further proceedings on the merits—is irreconcilable with the district court's current position (and the Higginbotham concurrence on the order remanding to the district court). *See Sprague v. Ticonic Nat. Bank*, 307 U.S. 161, 168 (1939) (holding an issue was not disposed of by prior mandate because "[i]t was neither before the Circuit Court of Appeals nor before this Court."); *Haley*, 371 U.S. at 19 (determining scope of prior mandate "[i]n light of the issues tendered in the papers filed on that appeal"). More to the point, had federal subject matter jurisdiction been absent, the Court could not have remanded for merits proceedings; it would have been required to dismiss.[5]

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[4] *See*, e.g., App. 169a–171a (vacating district court order denying motion to dismiss and instructing district court to dismiss for want of jurisdiction); App. 177a (Higginbotham, J., concurring in denial of reh'g en banc) (arguing absence of a "jurisdictional grant such as 42 U.S.C. § 1983" requires remand to state court).

[5] Had there been no subject matter jurisdiction over Petitioner's federal takings claims brought under the Fifth Amendment (a question that answers itself), the Court should have dismissed for want of jurisdiction, as the court of appeals (wrongly) did in the first instance on appeal. *See* App. 170a; *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152 (1908) (declining to reach merits where jurisdiction is lacking, even if the parties

The Court's disposition did not require it to reach the question of whether the Takings Clause—standing alone—provides a cause of action. But it could have affirmed the result below (dismissal of the Fifth Amendment claim as pled) without adopting the Fifth Circuit's reasoning and noting Petitioners' ability to amend.[6] It did not do that either. Instead, the Court vacated the judgment entirely. The Court's choice to vacate rather than affirm on narrow grounds confirms that the Fifth Circuit's disposition—which would have ended Petitioner's federal claims—was not consistent with the Court's analysis.

Finally, the Court's resolution of the issue also eliminated the Catch-22 that the Fifth Circuit's panel opinion had created. The effect of the panel opinion was that any plaintiff bringing a Takings Clause claim in Texas state court was susceptible to losing their claim, because "the State removes [and] the

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have not questioned it, and ordering the case be "remitted to the circuit court with instructions to dismiss the suit for want of jurisdiction"); s*ee also Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) ("[S]ubject-matter delineations must be policed by the courts on their own initiative even at the highest level."). And while Petitioners do not contend that this Court's silence on a jurisdictional defect categorically forecloses a lower court from raising one, that general proposition has no application here. The jurisdictional argument stood as a central issue below and the Court vacated rather than affirmed.

[6] Because this case reached the Court on interlocutory appeal, the disposition of the certified question would not, by itself, have required final resolution of the entire case. Petitioners' due process claims and state constitutional claims remained pending in the district court and were never at issue in the appeal.

federal court must assert jurisdiction and dismiss the claim with prejudice[.]" App. 210a. (Oldham, J., dissenting). "Likewise if the landowner tries to bring suit originally in federal district court." App. 210a–211a. This Court resolved that problem by recognizing federal subject-matter jurisdiction over Takings Clause claims even when brought through the Texas state-law vehicle—ensuring that the State could not use removal to extinguish the very claim it brought into federal court. The district court's remand order not only undoes that resolution but also entirely reverses the effect of this Court's Opinion and mandate.

B. The district court violated this Court's mandate by reopening issues this Court disposed of in its Opinion.

When this Court vacates a judgment and remands for further proceedings consistent with its opinion, its disposition necessarily resolves every issue on which the vacated judgment rested—including jurisdiction. *Haley*, 371 U.S. at 19–20. The lower courts had no authority to reopen the issue of federal jurisdiction over Petitioners' Takings Clause claims on remand, let alone to re-urge and adopt the same reasoning the State pressed before this Court and that this Court's vacatur had foreclosed.

As demonstrated above, this Court's Opinion necessarily contemplates federal jurisdiction over both of Plaintiffs' Takings Clause claims. By vacating the court of appeals' prior decision, this Court left intact only the district court's order which both denied the State's motion to dismiss Petitioners' federal Takings Clause claim and concluded that Petitioners

could proceed directly under the U.S. Constitution. That claim—a federal constitutional claim—conferred federal question jurisdiction. It existed, it remained, and it provided subject matter jurisdiction in the district court after vacatur of the court of appeals' judgment. All this Court (purposefully) held in the *DeVillier* Opinion was that, with the addition of a Texas common law claim based on the Takings Clause, the question of "whether a plaintiff has a cause of action arising directly under the Takings Clause" is not necessary for decision. *DeVillier*, 601 U.S. at 292. The district court mistook this Court's constitutional avoidance for a substantive ruling against the federal constitutional claim.

Yet, when the Fifth Circuit issued its revised remand order, Judge Higginbotham wrote separately to declare that it was now "settled" that "the state removal is now without jurisdictional legs to stand on." *Devillier*, 132 F.4th at 747 (citing *DeVillier*, 601 U.S. at 292-93). The articulated basis for remand to the state courts, as set out in Magistrate Edison's Memorandum and Recommendation, rested heavily on the Higginbotham concurrence. App. 12a, 18a.

The district court's remand order does not survive scrutiny under the mandate rule, which applies with full force to jurisdictional findings implicit in the Court's disposition. *Haley*, 371 U.S. at 20. The analysis that the Higginbotham concurrence offers in support of a contrary conclusion—that a state's fulfillment of its Fifth Amendment obligations through a state-law vehicle, eliminates federal-question jurisdiction under § 1331—is the same analysis underlying the earlier judgment this Court

vacated. The district court, by adopting it, has done exactly what this Court's mandate was designed to prevent: it has reinstated the result this Court vacated, through reasoning this Court had every occasion to adopt and expressly vacated. *See Sibbald v. U.S.*, 37 U.S. 488, 492 (1838) ("Whatever was before the Court, and is disposed of, is considered as finally settled."). With all due respect to the district court, a lower court cannot smuggle in a result this Court has previously rejected simply by routing the rejected analysis through a different procedural vehicle. *See Feltner*, 436 U.S. at 496–97 (issuing mandamus where the lower court had "again done precisely what we held that it lacked the power to do").

The Court vacated the Fifth Circuit's judgment and remanded Petitioners' case "for further proceedings consistent with the opinion of this Court." *DeVillier*, 601 U.S. at 293. The premise on which this Court avoided the cause-of-action question entirely is that Petitioners have a viable path forward to exercise a federal substantive right in federal court. A remand to state court is not "consistent with" this Court's opinion. It is the opposite: it reinstates the very disposition this Court vacated and strips the Petitioners of the forum the State chose and in which the State assured this Court the claims could proceed. In this circumstance, mandamus relief is both appropriate and imperative. *See Gaines v. Caldwell*, 148 U.S. 228, 244 (1893) ("[T]his court cannot, on well-established rules and principles, permit the circuit court, of its own motion, to go back of, or subvert, what was settled by the opinion and mandate in the present cases.").

III. Adequate Relief Cannot be Obtained in Any Other Form or From Any Other Court.

Petitioners cannot appeal the district court's remand order. 28 U.S.C. § 1447(d). But § 1447(d)'s bar on appellate review does not limit this Court's authority to enforce its own mandate under 28 U.S.C. § 1651(a).

Petitioners do not seek substantive review of the district court's jurisdictional analysis. They seek only to correct the district court's failure to give effect to this Court's mandate. Section 1447(d) does not reach this narrower inquiry. *See Fisher v. Hurst*, 333 U.S. 147, 150 (1948) ("The only question before us on this petition for a writ of mandamus is whether or not our mandate has been followed."); *U.S. v. U.S. Dist. Ct. for S. Dist. of N.Y.*, 334 U.S. at 265 ("The power to compel obedience with the mandate turns on whether the lower court has obstructed enforcement of it, not on the collateral repercussions which enforcement may entail.").

Additionally, this Court's authority under the All Writs Act extends to the enforcement of past exercises of jurisdiction, not merely the protection of future ones. *Delaware, L. & W.R. Co. v. Rellstab*, 276 U.S. 1, 4 (1928); *U.S. v. U.S. Dist. Ct. for S. Dist. of N.Y.*, 334 U.S. at 263–64. As this Court confirmed last Term, "a claim that a lower court has failed to give effect to an order of this Court is properly addressed here," and a party who has obtained judgment in this Court "should not be required to go through that entire process again to obtain execution of the judgment of this Court." *Dep't of Homeland Sec. v. D.V.D.*, 145 S. Ct. 2627, 2630 (2025) (quoting *Felter*, 436 U.S. at 497).

Nor could Petitioners seek a writ of mandamus similar to this one from the Fifth Circuit. Because this Court's work—the *DeVillier* Opinion—necessarily resolved the question of federal jurisdiction over Petitioners' Takings Clause claims, it is for this Court—and only this Court—to construe its own mandate and to require compliance with it. *Sanford Fork*, 160 U.S. at 255–56 ("[O]n the application for a writ of mandamus . . . it is for this court to construe its own mandate, and to act accordingly.").

All three requirements of Supreme Court Rule 20.1 are therefore satisfied. Petitioners have (1) no avenue of appellate review, (2) exceptional circumstances warrant this court's discretionary powers, and (3) no other court has authority to enforce this Court's mandate. The writ is the only remedy.

CONCLUSION

The petition for writ of mandamus should be granted.

Respectfully submitted.

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APPENDIX

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APPENDIX A — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, GALVESTON DIVISION, ENTERED APRIL 9, 2026

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

3:20-cv-223
(253rd Judicial District Court of Chambers County, 20-DCV-0300)

RICHARD ALLEN DEVILLIER, *et al.*,

Plaintiffs,

V.

STATE OF TEXAS,

Defendant.

3:20-cv-379
(344th Judicial District Court of Chambers County, 20-DCV-0792)

KEVIN SONNIER, *et al.*,

Plaintiffs,

V.

STATE OF TEXAS,

Defendant.

Appendix A

4:21-cv-1521
(172d Judicial District Court of Jefferson County,
E-207211)

DEVON BOUDREAUX, *et al.*,

Plaintiffs,

V.

STATE OF TEXAS,

Defendant.

3:21-cv-104
(253rd Judicial District Court of Liberty County,
21DC-CV-00071)

SOUTHEAST TEXAS OLIVE, LLC, *et al.*,

Plaintiffs,

V.

STATE OF TEXAS,

Defendant.

ORDER ADOPTING MAGISTRATE JUDGE'S MEMORANDUM AND RECOMMENDATION

On September 2, 2020, all non-dispositive and dispositive pretrial matters in this consolidated case were referred to United States Magistrate Judge Andrew M. Edison under 28 U.S.C. § 636(b)(1)(A)–(B). Dkt. 14. Judge Edison filed a memorandum and recommendation on January 5, 2026, recommending that The State of Texas's motion to remand to state court, Dkt. 174, be granted. Dkt. 186.

Appendix A

On January 20, 2026, the plaintiffs filed objections to the memorandum and recommendation. Dkt. 187. In accordance with 28 U.S.C. § 636(b)(1)(C), this court is required to "make a de novo determination of those portions of the [magistrate judge's] report or specified proposed findings or recommendations to which objection [has been] made." After conducting this de novo review, the court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." *Id.*; *see also* Fed. R. Civ. P. 72(b)(3).

The court has considered the objections, the memorandum and recommendation, and the record. The court accepts Judge Edison's memorandum and recommendation dated January 5, 2026, Dkt. 186, and adopts it as the opinion of the court. It is therefore ordered that:

(1) Judge Edison's memorandum and recommendation, Dkt. 186, is approved and adopted in its entirety as the holding of the court; and

(2) These four consolidated cases are remanded to the state courts of Chambers, Jefferson, and Liberty Counties from which they were removed, as reflected on the first page of this order.

Signed on Galveston Island this 9th day of April, 2026.

/s/ Jeffrey Vincent Brown
JEFFREY VINCENT BROWN
UNITED STATES DISTRICT JUDGE

APPENDIX B — MEMORANDUM AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, GALVESTON DIVISION, FILED JANUARY 5, 2026

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CIVIL ACTION NO. 3:20-CV-00223

RICHARD ALLEN DEVILLIER, *et al.*,

Plaintiffs,

v.

STATE OF TEXAS,

Defendant.

MEMORANDUM AND RECOMMENDATION

I would not be surprised if one day there is a law school class devoted entirely to this case. That is because the instant matter presents a myriad of fascinating procedural and substantive legal issues. It is not every day that a case pending in Galveston, Texas ends up before the United States Supreme Court. But that is exactly what has happened here.

I have spent an enormous amount of time and effort over the past several years working on this case. The

lawyering on both sides has been superb. I would love nothing more than to continue working on this case through its conclusion. Alas, I do not think this case can remain in federal court. After reviewing the Supreme Court's recent opinion in this case, as well as the parties' briefing on the jurisdictional issues, I am convinced that federal question jurisdiction is lacking. I must, therefore, recommend that the State of Texas's motion to remand be granted, and these consolidated cases be returned to the state courts from which they originated.

BACKGROUND

United States Interstate Highway 10 is a major transportation corridor, providing the main connection between Houston and the Southeast portion of the United States. During heavy rainfall events, stormwater draining from north to south (toward the Gulf of Mexico) would inundate I-10 between Houston and Beaumont, making it impassable. To facilitate the use of I-10's eastbound lanes as an evacuation route during periods of flooding, the Texas Department of Transportation installed a 32-inch impenetrable, solid concrete traffic barrier on the highway's centerline. The barrier was intended to act as a dam, protecting the southside of the freeway from flooding by keeping all rainfall on the northside. According to Plaintiffs, the barrier did its job. During Hurricane Harvey and Tropical Storm Imelda, two storms that hit the Gulf Coast over the last decade, rainfall that would otherwise run overtop the roadway and continue downstream towards the Gulf of Mexico instead was stopped by the barrier. This allowed the south side of the

highway to remain open. But the barrier caused Plaintiffs' properties on the northside of I-10 to flood, ultimately displacing Plaintiffs from their homes, ruining crops, killing livestock, and destroying personal property.

Plaintiffs originally filed four putative class actions against the State in Texas state court—two in Chambers County, one in Jefferson County, and one in Liberty County. In each lawsuit, Plaintiffs argue that the State's construction of the solid concrete barrier along a stretch of I-10 caused their properties to be inundated, taken, destroyed, and damaged without their consent or compensation in violation of both the Texas and United States Constitutions.

The State removed the four cases to federal court, and they were eventually transferred to the Galveston Division of the Southern District of Texas. In the interests of judicial economy and efficiency, I consolidated all the actions into this case. After Plaintiffs filed an amended pleading, the State moved to dismiss Plaintiffs' Fifth Amendment Takings Clause claim for several independent reasons, including that Plaintiffs had no cause of action arising directly under the Takings Clause. The district court denied the motion to dismiss, but allowed for a permissive interlocutory appeal.

In a three-sentence opinion, the Fifth Circuit held "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." *Devillier v. State*, 53 F.4th 904 (5th Cir. 2023).

Appendix B

After the Fifth Circuit refused to hear the case *en banc*, the Supreme Court "granted certiorari to decide whether a property owner may sue for just compensation directly under the Takings Clause." *DeVillier v. Texas*, 601 U.S. 285, 290, 144 S. Ct. 938, 218 L. Ed. 2d 268 (2024). Writing for a unanimous court, Justice Clarence Thomas declined to reach the question presented because it "would be imprudent to decide [what would happen if a property owner had no cause of action to vindicate his rights under the Takings Clause] without satisfying ourselves of the premise that there is no cause of action." *Id.* at 292. Noting "that constitutional concerns do not arise when property owners have other ways to seek just compensation," *id.* at 292, the Supreme Court explained that Texas's "statelaw inverse-condemnation cause of action provides a vehicle for takings claims based on both the Texas Constitution and the Takings Clause." *Id.* at 293. The Supreme Court concluded that, on remand, Plaintiffs "should be permitted to pursue their claims under the Takings Clause through the cause of action available under Texas law." *Id.*

After mandate issued, Plaintiffs filed a Second Amended Master Complaint ("Complaint"). *See* Dkt. 162. The Complaint advances six counts: (1) a state inverse condemnation claim under article 1, § 17 of the Texas Constitution; (2) a federal inverse condemnation claim under the United States Constitution's Fifth Amendment Takings Clause; (3) a Fourteenth Amendment procedural due process claim; (4) a Fourteenth Amendment substantive due process claim; (5) a request for declaratory and injunctive relief; and (6) a state common law cause of action seeking just compensation for violation of the

United States Constitution's Fifth Amendment Takings Clause.

The State has moved to remand the case to state court. *See* Dkt. 174. Plaintiffs oppose. I held an oral argument to fully explore the relevant legal issues. I now explain why this case must be remanded to state court.

LEGAL STANDARD

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994). Accordingly, "doubts regarding whether removal jurisdiction is proper should be resolved against federal jurisdiction" and in favor of remand. *Acuna v. Brown & Root Inc.*, 200 F.3d 335, 339 (5th Cir. 2000). Where Plaintiffs amend their "complaint following [the] suit's removal, a federal court's jurisdiction depends on what the new complaint says." *Royal Canin U.S.A., Inc. v. Wullschleger*, 604 U.S. 22, 30 (2025), 145 S. Ct. 41, 220 L. Ed. 2d 289.

The two primary sources of federal district courts' original jurisdiction are diversity jurisdiction and federal question jurisdiction. *See* U.S. Const., art. III, § 2, cl. 1; 28 U.S.C. §§ 1331-32. Diversity jurisdiction allows district courts to decide cases that are between citizens of different states when the amount in controversy involves more than $75,000. *See* 28 U.S.C. § 1332(a). Federal question jurisdiction exists where a claim arises

"under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Because the parties agree that diversity jurisdiction is lacking, this court's ability to hear this matter turns on whether there is federal question jurisdiction.

"The presence or absence of federal-question jurisdiction is governed by the well-pleaded complaint rule, which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987) (quotation omitted). An action arises under federal law "only in those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Singh v. Duane Morris LLP*, 538 F.3d 334, 337-38 (5th Cir. 2008) (cleaned up). The "test for jurisdiction over federal issues embedded in state-law claims between nondiverse parties" is this: "does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314, 125 S. Ct. 2363, 162 L. Ed. 2d 257 (2005). Federal courts must presume "that a cause lies outside this limited jurisdiction" unless the party asserting federal jurisdiction carries its burden to establish otherwise. *Kokkonen*, 511 U.S. at 377.

Appendix B

ANALYSIS

In a nutshell, the State's position is that the Supreme Court's *DeVillier* decision establishes "that where a Texas cause of action exists to vindicate federal takings rights, Plaintiffs must use it and cannot rely alternatively on an implied federal cause of action." Dkt. 174 at 13. Because "constitutional concerns do not arise" where, as here, Texas law provides a way "to seek just compensation," the State insists that federal question jurisdiction does not exist and this case must be remanded to state court. *DeVillier*, 601 U.S. at 292.

Plaintiffs strongly disagree. They argue that "[f]ederal subject matter jurisdiction over this case is provided by the general federal question jurisdiction statute for Counts 2 (federal Takings Clause), 3 (procedural due process), 4 (substantive due process), and 6" (a state-law cause of action grounded in the federal Takings Clause). Dkt. 175 at 9. In Plaintiffs' view, the jurisdictional issues are simple and straightforward: "This Court would be hard pressed to find a claim more squarely within its federal question jurisdiction than one based directly on the U.S. Constitution." *Id.* at 12.

Because it is settled law that a case properly belongs in federal court if there is a single federal question present in the Complaint, I must conduct a claim-by-claim inquiry. At the same time, I am mindful that any doubts or ambiguities I have concerning federal question jurisdiction must be resolved in favor of remand. *See Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002).

Count 2: Count 2 purports to assert a claim directly under the Fifth Amendment's Takings Clause, which mandates the payment of just compensation when a government takes private property for public use. *See* U.S. Const. amend. V. Plaintiffs argue that Count 2 falls squarely within federal question jurisdiction because it requires construction of federal law as applied under the Fifth Amendment. At first blush, Plaintiffs have a point. They plainly allege a Fifth Amendment Takings Claim on the face of the Complaint. But that is not the end of the story. Even though "a federal claim appears on the face of the complaint," federal question jurisdiction does not exist when there is "a frivolous or insubstantial claim, i.e., a claim which has no plausible foundation or which is clearly foreclosed by a prior Supreme Court decision." *Young v. Hosemann*, 598 F.3d 184, 188 (5th Cir. 2010) (quotation omitted).

It is worth repeating that the Supreme Court in *DeVillier* held "that constitutional concerns do not arise when property owners have other ways to seek just compensation." *DeVillier*, 601 U.S. at 292. Given that "Texas state law provides a[n inverse-condemnation] cause of action by which property owners may seek just compensation against the State," the Supreme Court instructed Plaintiffs "to pursue their claims under the Takings Clause through the cause of action available under Texas law." *Id.* at 293.

Justice Thomas recognized in *DeVillier* that the state court system is capable of handling those cases in which property owners advance a state-law inverse

condemnation cause of action to vindicate their rights under the Fifth Amendment's Takings Clause:

> Our constitutional system assigns to state officers a coordinate responsibility to enforce the Constitution according to their regular modes of procedure. It therefore looks to the good faith of the States to provide an important assurance that "this Constitution, and the Laws of the United States which shall be made in Pursuance thereof shall be the supreme Law of the Land." We should not assume the States will refuse to honor the Constitution, including the Takings Clause, because States and their officers are also bound by obligations imposed by the Constitution.

DeVillier, 601 U.S. at 292-93 (quoting U.S. Const., art. VI) (cleaned up). In remanding this case to the district court for further proceedings consistent with the Supreme Court's decision, Fifth Circuit Judge Patrick E. Higginbotham offered his opinion: "It is now settled that in providing rights of action for takings by the state, Texas is discharging its obligations under the Fifth Amendment and the state removal is now without jurisdictional legs to stand on." *DeVillier v. Texas*, 132 F.4th 746, 747 (5th Cir. 2024) (Higginbotham J., concurring).

Federal question jurisdiction typically exists when "a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial

question of federal law." *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 27-28, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983). Plaintiffs' right to relief under a state-law inverse condemnation cause of action does not implicate a substantial question of federal law.

As Justice Benjamin Cardozo explained almost 90 years ago:

> The most one can say is that a question of federal law is lurking in the background, just as farther in the background there lurks a question of constitutional law, the question of state power in our federal form of government. A dispute so doubtful and conjectural, to far removed from plain necessity, is unavailing to extinguish the jurisdiction of the states.
>
> . . .
>
> If we follow the ascent far enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible.

Gully v. First Nat. Bank, 299 U.S. 109, 117-18, 57 S. Ct. 96, 81 L. Ed. 70 (1936). The same holds true here.

Appendix B

Counts 3 and 4: In Count 3, Plaintiffs allege a procedural due process claim in violation of the Fourteenth Amendment "[i]n the alternative to Count 1." Dkt. 162 at 29. Plaintiffs contend that if their claims under article 1, § 17 of the Texas Constitution (Count 1) are "denied based on a determination that it must be shown that the State possessed actual knowledge that its actions were certain to inundate specific parcels of property," then Plaintiffs have been deprived of a property interest without procedural due process of law. *Id.* In Count 4, Plaintiffs allege—again "[i]n the alternative" to their takings claims—a substantive due process claim in violation of the Fourteenth Amendment. This claim is premised on the idea that if "Plaintiffs have no right to directly assert an inverse condemnation claim against the State of Texas for just compensation under the Fifth Amendment to the U.S. Constitution," then "their substantive rights to due process protection secured by the Fourteenth Amendment to the U.S. Constitution have been violated by the State's taking." *Id.* at 31.

Because I am obligated to strictly construe the removal statute in favor of remand, I conclude that neither Count 3 nor Count 4 provide subject matter jurisdiction. It is black-letter law that "a claim must be ripe for a federal court to have jurisdiction." *Lower Colo. River Auth. v. Papalote Creek II, L.L.C.*, 858 F.3d 916, 924 (5th Cir. 2017). The "[r]ipeness doctrine enforces the Constitution's limit of federal court jurisdiction to 'cases or controversies' by preventing premature litigation." *Archbold-Garrett v. New Orleans City*, 893 F.3d 318, 321 (5th Cir. 2018). "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed

may not occur at all." *Texas v. United States*, 523 U.S. 296, 300, 118 S. Ct. 1257, 140 L. Ed. 2d 406 (1998) (quotation omitted). "A court should dismiss a case for lack of 'ripeness' when the case is abstract or hypothetical." *Orix Credit All., Inc. v. Wolfe*, 212 F.3d 891, 895 (5th Cir. 2000) (quotation omitted). In determining whether a case is ripe, there are two key considerations: "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* (quotation omitted).

Plaintiffs' procedural and substantive due process claims outlined in Counts 3 and 4 are abstract, hypothetical, and contingent. As Plaintiffs recognize, their procedural and substantive due process claims only arise if they do not prevail on their underlying takings claim. But "where the injury that resulted from an alleged procedural due process violation is merely a taking without just compensation, [the court] cannot know whether the plaintiff suffered any injury until the takings claim has been adjudicated." *Rosedale Missionary Baptist Church v. New Orleans City*, 641 F.3d 86, 91 (5th Cir. 2011). For that reason, Plaintiffs must allow their state-law inverse-condemnation claim to run its course before they can raise—and a court can adjudicate—their procedural and substantive due process claims. *See id.* at 89 ("Because the church does not allege a substantive due process claim that is independent of its procedural due process claim, and we cannot address the procedural due process claim without knowing the outcome of the takings claim, which is not before us, we dismiss the case as unripe."); *John Corp. v. City of Houston*, 214 F.3d 573, 585-86 (5th Cir. 2000) (holding that a district court cannot address

a procedural due process claim until it has determined whether a taking has occurred).[1]

As the State points out, Plaintiffs offer their procedural and substantive due process claims "as a hedge bet in the event their" Counts 1 and 2 fail. Dkt. 176 at 19. Because Plaintiffs' procedural and substantive due process claims are entirely dependent on the outcome of their takings claims, the due process issues are not ripe. Thus, no federal question jurisdiction exists with respect to Counts 3 and 4.[2]

---

1. Plaintiffs argue that *Rosedale* and *John Corp.* are inapposite because they are based on *Williamson County's* now-defunct state-court exhaustion requirement. *See Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank*, 473 U.S. 172, 186, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985), *overruled in part by Knick v. Twp. of Scott*, 588 U.S. 180, 139 S. Ct. 2162, 204 L. Ed. 2d 558 (2019). This argument does not move me because the Fifth Circuit stated in *Rosedale* and *John Corp.* that it was relying on general ripeness principles, not *Williamson County*, to find procedural and substantive due process claims unripe in the taking context. *See Rosedale*, 641 F.3d at 89 ("[T]he church's due process claim is unripe based not on *Williamson County* but on general ripeness principles."); *John Corp.*, 214 F.3d at 586 ("In determining that Appellants' procedural due process claim is unripe, we do not apply *Williamson County* per se, but rather the general rule that a claim is not ripe if additional factual development is necessary.").

2. I acknowledge that the State has previously taken the position that Counts 3 and 4 independently provide federal subject matter jurisdiction. *See* Dkt. 175 at 20. Although Plaintiffs are quick to highlight those prior statements, "no action of the parties can confer subject-matter jurisdiction." *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982). "Courts have an independent obligation to determine

Count 6: In Count 6, Plaintiffs bring a state common law cause of action seeking just compensation for violation of the Fifth Amendment. This is the state-law inverse-condemnation claim that the Supreme Court noted in *DeVillier* provides a vehicle for takings claims based on both the Texas Constitution and the federal Takings Clause. This state-law claim does not give rise to federal question jurisdiction.

There is a "long-settled understanding that the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 813, 106 S. Ct. 3229, 92 L. Ed. 2d 650 (1986). "A suit arises under the law that creates the cause of action." *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260, 36 S. Ct. 585, 60 L. Ed. 987 (1916). "Federal jurisdiction is not shown by this test, for [Plaintiffs] allege[] an asserted cause of action created by Texas law." *Willy v. Coastal Corp.*, 855 F.2d 1160, 1167 (5th Cir. 1988).

"[F]ederal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn v. Minton*, 568 U.S. 251, 258, 133 S. Ct. 1059, 185 L. Ed. 2d 72 (2013). "Where all four of these requirements are met, . . . jurisdiction is proper because there is a serious federal interest in

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whether subject-matter jurisdiction exists." *Hertz Corp. v. Friend*, 559 U.S. 77, 94, 130 S. Ct. 1181, 175 L. Ed. 2d 1029 (2010).

claiming the advantages thought to be inherent in a federal forum, which can be vindicated without disrupting Congress's intended division of labor between state and federal courts." *Id.* (quotation omitted).

None of these elements are satisfied here. To begin, there is no federal issue necessarily raised in this case. That is because the State has "honor[ed] its obligations under the Fifth Amendment" by providing a cause of action for inverse condemnation. *DeVillier*, 132 F.4th at 748 (Higginbotham J., concurring). "[F]ederal jurisdiction demands not only a contested federal issue, but a substantial one, indicating a serious federal interest in claiming the advantages thought to be inherent in a federal forum." *Grable*, 545 U.S. at 313. Even if there is a federal issue at stake, Plaintiffs' right to relief on the state-law inverse condemnation cause of action does not depend on the resolution of a substantial and disputed question of federal law. Finally, there is no reason to think that a federal court is uniquely positioned to address a state-law inverse condemnation claim simply because such a claim allows Plaintiffs to vindicate their rights under the federal Takings Clause. Indeed, the Supreme Court has already opined in this case that it has no constitutional concerns with state courts handling such claims "according to their regular modes of procedure." *DeVillier*, 601 U.S. at 292 (quotation omitted).

A mere invocation of the federal Takings Clause in the Complaint does not, by itself, give rise to federal question jurisdiction, especially when the underlying cause of action—in this case, an inverse condemnation claim—is

brought under state law. As pointed out by the State, the logical extension of Plaintiffs' argument is that

> every single taking case that exists across the entire U.S., in every state, which all, to some degree, can trace their way back to the Constitution, can be filed in federal court. The allowance of this position would strip the states' judiciar[ies] of their powers to govern the actions and the laws of their state[s]. *See Alden v. Maine*, 527 U.S. 706, 713, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999) ("[T]he States entered the federal system with their sovereignty intact. Various textual provisions of the Constitution assume the States' continued existence and active participation in the fundamental processes of governance.").

Dkt. 176 at 22.

I am sympathetic to Plaintiffs' argument that "[r]eturning to state courts would erase years of effort and return a near-trial-ready case to a disorganized infancy." Dkt. 175 at 10. I have no doubt that Plaintiffs are correct in their assessment. But my task is not to select the most convenient forum for the parties to litigate their dispute. I am "duty-bound" to examine whether subject-matter jurisdiction exists and I may not proceed where it is apparent that jurisdiction does not exist. *Union Planters Bank Nat'l Ass'n v. Salih*, 369 F.3d 457, 460 (5th Cir. 2004); *see also Wullschleger*, 604 U.S. at 26 ("If the complaint presents no federal question, a federal court

may not hear the suit."). It is apparent that jurisdiction does not exist here.

* * *

In sum, Plaintiffs' only ripe claims are their claims under article 1, § 17 of the Texas Constitution (Count 1) and their state common law cause of action seeking just compensation for violation of the Fifth Amendment (Count 6). Although Count 6 implicates the federal Takings Clause, the cause of action is created by state law. Plaintiffs' claim for procedural and substantive due process would be a source of federal question jurisdiction if they were ripe, but they are not. Accordingly, there is no ripe claim that gives rise to federal question jurisdiction.

CONCLUSION

Construing all doubts and ambiguities in favor of remand, as I am required to do, I conclude that this court does not possess subject matter jurisdiction. I thus recommend that the State of Texas's Motion to Remand to State Court (Dkt. 174) be granted. These four consolidated cases—No. 3:20-cv-223; No. 3:20-cv-379; No. 3:21-cv-104; and No. 4:21-cv-1521—should be remanded to the state courts of Chambers, Jefferson, and Liberty Counties from which they were removed.

The parties have 14 days from service of this memorandum and recommendation to file written objections. *See* 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b)(2). Failure to file timely objections will preclude

appellate review of factual findings and legal conclusions, except for plain error.

SIGNED this 5th day of January 2026.

/s/ Andrew M. Edison
ANDREW M. EDISON
UNITED STATES MAGISTRATE JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED NOVEMBER 13, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-40750

RICHARD DEVILLIER; WENDY DEVILLIER; STEVEN DEVILLIER; RHONDA DEVILLIER; BARBARA DEVILLIER; *et al.*,

Plaintiffs-Appellees,

versus

STATE OF TEXAS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC Nos. 3:20-CV-223, 3:20-CV-379,
3:21-CV-104, 4:21-CV-1521

Before HIGGINBOTHAM, SOUTHWICK, and HIGGINSON, *Circuit Judges.*

PUBLISHED ORDER

PER CURIAM:

The United States Supreme Court vacated the judgment of this court and remanded for further

proceedings. *See DeVillier v. Texas*, 601 U.S. 285, 144 S. Ct. 938, 218 L. Ed. 2d 268 (2024). On September 26, 2024, we remanded to the district court with instructions to remand to state court. On reconsideration, we withdraw that order. We now REMAND to the district court for further proceedings consistent with the decision of the Supreme Court. The withdrawal of our previous order should not be interpreted as a rejection of the validity of returning the litigation to state court. Instead, it leaves that decision to the district court.

Appendix C

PATRICK E. HIGGINBOTHAM, *Circuit Judge*, concurring:

These currently consolidated individual cases should be returned to the individual state courts from which they came and proceed under state processes—while still respecting the earlier consolidations made under state law. Any other path shadows the High Court.[1]

At the outset, it is important to recount the procedural history of these cases. In response to the flooding caused by the Texas Department of Transportation, affected landowners sought compensation in four separate class actions across Chambers, Liberty, and Jefferson counties.[2] Pursuing a distinct agenda, the State of Texas removed the cases to federal court. In short, the presence of these Plaintiffs in federal court came not by their own hands, but by the State's pursuit of a distinct goal.

Following removal to the district court, the four groups of Plaintiffs and the State of Texas moved under the federal rules to consolidate the four cases into one suit. This motion was granted by the Magistrate Judge. But then the Supreme Court in a unanimous opinion recognized that it need not decide the issue on which the state's removal was based because Texas law provided the landowners the protection of the Fifth Amendment.

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1. *See DeVillier v. Texas*, 601 U.S. 285, 144 S. Ct. 938, 218 L. Ed. 2d 268 (2024).

2. The Plaintiffs filed four separate class actions under TEX. R. CIV. P. 42. The classes were never certified.

Yet, although not here by their own choice, the Plaintiffs now prefer to remain in federal court with their state law claims. But that preference is not dispositive. It is now settled that in providing rights of action for takings by the state, Texas is discharging its obligations under the Fifth Amendment and the state removal is now without jurisdictional legs to stand on.[3]

So, the parties argue that the district court should exercise supplemental jurisdiction. This important tool of judicial efficiency has four exceptions: when a claim raises a novel or complex issue of state law, when a claim substantially predominates over other claims, when the district court has dismissed all claims over which it has original jurisdiction, and when "exceptional circumstances" are present and provide compelling reasons for declining jurisdiction.[4]

To these eyes, the § 1367(c) exceptions stand in the way of supplemental jurisdiction. The issues of Texas law remain both controlling and complex, as its law of inverse condemnation here is uncertain in its application and retaining the cases places the district court in the position of either making an *Erie* guess or certifying questions of law to the state court. This is the first trip on the new path—one Texas has provided through a right of action that honors its obligations under the Fifth Amendment.

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3. *See DeVillier*, 601 U.S. at 292-93.

4. 28 U.S.C. §§ 1367(c)(1)-(4). *See also Ameritox, Ltd. v. Millenium Lab'ys, Inc.*, 803 F.3d 518, 530-33 (11th Cir. 2015) (chronicling the evolution of the doctrine of supplemental jurisdiction).

It cannot be gainsaid that its courts are equipped to vindicate the litigant's rights.[5]

A unanimous Supreme Court has relied upon the state pathway, enabling it to not reach the difficult issue of implied federal jurisdiction. As its decision makes plain, this pathway—available to all states—is in classic service of federalism. It would be perverse to not return these cases to the state courts from which they were removed so that they may travel on the Supreme Court's predicate pathway, the first to do so.

As Justice Thomas observed, it is undisputed that state court judges are "bound by obligations imposed by the Constitution."[6] I am confident that our able district court will heed his observation—made for a unanimous court—and send these travelers on the Supreme Court's predicate pathway, mindful that federal law *is* state law.[7]

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5. *See, e.g.*, *Tex. Dep't of Transp. v. Self*, 690 S.W.3d 12 (Tex. 2024) (explaining and expounding on Texas inverse condemnation caselaw).

6. *DeVillier*, 601 U.S. at 293 (quoting *Alden v. Maine*, 527 U.S. 706, 755, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999)).

7. *See generally Testa v. Katt*, 330 U.S. 386, 67 S. Ct. 810, 91 L. Ed. 967 (1947).

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED SEPTEMBER 30, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-40750

RICHARD DEVILLIER; WENDY DEVILLIER; STEVEN DEVILLIER; RHONDA DEVILLIER; BARBARA DEVILLIER; *Et al.*,

Plaintiffs-Appellees,

versus

STATE OF TEXAS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 3:20-CV-223
USDC No. 3:20-CV-379
USDC No. 3:21-CV-104
USDC No. 4:21-CV-1521

UNPUBLISHED ORDER

Before HIGGINBOTHAM, SOUTHWICK, and HIGGINSON, *Circuit Judges.*

Appendix D

PER CURIAM:

IT IS ORDERED that Appellees' opposed motion to recall the mandate is GRANTED. The parties are DIRECTED to file simultaneous letter briefs within 10 days from the date this order explaining what this Court should now do in light of the Supreme Court's decision.

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED SEPTEMBER 26, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-40750

RICHARD DEVILLIER; WENDY DEVILLIER; STEVEN DEVILLIER; RHONDA DEVILLIER; BARBARA DEVILLIER; *et al*,

Plaintiffs-Appellees,

versus

STATE OF TEXAS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
No. 3:20-CV-223

PUBLISHED ORDER

Before HIGGINBOTHAM, SOUTHWICK, and HIGGINSON, *Circuit Judges*.

PER CURIAM:

The United States Supreme Court vacated the judgment of this court and remanded for further proceedings. *See Devillier v. Texas*, 601 U.S. 285 (2024).

Appendix E

In light of the Supreme Court's decision, we REMAND to the District Court with instructions to REMAND to the state court from which this case was removed.

APPENDIX F — OPINION OF THE SUPREME COURT OF THE UNITED STATES, FILED APRIL 16, 2024

SUPREME COURT OF THE UNITED STATES

No. 22–913

RICHARD DEVILLIER, *et al.*,

Petitioners ,

v.

TEXAS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[April 16, 2024]

JUSTICE THOMAS delivered the opinion of the Court.

Richard DeVillier alleges that the State of Texas took his property for stormwater storage. He sought just compensation under the Takings Clause of the Fifth Amendment, arguing that the Constitution itself authorized him to bring suit. We granted certiorari to decide whether "a person whose property is taken without compensation [may] seek redress under the self-executing Takings Clause even if the legislature has not affirmatively provided them with a cause of action." Pet. for Cert. i. That question assumes the property owner has

no separate cause of action under which to bring a claim based on the Takings Clause. But, that is not the case here. Texas law provides a cause of action that allows property owners to vindicate their rights under the Takings Clause. We therefore vacate and remand so that DeVillier's claims may proceed under Texas' state-law cause of action.

I

Richard DeVillier and more than 120 other petitioners own property north of U. S. Interstate Highway 10 between Houston and Beaumont, Texas.[1] The State of Texas undertook several projects to facilitate the use of that portion of the highway as a flood-evacuation route. It installed a roughly 3-foot-tall barrier along the highway median to act as a dam, preventing stormwater from covering the south side of the road.

In August 2017, Hurricane Harvey brought heavy rainfall to southeast Texas. The new median barrier performed as intended, keeping the south side of the highway open. But, it also flooded petitioners' land to the north, displacing them from their homes, damaging businesses, ruining crops, killing livestock, and destroying family heirlooms. The same thing happened during Tropical Storm Imelda in 2019. As depicted, the median barrier kept the south side of the highway open (on the left side of both pictures) by holding back stormwater, which

1. Because this case comes to us at the pleading stage, we assume the truth of the facts alleged in the operative complaint. See, *e.g.*, *Swierkiewicz* v. *Sorema N. A.*, 534 U. S. 506, 508, n. 1 (2002).

then submerged property north of the highway (on the right side of both pictures):

Figure 1

Figure 2

Because heavy rainfall is not uncommon in southeast Texas, the median barrier will continue to cause flooding on DeVillier's land during future storms.

Appendix F

DeVillier filed suit in Texas state court. He alleged that, by building the median barrier and using his property to store stormwater, Texas had effected a taking of his property. DeVillier argued that he was therefore entitled to just compensation under both the United States and Texas Constitutions. Other property owners filed similar suits. Texas removed the cases to federal court, where they were consolidated into a single proceeding with one operative complaint. The operative complaint includes inverse-condemnation claims under both the Texas Constitution and the Takings Clause of the Fifth Amendment. See *Knick* v. *Township of Scott*, 588 U. S. 180, 186 (2019) ("Inverse condemnation is a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant" (internal quotation marks omitted)).

As relevant, Texas moved to dismiss the federal inverse-condemnation claim, arguing that a plaintiff has no cause of action arising directly under the Takings Clause. It contended that only Rev. Stat. §1979, 42 U. S. C. §1983, provides a vehicle to assert constitutional violations, and §1983 does not authorize claims against a State. DeVillier did not dispute that he intended to bring his federal claim directly under the Fifth Amendment. Instead, he responded that the Takings Clause is "self-executing," which, he argued, means that the Clause itself provides a cause of action for just compensation.

The District Court denied Texas' motion, concluding that a property owner may sue a State directly under the Takings Clause. The Court of Appeals disagreed. In a one-

paragraph opinion, it "h[eld] 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." 53 F. 4th 904 (CA5 2023) (*per curiam*).

We granted certiorari to decide whether a property owner may sue for just compensation directly under the Takings Clause. 600 U. S. ___ (2023). We now vacate and remand for further proceedings.

II

The Takings Clause of the Fifth Amendment states: "nor shall private property be taken for public use, without just compensation." We have explained that "a property owner acquires an irrevocable right to just compensation immediately upon a taking" "[b]ecause of 'the self-executing character' of the Takings Clause 'with respect to compensation.'" *Knick*, 588 U. S., at 192 (quoting *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304, 315 (1987)). Texas does not dispute the nature of the substantive right to just compensation. This case presents only a question regarding the procedural vehicle by which a property owner may seek to vindicate that right.

Constitutional rights do not typically come with a built-in cause of action to allow for private enforcement in courts. See *Egbert* v. *Boule*, 596 U. S. 482, 490–491 (2022). Instead, constitutional rights are generally invoked defensively in cases arising under other sources of law,

or asserted offensively pursuant to an independent cause of action designed for that purpose, see, *e.g.*, 42 U. S. C. §1983. DeVillier argues that the Takings Clause is an exception. He relies on *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles* to assert that the just-compensation requirement of the Takings Clause is "self-executing" and that "[s]tatutory recognition [is] not necessary" for takings claims because they "are grounded in the Constitution itself." 482 U. S., at 315 (internal quotation marks omitted). In other words, the Takings Clause creates by its own force a cause of action authorizing suits for just compensation.

The cases that DeVillier cites do not directly confront whether the Takings Clause provides a cause of action for just compensation. *First English* itself proceeded under a state-law cause of action. *Id.*, at 313–314, n. 8. DeVillier also points to several takings cases where property owners sought injunctions to prevent the Government from interfering with their property rights, such as by obtaining easements or imposing zoning regulations. See *Dohany* v. *Rogers*, 281 U. S. 362, 364 (1930); *Delaware, L. & W. R. Co.* v. *Morristown*, 276 U. S. 182, 188 (1928); *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 384 (1926); *Cuyahoga River Power Co.* v. *Akron*, 240 U. S. 462, 463 (1916); *Nor-wood* v. *Baker*, 172 U. S. 269, 276 (1898). Because none of those cases relied on §1983 for a cause of action, he reasons that those cases must have proceeded directly under the Constitution. But, the mere fact that the Takings Clause provided the substantive rule of decision for the equitable claims in those cases does not establish that it creates a cause of action for damages, a remedy that

is legal, not equitable, in nature.[2] That said, the absence of a case relying on the Takings Clause for a cause of action does not by itself prove there is no cause of action. It demonstrates only that constitutional concerns do not arise when property owners have other ways to seek just compensation. Our precedents do not cleanly answer the question whether a plaintiff has a cause of action arising directly under the Takings Clause.

But, this case does not require us to resolve that question. The question presented asks what would happen if a property owner had no cause of action to vindicate his rights under the Takings Clause. It would be imprudent to decide that question without satisfying ourselves of the premise that there is no cause of action. Our constitutional system assigns to state officers "a coordinate responsibility to enforce [the Constitution] according to their regular modes of procedure." *Howlett* v. *Rose*, 496 U. S. 356, 367 (1990). It therefore looks to "[t]he good faith of the States [to] provid[e] an important assurance that 'this Constitution, and the Laws of the United States which shall be made in Pursuance thereof shall be the supreme Law of the Land.'" *Alden* v. *Maine*, 527 U. S. 706, 755 (1999) (quoting U. S. Const., Art. VI; original alterations omitted). We should not "assume the States will refuse to honor the Constitution," including the Takings Clause, because "States and their officers are

2. The significance of DeVillier's equitable cases is further obscured by fundamental changes to the law of equity that postdate those decisions. Compare Fed. Rule Civ. Proc. 2 with A. Bellia & B. Clark, The Original Source of the Cause of Action in Federal Courts, 101 Va. L. Rev. 609, 653 (2015).

[also] bound by obligations imposed by the Constitution." 527 U. S., at 755.

The premise that Texas left DeVillier with no cause of action to obtain the just compensation guaranteed by the Takings Clause does not hold. Texas state law provides a cause of action by which property owners may seek just compensation against the State. As Texas explained at oral argument, its state-law inverse-condemnation cause of action provides a vehicle for takings claims based on both the Texas Constitution and the Takings Clause. Tr. of Oral Arg. 38; *id.*, at 40 (citing *Baytown* v. *Schrock*, 645 S. W. 3d 174 (Tex. 2022)); Tr. of Oral Arg. 59–60. And, although Texas asserted that proceeding under the state-law cause of action would require an amendment to the complaint, it also assured the Court that it would not oppose any attempt by DeVillier and the other petitioners to seek one. *Id.*, at 41, 61, 64. This case therefore does not present the circumstance in which a property owner has no cause of action to seek just compensation. On remand, DeVillier and the other property owners should be permitted to pursue their claims under the Takings Clause through the cause of action available under Texas law.

III

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

APPENDIX G — ORAL ARGUMENT TRANSCRIPT (FINAL), DATED JANUARY 16, 2024

IN THE SUPREME COURT OF THE
UNITED STATES

No. 22-913

RICHARD DEVILLIER, *et al.*,

Petitioners,

v.

TEXAS,

Respondent.

Washington, D.C.

Tuesday, January 16, 2024

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:10 a.m.

[TABLES INTENTIONALLY OMITTED]

[3]PROCEEDINGS

(11:10 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 22-913, Devillier versus Texas.

Appendix G

Mr. McNamara.

ORAL ARGUMENT OF ROBERT J. McNAMARA

ON BEHALF OF THE PETITIONERS

MR. McNAMARA: Mr. Chief Justice, and may it please the Court:

The Question Presented in this case is resolved by the text of the Fifth Amendment, which, unlike any other provision of the Constitution, imposes on the government a -- an explicit duty to pay money.

It's also answered by this Court's decision in First English, which holds that the just compensation remedy is mandatory and that the Fifth Amendment itself furnishes a basis on which a court can award just compensation in an inverse condemnation case.

And this right of property owners to sue in inverse condemnation to obtain just compensation for an alleged taking is at the heart of modern American takings law. It's at [4]the heart of inverse condemnation claims filed against state and local governments nationwide. And it's also at the heart of every takings claim filed against the federal government under the Tucker Act.

The Tucker Act provides no cause of action, no substantive entitlement to a remedy. The cause of action, the substantive entitlement to a remedy, in every Tucker Act takings case is the self-executing Fifth Amendment,

the same cause of action recognized in First English, the same cause of action pled here.

To reject that cause of action now is to upend the way lower courts, both state and federal, understand the Takings Clause to work and also to abandon this Court's consistent explanations of that clause not just in First English but in more recent cases like Knick v. Township of Scott.

And there's no reason to make that kind of drastic change. This Court has already recognized that money-mandating legal obligations logically come along with the right to file a lawsuit to enforce those obligations. That's true as to statutes, which is [5]what this Court held in Maine Community Health Options. It should be at least as true as to the Constitution, and this Court's precedents consistently teach that it is.

I welcome the Court's questions.

JUSTICE THOMAS: In your reply brief, you say that the 19th century federal courts were faced with a bedrock property right and no way to enforce it directly.

Doesn't that seem to be at odds -- the fact that the courts there had to resort to extra-constitutional causes of action, isn't that at odds with your argument now?

MR. McNAMARA: I don't think so, Your Honor, because the primary problem facing federal courts in the early part of the 19th century was a lack of jurisdiction.

And I think the question of jurisdiction is just conceptually distinct from the question of whether there's a cause of action, whether there's a right to a remedy.

Congress could tomorrow amend Section 1331 to reimpose an amount-in-controversy limit, and if it did that, that would prevent a number of people from [6] bringing Ex parte Young actions in federal court. Those claims wouldn't cease to exist. Congress would just have eliminated the jurisdiction over them.

And so I think there's a difference between jurisdictional limits which limited takings claims and even pleading requirements like the limits to the forms of action, which also limited plaintiffs' abilities to bring certain kinds of claims, and the core Question Presented here, which is just whether there is an entitlement to relief.

There -- there's only one modern form of action, which just takes the shape of saying, I'm entitled to this remedy for that reason. The remedy is just compensation. The reason is the Fifth Amendment as applied through the Fourteenth. And once the jurisdictional problems and the pleading problems are removed, as they have been in this case, the only question remains whether the Fifth Amendment mandates compensation, whether it mandates that remedy, which this Court has already answered. First English says that the just compensation remedy is mandatory.

[7]And I think contrasting the -- the arguments of the other side with the rule adopted by the California Supreme Court in Agins is actually a useful illustration here. The California Supreme Court's decision in Agins said, we as a common law court don't want to recognize a claim for just compensation in a regulatory takings case. We think that intrudes on the legislature's prerogative. We don't recognize that cause of action.

And First English says that doesn't matter. The cause of action, the entitlement to relief, flows directly from the Fifth Amendment. So too here. The complaint here pleads a cause of action directly under the Fifth Amendment --

JUSTICE BARRETT: Counsel --

MR. McNAMARA: -- that says our property was taken and the Fifth Amendment -- yes, Your Honor?

JUSTICE BARRETT: Counsel, I agree that jurisdiction and a cause of action are distinct, but it's a little bit hard to see how in 1791 -- I mean, I think your argument is, when the Fifth Amendment was ratified, those who ratified it had to see the Fifth Amendment as [8]itself supplying the cause of action because this was the crucial way to vitiate the takings right, the right to just compensation.

But Congress didn't provide for federal question jurisdiction until 1875, so that kind of languished on the vine for a pretty long time if you're right that the founding

generation or the -- you know, the ratifying generation in 1791 viewed it that way.

Moreover, you know, the historical evidence of private bills runs contrary to your argument because, yes, there was a right to just compensation, but we have all of this time, throughout the 19th century, of Congress enacting private bills to give just compensation.

And I think you have to contend with that because, I mean, I get that this is against Texas, against the state, but if the Fourteenth Amendment incorporated the Fifth Amendment as it was, there's kind of a mountain of historical evidence, you know, that you've got to contend with.

MR. McNAMARA: So I -- I don't think that mountain does quite the work that Texas [9]needs it to, Your Honor. And I think one problem here is the difficulty in mapping the modern conception of cause of action onto 1791 visions of the court. I think, if you asked a lawyer in 1791 whether the Fifth Amendment contained a cause of action, they probably wouldn't understand the question.

But, if you asked them can a property owner sue to enforce just compensation, the answer absolutely would have been yes. It would have been a suit in trespass. It would perhaps have been a suit in ejectment. But there was an understanding at the framing that this was an enforceable right, and if you --

JUSTICE GORSUCH: Well, that -- that establishes at most, it seems to me, that the Fifth Amendment envisioned some remedial mechanism would be available. And the common law trespass, as you point out, might have been it, or conversion might have been it. It -- it doesn't necessarily mean that there is itself an independent cause of action under the Fifth Amendment.

MR. McNAMARA: I -- I think it does, Your Honor, once the forms --

[10]JUSTICE GORSUCH: Why? You've just conceded that the cause of action that -- that the Framers would have understood would have been in trespass.

MR. McNAMARA: Well, Your Honor, I think, in -- in modern terms, what the Court means when it says "cause of action" --

JUSTICE GORSUCH: Well, no. But what we're talking about the original meaning, and you're asking us to appeal to the original meaning and say they would have understood there would have been a cause of action. Perhaps, but what would that cause of action look like?

MR. McNAMARA: I -- I think they would have understood that there was an entitlement to a remedy.

JUSTICE GORSUCH: Some remedy?

MR. McNAMARA: An entitlement to just compensation as a remedy.

JUSTICE GORSUCH: Some -- some way to get that?

MR. McNAMARA: Yes, and I think --

JUSTICE GORSUCH: Fair enough. That doesn't necessarily mean there's a federal cause of action. It could mean it happens under state [11]common law, right?

MR. McNAMARA: Well, Your Honor, two -- two --

JUSTICE GORSUCH: I mean, you -- you would admit that a state common law cause of action did and could fully vindicate the Fifth Amendment?

MR. McNAMARA: Yes, Your Honor, I think there could be a state common law action that vindicated the First Amendment, but I also think --

JUSTICE GORSUCH: Fifth. Fair enough.

MR. McNAMARA: Yes, Your Honor, or -- or the First.

JUSTICE GORSUCH: And that that would -- that would be enough. No -- nothing more would be required.

MR. McNAMARA: Well --

JUSTICE GORSUCH: And, in fact, that's how it operated for a long time.

MR. McNAMARA: Well, certainly, Your Honor, if compensation is provided through any mechanism, there's no longer a Fifth Amendment injury to be remedied.

JUSTICE GORSUCH: Ah. Okay. I [12]understand that argument. That's not the argument you're -- you're pressing, though.

MR. McNAMARA: That's because, here, compensation hasn't been paid. The plaintiffs in this case continue to suffer the ongoing Fifth Amendment injury.

JUSTICE GORSUCH: Well, maybe that's because you -- you -- you -- you allowed this case to be removed, which I -- and -- and -- and, you know, I'm -- I'm surprised you didn't oppose removal on that ground and said there's no federal question that we need to resolve here because it's really a state common law cause of action we're pursuing. That would have been one option.

Or maybe in federal court you might have said we want a declaratory judgment, which everyone concedes you can get under the Fifth Amendment, and take pendent jurisdiction over our state common law cause of action, which would adequately vindicate our Fifth Amendment rights.

You didn't pursue either of those courses here.

MR. McNAMARA: So two responses, Your [13] Honor. One, I don't think there was a good-faith grounds to oppose Texas's removal because what the complaint

says on its face is we are entitled to just compensation under the Fifth Amendment.

JUSTICE GORSUCH: Well, but it -- it then pleads state causes of action to do so.

MR. McNAMARA: No, Your Honor. It -- it pleads a claim directly under the Fifth Amendment.

JUSTICE GORSUCH: Well, maybe that's another problem you face is it -- you -- if you had an adequate common law -- do you dispute that Texas has an adequate common law remedy to -- for -- for your problem?

MR. McNAMARA: I do, Your Honor. And this is actually an important point. That --

JUSTICE GORSUCH: Is that argument in your brief, that -- that the -- that the -- the common law of Texas or state law has no mechanism to enforce the Fifth Amendment?

MR. McNAMARA: Well, Your Honor, Texas asserts --

JUSTICE GORSUCH: If -- if it did, I'd -- that one would I -- I'd take seriously, [14]but I didn't see it.

MR. McNAMARA: So Texas asserts, Your Honor, that there is a Texas common law mechanism to vindicate the Fifth Amendment, but there is no Texas decision saying we sitting as a common law court invoke our common law powers to create a cause of action.

JUSTICE GORSUCH: No trespass, no conversion?

MR. McNAMARA: Texas hears inverse condemnation claims arising under the Fifth Amendment. That's what the Texas Supreme Court said most recently in City of Baytown v. Schrock, and it cites the Fifth Amendment. It doesn't invoke its common law powers.

JUSTICE GORSUCH: Fair enough. I get all of that now. All right. Now that's clarifying. But you -- you -- the -- the nature of the argument before us isn't that Texas lacks a common law cause of action. It's whether or not Texas has such a thing, we're entitled to another remedy under federal law.

MR. McNAMARA: I -- I don't think that's right, Your Honor. What the Fifth Circuit said is that the complaint that alleges [15]an entitlement to just compensation flowing from the Fifth Amendment doesn't state a claim, that that claim is dead. If --

JUSTICE GORSUCH: Let -- let -- let -- let's suppose you -- we -- it did create a cause of action. Would -- would it also waive sovereign immunity? And what would the statute of limitations be?

MR. McNAMARA: I -- it -- it wouldn't necessarily waive sovereign immunity, Your Honor. I think that's a distinct question. And the statute of limitations would be the statute of limitations that is applied by lower courts when people actually bring these claims.

There's a -- a robust Court of Federal Claims jurisprudence, federal district courts hear claims arising under the Fifth Amendment, sometimes looking to state law to set the statute of limitations.

JUSTICE GORSUCH: Ah, they look to state law, don't they, yeah?

MR. McNAMARA: But the claim itself, Your Honor, comes from the Fifth Amendment not just in Texas but in states nationwide. And I think this is an important point.

[16]Take Oregon, for example. Oregon signed on to the state's amicus brief in support of Texas, but the reason that Oregon pays just compensation for takings under the Fifth Amendment is the Oregon courts, citing First English, have said it must pay just compensation. And so answering the Question Presented --

JUSTICE BARRETT: If we don't read First English the way you do -- I mean, I think that footnote's pretty difficult to decipher -- do you lose?

MR. McNAMARA: No, Your Honor. I would -- I don't think it's just the footnote in First English. I think it's the broader holding that the remedy is required.

But I think there's no dispute here that there is an entitlement to relief. And, certainly, by the time of the ratification of the Fourteenth Amendment, courts across the country had converged on how that kind of entitlement would be enforced.

And it's enforced by a lawsuit directly against the entity that took the property that takes the form of saying, you have [17]this duty to provide just compensation, you have not fulfilled it, and I'd like the court to order you to fulfill it.

JUSTICE SOTOMAYOR: Can I have a -- just a small point of information? Your case was dismissed in federal court. Did you ask for a remand on your claims under the Texas Constitution?

MR. McNAMARA: No, Your Honor. The district court is keeping pendent jurisdiction over the claims under the Texas cause.

JUSTICE SOTOMAYOR: So you -- you have a pending suit on the state law claim?

MR. McNAMARA: Yes, Your Honor, but there is a dispute about the scope of the takings law that governs that question. Texas has taken the position in the lower courts that the Texas Constitution has a narrower definition of what counts as a taking than the federal courts.

JUSTICE SOTOMAYOR: Well, then First English comes in too because First English was about a state court claim and when it started, whether a temporary claim was a taking or not, and we said yes, it's a taking, and so the state [18]court had to pay for that taking.

How is it different than First English in that respect?

MR. McNAMARA: I -- I don't think it's different from First English, Your Honor, except that, here, it was removed into federal court and then the Fifth Amendment aspect of the case was dismissed on the merits.

JUSTICE SOTOMAYOR: Oh, I -- I -- I -- I don't disagree with you, but First English is about what the substantive law of Texas is and what Texas has to pay.

And so that issue should be resolved even in the district court, correct?

MR. McNAMARA: I -- I don't think so, Your Honor, because the backstop in First English is the Fifth Amendment that -- that says that the met -- the just compensation --

JUSTICE SOTOMAYOR: No, the backstop in the Fifth -- yes, it's the Fifth Amendment that provides the substantive law, but not necessarily -- we didn't address whether it provides a cause of action.

MR. McNAMARA: I -- I think the Court did, Your Honor. The United States' amicus [19]brief --

JUSTICE SOTOMAYOR: All right. We're -- we're going to -- we're going to go into --

JUSTICE JACKSON: Can I just ask -- I -- I mean, this is similar to what -- what Justice Sotomayor was just getting into. Are -- are you saying that we don't have three separate concepts, right, remedy, and cause of action? I

thought those were three different things, and perhaps First English only covered two of them?

MR. McNAMARA: I -- I'm not sure they're distinct concepts, Your Honor. I think the simplest way to understand cause of action is an entitlement to a particular remedy, which is why it's coherent to say someone might have a cause of action for an injunction.

JUSTICE JACKSON: I thought it had to do with the forum, that you have a cause of action that is recognized in the judicial forum as opposed to, say, going to the legislature through -- through private bills.

MR. McNAMARA: Well, Your Honor, I -- I think, to the extent that's the definition of "cause of action," we would have a cause of action under the clear import of the history [20]that the --

JUSTICE JACKSON: Not -- not the history. I guess I'm just trying to understand, is there -- does it make sense to think about the Fifth Amendment as providing the right and the remedy but not speaking to where you're going to get that remedy from or what is the enforcement mechanism?

That's how I sort of am conceptualizing this, and -- and I think we differ about that, so I'd like to hear your opinion on it.

MR. McNAMARA: I -- I'm not sure that's a correct reading of the Fifth Amendment, Your Honor, in part

because I think that reading -- everyone agrees there are some judicial remedies for the Fifth Amendment.

As I understand my friend's argument, we'd be entitled to sue for injunctive relief or for ejectment in the absence of a -- a path to a Fifth Amendment compensation remedy.

So everyone agrees there's some judicial remedy, and I think the form of that judicial remedy depends on the scope of the government's obligation.

[21]There are two visions of the Fifth Amendment. One is that the Fifth Amendment just provides a precondition. The government is required to pay and it can be enjoined from taking the property if it doesn't pay.

The other vision that's adopted in First English that's reiterated in Knick is that the Fifth Amendment creates an obligation to pay just compensation. And if that's the ongoing obligation, the government has taken property, it owes just compensation today, will owe just compensation tomorrow, courts are empowered to cure that ongoing obligation.

It's not a question of damages for a past violation. It's a question of the government's obligation as it stands in court today.

JUSTICE BARRETT: Mr. McNamara, can I go back to Justice Sotomayor's question and just ask for a point of clarification? I understood Texas law to provide a

cause of action for vitiating the federal Fifth Amendment right.

I took your answer to Justice Sotomayor to be saying that Texas courts say -- you were talking about how Texas courts define a [22]taking for purposes of the Texas Constitution.

So am I wrong in thinking that Texas allows you to bring a state cause of action for the federal Fifth Amendment claim?

MR. McNAMARA: I -- I'm not sure whether that's right to be honest, Your Honor. And I think two things flow from this. One, if it's true that there is a Texas common law cause of action under which we could have -- we can vindicate our Fifth Amendment rights, then the Fifth Circuit still has to be reversed because it held that that substantive claim should be dismissed on the merits.

JUSTICE BARRETT: Okay. Well, let me just -- just -- just -- it's important for me to be able to understand this procedural point. Does Texas have -- provide a state cause of action to vitiate the state takings right from the Texas Constitution?

MR. McNAMARA: Yes, Your Honor.

JUSTICE BARRETT: Okay. It seems to me then it can't discriminate against the federal claim anyway.

MR. McNAMARA: I -- I think that's true, Your Honor, but Texas doesn't -- Texas [23]isn't trying to discriminate against the -- this federal claim. What Texas says, like other state courts, is it's not doing -- it doesn't say we're doing common law analysis and creating a cause of action.

What Texas seems to be doing is constitutional analysis, just like the other state courts that specifically cite First English and say, ah, there is a cause of cause of action here. I'm not familiar with any state case saying we are using our powers as a common law court to create a cause of action to vindicate the Fifth Amendment.

What they say is we're looking at the Fifth Amendment. We see it creates the obligation. Frequently they cite First English directly and they say that's what gives rise to the cause of action.

And that, I think, is what's dangerous about the Question Presented here. As -- as I understand Texas's argument, the complaint we filed in state court was perfectly valid and could be adjudicated, and the Fifth Amendment could have been adjudicated in state court. Once it was removed, Texas moved to dismiss and [24] sought an interlocutory appeal and has successfully extinguished that.

But my concern is that adopting Texas's arguments here tells all of these state courts that have pointed to First English and said this is the source of -- the Fifth Amendment is the source of the cause of action would look

to a decision in this case adopting Texas's arguments and say: Okay. We were wrong. The Constitution does not, in fact, require a remedy. There is no federal constitutional cause of action. And that would eliminate the federal takings remedy in state courts across the nation.

JUSTICE ALITO: Mr. McDowell, the language of the Takings Clause is quite similar to the language of the Due Process Clause in the Fifth Amendment, which immediately precedes it. "No person shall be [. . .] deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

So why should they be read differently with respect to the creation of a cause of action?

[25]MR. McNAMARA: I -- I don't think they have to be read differently, Your Honor. I think, if there's an ongoing due process violation, a plaintiff could bring an Ex parte Young action. Ex parte Young was not a 1983 action. It was --

JUSTICE ALITO: No, not an Ex parte Young, but a claim for damages?

MR. McNAMARA: Well, and I think that's the difference here, that we're not seeking damages; we're seeking just compensation. We're not saying there was a past completed violation of the Constitution and we want something to offset that. We're saying the government has taken property, which gives rise to a present duty to

pay just compensation, and we want the present obligation enforced, not a backwards-looking damages remedy concocted or created. And I think that entitlement to just compensation is how the Framers would have understood the Fifth Amendment.

The alternative view, the idea that all you get are injunctions, I don't think squares with either the text or how contemporary commentators talked about the clause.

[26]St. George Tucker and John Jay wrote about the Takings Clause in the context of the Army seizing horses and military supplies. But, if the Army is seizing horses, the Army's going to get the horses. The understanding would not have been that you could stop the Army in the moment from seizing your horses.

What St. George Tucker is writing about is the ongoing duty to provide compensation for the horses, which is also how contemporary courts wrote about the just compensation requirement, even constrained as they were by the forms of action.

I -- I think a great example of this is the Massachusetts Supreme Court's decision in -- excuse me -- the Massachusetts Supreme Court's decision in evaluating an -- an action brought as a -- a writ of debt in Gedney v. Inhabitants of Tewksbury, where the justices -- the judges of the Massachusetts Supreme Court there said: This isn't the right forum. This isn't an action in debt. You can't state it using that forum. You have to go to a different forum to get your just compensation. But, if that other

forum denies you compensation, you [27]can return here, in the statement of one of the judges, and ask for that remedy again, which will not probably be refused if --

JUSTICE ALITO: If the Fifth Amendment confers a right to sue for just compensation in and of itself, is that right unqualified? And if it is not unqualified, what qualifications do you recognize?

MR. McNAMARA: Oh, I -- I certainly don't think it's unqualified, Your Honor. It --

JUSTICE ALITO: What qualifications do you recognize?

MR. McNAMARA: It -- it requires a court of competent jurisdiction, and so, certainly, Congress is free to channel jurisdiction however it likes. Texas is similarly free to create courts of jurisdiction as it pleases.

But the underlying -- all we're saying is that there is an underlying entitlement to receive just compensation and that when that entitlement is denied, a court of competent jurisdiction can order that that just compensation be paid.

JUSTICE ALITO: Well, does it make [28]sense to view the Fifth Amendment as providing a right to sue for compensation, but your ability to vindicate that right is totally dependent on Congress's discretionary choice to create lower federal courts and to give them jurisdiction to entertain such claims? That sounds like a very weak right if that's -- if it's subject to limitation in that way.

MR. McNAMARA: I think the same could be said of the entire Bill of Rights, though, Your Honor. The -- the entire stratum of federal constitutional rights depends on Congress to create lower federal courts, courts where these rights can be vindicated.

Once Congress does create those courts, and when a state defendant deliberately chooses to avail itself of those courts, the only question is whether that court can enforce the ongoing obligation to require the payment of just compensation.

And I think that's ultimately what distinguishes this case from the Court's Bivens cases, where Bivens cases are about the policy question of whether to create a remedy. They don't engage in constitutional text, history, [29]and tradition analysis, which is why Justice Rehnquist could dissent in cases like Carlson v. Green and Davis v. Passman and then, less than a decade later, Chief Justice Rehnquist could write First English, because we're not talking about a damages remedy; we're talking about the power of the federal courts to, when their jurisdiction is competently invoked and when the state has waived its sovereign immunity, require the state to comply with its ongoing constitutional duty.

I think that matches both with the history, it matches with the tradition, and it matches particularly with the Fourteenth Amendment context itself. It's worth remembering that when this Court incorporated the Fifth Amendment against the states in Chicago, Burlington & Quincy Railroad, it specifically incorporated the right

to compensation, not the right not to have the property taken but the right to receive money, that the due process of law necessarily included as a matter of first principles -- Chicago, Burlington actually doesn't cite the Fifth Amendment -- but, as a matter of first [30]principles, it includes the right to receive compensation for the property taken.

These state -- these cases rarely appear in federal court, in part because, before Knick, no takings case could be filed ab initio, but also because, as the magistrate judge's opinion in this case points out, it's relatively rare for a state to choose to remove this federal claim -- this federal right into a federal forum. But, once it does so, once Texas has decided it wants the scope of our rights under the Fifth Amendment to be litigated in federal court, that can't change the scope of the claim we make.

What the Fifth Circuit opinion below says is that we cannot state a claim invoking our rights under the Fifth Amendment, full stop. If Texas is right that, in fact, we have that right as a matter of Texas common law, then the Fifth Circuit was wrong to say that we only have that right under Section 1983. That counsels in favor of reversal.

But this Court has also squarely held and again repeated in Knick that the Fifth Amendment does furnish a basis on which a court [31]can award just compensation. In the mine run of cases, that's going to be a state court awarding just compensation. But, when the state wishes to be in federal court, I don't think there's a good-faith basis for the plaintiff to say, I'm invoking my rights under the

Fifth Amendment, I want the full scope of compensation -- that I'm entitled to under the Fifth Amendment, but I refuse to allow this claim that arises under my rights under the Fifth Amendment to be in federal court.

It is the defendant's choice to have this federal claim that turns on federal law heard in federal court. That's the choice that Texas made, and that choice can't, on the merits, extinguish our Fifth Amendment remedy.

What Texas has effectively accomplished here by making the unusual decision to remove is that it's eliminated the Fifth Amendment question from this case and given itself what it believes -- I'm not conceding that they're right about Texas law -- but what it believes is a more favorable rule of Texas law.

But, if First English is right and the [32]just compensation remedy is mandatory, then the just compensation remedy is mandatory, and Texas can't extinguish it through procedural maneuvers like removing this case to federal court. The claim -- a claim for just compensation simply takes the form of saying the government has taken a property interest and I as the former owner am entitled to the fair market value of that property interest.

JUSTICE JACKSON: Can I just be clear, are you arguing that through Texas's maneuvering that claim is no longer available to you?

MR. McNAMARA: Yes, Your Honor. I think that's what Judge Oldham points out in his dissent below.

JUSTICE JACKSON: I -- I understand not in federal court, but are you claiming that Texas has prevented you from making this claim in state court?

MR. McNAMARA: Yes, Your Honor. There -- there will be no remand in this case. This case is staying in federal district court. And as Judge Oldham correctly pointed out, the upshot of the panel opinion below is that this case will proceed without any federal takings [33] claim in it because --

JUSTICE JACKSON: If you had sought remand and it went back to Texas court, are you saying that there wouldn't be the opportunity to make this claim in state court? I'm just trying to understand if the claim is totally gone as -- as a general matter here.

MR. McNAMARA: I -- so I -- I think -- I -- I see my light is on.

CHIEF JUSTICE ROBERTS: No, go ahead.

MR. McNAMARA: Thank you, Your Honor. I -- so I think, Your Honor, first, I don't know that we would have had grounds to fight remand because the claim does invoke our entitlement under federal law. But, if the case were remanded, I think the question in Texas state court would be exactly the Question Presented here: Are we entitled,

without the 1983 vehicle, to invoke our rights under the Fifth Amendment?

Texas courts have said yes, we are entitled to invoke our rights under the Fifth Amendment. But, again, they just cite the Fifth Amendment. They're not invoking some special cause of action that they have created. They, [34] like other courts, look to the Constitution, to this Court's analysis of the Constitution, and say the Constitution provides the entitlement to just compensation, not, as far as I'm aware, an independent common law cause of action.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Let's suppose you bring a -- a -- the state takes some action, you claim that is a taking, you bring that claim for just compensation. In the state court, they decide yes, it was a taking, and so the government owes you $3 million. And the government says: Wow, we didn't think it was worth that much. Here, take it back.

And can they do that?

MR. McNAMARA: To -- to a point, Your Honor. I think saying here take it back runs afoul of what Justice Brennan identified in his San Diego Gas & Electric dissent that ending the taking just creates an uncompensated temporary taking. And that is why, as this Court noted in Knick, Justice Brennan's dissent became the law in First English, that just stopping the taking creates an uncompensated temporary taking.

[35]Certainly, the -- the state is within its rights to cease a taking if it wants to cease a taking, and it may be that evidence at trial shows Texas has chosen to cease the taking here, but the question is and always based on the full factual record what property interest has Texas actually taken or has the defendant actually taken --

CHIEF JUSTICE ROBERTS: So they can claim what we've taken is a temporary, you know, right, so we owe you rent, that -- and that's just compensation?

MR. McNAMARA: Exactly, Your Honor. The -- the defendant is always free to say this is -- this is just a temporary easement or maybe this is a temporary partial easement.

CHIEF JUSTICE ROBERTS: And they can say that after the fact?

MR. McNAMARA: I -- I think --

CHIEF JUSTICE ROBERTS: We took the whole thing, we found out we were taking more than we could -- we're biting off more than we could chew, and so we're going to give it back to you?

MR. McNAMARA: I -- I think that would [36]be a valid ground for going back to the district court and saying that the facts have changed. The way --

CHIEF JUSTICE ROBERTS: Okay. Thank you.

MR. McNAMARA: Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Justice Thomas?

Justice Alito?

JUSTICE ALITO: Well, suppose that going forward they find a way to divert the water so that it doesn't cause flooding in the future. Then what claim would you have?

MR. McNAMARA: I -- I think that would just be a -- a claim for a temporary easement, Your Honor. Ultimately, the property interest in this case would be some kind of flooding easement. The trial court would have to decide whether it's a permanent easement, a partial easement, a temporary easement, and this is the kind of determination courts make in takings cases every day.

JUSTICE ALITO: Yeah, and if it's -- so, if it's completely eliminated going forward, your -- your property is not going to be flooded [37]going forward, what would the remedy be?

MR. McNAMARA: The -- the remedy -- so, to the extent the Court found on the facts that Texas had taken a temporary easement, it would be the fair market value of that temporary easement.

JUSTICE ALITO: Would that be different from damages?

MR. McNAMARA: Yes, Your Honor, and --

JUSTICE ALITO: In what way would it be different from damages?

MR. McNAMARA: So damages are an attempt to rectify a wrongful act. And so a plaintiff seeking damages can seek consequential damages. I would have had -- if you had paid me on time, I would have had this business opportunity that I had to forego.

JUSTICE ALITO: Yeah, I understand that. So how would you put a value on the temporary taking?

MR. McNAMARA: It would be -- generally speaking, there is testimony from dueling appraisers who talk about at fair market value what rent someone would pay for -- for that kind of easement, what a -- a willing [38]seller would have sold that kind of easement for, but it's limited to the fair market value. It's limited to what the government took as distinct from what the property owner may have lost.

JUSTICE ALITO: Okay. Thank you.

CHIEF JUSTICE ROBERTS: Justice Sotomayor?

Justice Kagan?

Justice Barrett?

Justice Jackson?

Okay. Thank you, counsel.

MR. McNAMARA: Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Mr. Nielson.

ORAL ARGUMENT OF AARON L. NIELSON

ON BEHALF OF THE RESPONDENT

MR. NIELSON: Mr. Chief Justice, and may it please the Court:

The Court will be hard-pressed to find any government more committed to property than Texas. The Texas Constitution is more protective than the federal Constitution, and Texas courts under a Texas cause of action adjudicate takings claims under both constitutions.

[39]This appeal thus isn't about substantive rights. All Petitioners had to do was use Texas's cause of action. Instead, Petitioners insist they can bring a cause of action directly under the federal Takings Clause itself. This argument is wrong for many reasons.

For one, it ignores what the Constitution says. Governments must provide just compensation, but the Takings Clause says nothing about how they must do it, whether through commissions, private bills, or litigation.

For another, this Court held in Williams that Congress may constitutionally -- and I'm going to quote here -- "retain for itself, the power to hear and determine controversies respecting claims against the United States." It follows

that, again, a quote, "there is no constitutional right to a judicial remedy."

As Petitioners concede, Congress did just that for nearly a century. We don't see how this Court could hold for Petitioners without overruling Williams.

[40]And as this Court explained in Knick, states didn't start recognizing state causes of action until after the Fourteenth Amendment's ratification.

Petitioners argue none of this matters because of First English, but the Court went out of its way in First English to emphasize that its decision was about substance, not procedure.

And if first Williams somehow did include a procedural holding, Texas satisfies it. We have a cause of action for federal takings claims. Petitioners simply refuse to use it.

We welcome the Court's questions.

JUSTICE THOMAS: How would that cause of action look -- what would it look like?

MR. NIELSON: So I would point the Court to the Texas Supreme Court's decision in City of Baytown --

JUSTICE THOMAS: Yeah.

MR. NIELSON: -- and they say, we hear claims under both the Texas Constitution and under the federal

Constitution, and then they resolve the claim under Penn Central, which, of course, is a decision of this Court.

[41]JUSTICE THOMAS: Let's say we affirm here. Can Petitioners' constitutional right be vindicated now in -- in Texas courts?

MR. NIELSON: Well, in federal court. The problem is they haven't pleaded the claim. So, at this point, you'd have to have leave from the district court to amend their complaint if they wanted to bring a claim under the Texas cause of action.

There's still live claims here. There's still a claim under the Texas Constitution itself and they have federal due process claims. This is an interlocutory appeal.

So they would have to get leave from the district court to amend their complaint to bring a claim under Texas common law. They've just never done it because they say they don't have to.

JUSTICE SOTOMAYOR: I'm --

CHIEF JUSTICE ROBERTS: Counsel, in -- just a couple of quotes from cases. In Cedar Point, we said that the Court in First English "concluded categorically that the government must pay just compensation for physical [42]invasion."

In Knick, it said First English rejects "the view that the Constitution does not of its own force furnish a

basis for a court to award money damages against the government."

Now we've -- we've said those in many cases. Those are just two recent ones --

MR. NIELSON: Correct, Your Honor.

CHIEF JUSTICE ROBERTS: -- where I wrote the opinions. So --

(Laughter.)

MR. NIELSON: Correctly wrote the opinions.

CHIEF JUSTICE ROBERTS: -- so do you have any dispute with those -- those holdings?

MR. NIELSON: We do not, Your Honor. That's a question of the substantive right, which Texas does not dispute, and you could pursue that claim under the Texas cause of action in a Texas court or here --

CHIEF JUSTICE ROBERTS: The -- the -- the -- the -- it -- it's --

MR. NIELSON: -- in federal court -- yes, Your Honor.

CHIEF JUSTICE ROBERTS: -- it's -- [43]it's the statement of the -- the right, and that's a federal right, right?

MR. NIELSON: Yes, Your Honor.

CHIEF JUSTICE ROBERTS: So you can require that a federal assertion of rights like that be brought in state court and not in federal court?

MR. NIELSON: Well, it's brought under a -- a state cause of action. So, I mean, you can remove -- there's diversity jurisdiction or something like that, like any other sort of cause of action, but the cause of action itself is created by -- by Texas.

And that's how it's been -- as this Court explained in Knick, that's how state courts have always done it. Since 1870s, this Court said and onwards --

CHIEF JUSTICE ROBERTS: Well, it said -- what we said in --

MR. NIELSON: -- that's how we've done it.

CHIEF JUSTICE ROBERTS: -- what we said in Knick is that the Constitution of its own force furnishes the basis for a court to award money damages. And you think what we had [44]in mind is a -- a basis to -- to -- in state court but not federal court?

MR. NIELSON: When the claim is against a state, in Knick, the Court said 19 times by our count 1983. Every time the Court states the holding in Knick, they tie it to Section 1983 because there's a difference between the substantive right and the cause of action.

In Knick, the cause of action was Section 1983 because Congress said, if you're going to sue municipalities or cities, there you go, there's the cause of action.

CHIEF JUSTICE ROBERTS: Well, you removed to federal court, where you couldn't bring an action under 1983, right?

MR. NIELSON: Correct, Your Honor. We did remove to federal -- federal court. Two reasons for that. One, this is not just one case. These are four separate cases, all putative class actions. They say there's more than a hundred plaintiffs here.

Texas -- these are filed in different counties. Texas has no way to put all of them in a single Texas court. So, if the cases were [45]going to be in a single court, it had to be through removal and put them in -- in that court.

The second reason for that was Texas courts don't have a lot of experience with implied rights of action, alleged -- implied rights of action under federal law. This is the bread and butter of this Court's -- you guys' Court resolves factual -- those types of issues all of the time. So we thought let's just get it there, we'll get everybody in one case, and we can take out this, you know, putative federal cause of action, which we think is flatly irreconcilable to begin with.

CHIEF JUSTICE ROBERTS: So what -- under what basis would they proceed against the state under -- under 1983?

MR. NIELSON: They -- they couldn't, Your Honor. There is no such claim. Congress has said that you can bring claims against cities and municipalities. You cannot sue the states under Section 1983.

They say they can. So, under Bell v. Hood, they've claimed that there is a federal cause of action. When someone asserts that a [46]federal cause of action exists, the federal courts have jurisdiction to decide whether that is true, and then they can decide on the merits whether the cause of action exists.

CHIEF JUSTICE ROBERTS: Well, isn't that a -- a Catch-22 or -- I mean, you say you -- they have to proceed in -- in state court. They can't proceed in federal court. And as soon as they do, you remove it to federal court under 1983, where you say they can't proceed?

MR. NIELSON: Well, we would make the same argument in state or federal court that there is no federal cause of action directly under the Fifth Amendment. That is not --

CHIEF JUSTICE ROBERTS: Well, but that's what was rejected in the -- in the two cases that I read to you, Cedar Point and Knick.

MR. NIELSON: With your respect, Your Honor, I don't read either of those cases as saying there is a federal cause of action. There's certainly a federal substantive right to relief, but as this Court said in all of the Bivens line of cases or all the implied right of action cases, the right

to, you know, a -- a substantive right does not therefore mean that [47]there is a cause of action.

JUSTICE KAGAN: But, General, do you agree with Mr. McNamara that if a state takes a person's property and doesn't give compensation, that state is violating the Constitution every day? It's an ongoing violation. Do you agree with that?

MR. NIELSON: That's not how the Court has -- I -- I -- I believe -- I certainly agree that's a violation of the Constitution. I don't think this Court's cases have ever --

JUSTICE KAGAN: But that's what I want to know. It's an --

MR. NIELSON: Sure.

JUSTICE KAGAN: -- ongoing violation of the Constitution, right? I've taken Mr. McNamara's property. I haven't paid him. Every day, I'm violating the Constitution, correct?

MR. NIELSON: Yes, Your Honor.

JUSTICE KAGAN: Okay. So aren't courts supposed to do something about that?

MR. NIELSON: Yes, Your Honor. And what this Court said in Knick is, when there's not a cause of action, which remember there wasn't a cause of action, there were -- you have [48]-- there's no remedies.

JUSTICE KAGAN: Yeah.

MR. NIELSON: What -- what is injunctive relief --

JUSTICE KAGAN: But this is -- this is very different.

MR. NIELSON: Sure.

JUSTICE KAGAN: You know, in the usual case, we have a constitutional -- let's take a Fourth Amendment case. You know, it's you've searched somebody's home illegally.

MR. NIELSON: Mm-hmm.

JUSTICE KAGAN: It's happened, and then it's over, and then the question is what remedy are you going to be giving for that violation.

But this is a different kind of violation. It's not a -- it's not even clear that the word "remedy" is appropriate here. It's a right to compensation. And the state, by taking the land and not compensating, is violating that right every day. It's not that the state --

MR. NIELSON: Mm-hmm.

JUSTICE KAGAN: -- is failing to [49]provide a remedy. The state is violating the right to be paid.

MR. NIELSON: Sure, Your Honor. And I -- I just -- and the answer would be, if there's not a cause of action, that's why I went back to Knick.

JUSTICE KAGAN: Well, if it's not a cause of action, I mean, in the --

MR. NIELSON: Sure.

JUSTICE KAGAN: -- usual case, suppose that a state violates Mr. McNamara's First Amendment rights.

MR. NIELSON: Yep.

JUSTICE KAGAN: Could he bring a suit about that?

MR. NIELSON: Yes, Your Honor, for injunctive relief.

JUSTICE KAGAN: Yes. And what Mr. McNamara, I believe, is saying is that -- that the usual distinction that we draw, you can bring a right for injunctive relief, but you can't -- you can bring a suit for injunctive relief, but you can't bring a suit for damages, that's the usual distinction.

But it sort of falls apart in this [50]case because the right is a right to be paid.

MR. NIELSON: Yes, Your Honor. And so I -- I -- I come at this from maybe the other direction. Let's imagine that some government said, you know what, we're not

going to pay. We're telling everybody now. Now you are on notice we are not paying.

Well, then what happens? Before they could do anything, you would rush to court and you would say: Injunction. They can't do it. They've promised they're not going to pay. They're not going to provide that. And the Constitution says, if they don't, they're out of -- they're -- they're violating their rights. That's Eastern Enterprises v. Apfel, where if there's -- clear that there's not going to be a right to judicial -- to payment, there are no -- no monies coming, not -- not judicial, but no payments coming, you can get that injunction right away.

JUSTICE KAGAN: I mean, General, let me make the point another way.

MR. NIELSON: Sure.

JUSTICE KAGAN: I mean, it's sort of backwards to say that Mr. McNamara's client can [51]sue for an injunction, meaning like, you know, give me back my property. Actually, the state has a right to take his property or a prerogative to take --

MR. NIELSON: Yeah.

JUSTICE KAGAN: -- his property. If the state wants to use his property for a railroad, it doesn't really matter that the -- a person doesn't want to sell. The state has the ability to take -- the only thing that the state

does not have the prerogative to do and the thing that the landowner has a right to have is payment.

MR. NIELSON: Yes, Your Honor.

JUSTICE KAGAN: So to say, well, look, you can sue for an injunction but you can't sue for payment just doesn't understand the nature of this right.

MR. NIELSON: Well, so our first-line argument is, you know, the way the United States did it for a hundred years is -- is correct. But, if the Court disagrees with that, if the Court says, you know what, actually --

JUSTICE KAGAN: So, General, I kind of agree with that. Your best argument is like [52]what happened between the time of the Constitution and, you know, someplace in the late 19th Century.

But suppose that I'm not such an originalist and I don't really care about that.

(Laughter.)

MR. NIELSON: Sure. All right. So the -- that -- that's the answer I'm going to say. So, if we -- if the Court says, we read First English and it requires not just a substantive relief, it requires some sort of judicial proceeding, which we don't think is consistent with the history, but let's assume, Texas does it. Texas provides the cause of action for which they can bring a federal takings claim.

So even if that is true, which we don't believe as our first-line argument is correct, Texas still wins. They --

JUSTICE BARRETT: What if Texas didn't do it, though?

MR. NIELSON: So -- so that's where we get interesting.

JUSTICE BARRETT: But I'm not -- but -- I -- I -- and I just want to be clear I'm not [53]talking about the hypothetical you gave where Texas announces in advance --

MR. NIELSON: Yeah.

JUSTICE BARRETT: -- we're going to take and we're not going to pay. Let's say that Texas takes and just this one property owner can't get the money, the -- Texas is being intransigent about it.

MR. NIELSON: Mm-hmm.

JUSTICE BARRETT: And Texas says: And, by the way, our state cause of action -- we have no state cause of action for you to use in our courts to get the money, no private bills. We don't do that. There's no state --

MR. NIELSON: Sure.

JUSTICE BARRETT: -- law remedy. What then?

MR. NIELSON: All right. So, you know, if a state goes rogue, that's how we're thinking about it, because we know from Knick all the states don't do that, but let's assume some state says, we're just not going to do that. Well, you have injunctive relief. I realize that might not be a perfect relief --

JUSTICE BARRETT: Doesn't work in this [54] hypothetical.

MR. NIELSON: It doesn't work because of that. Then the answer is exactly what the Constitution says. Congress -- Section 5 of the Fourteenth Amendment says, if a state is violating the Constitution, which would be happening in this scenario, that's precisely what Section 5 is for.

Congress has never done that --

JUSTICE BARRETT: So they have to wait for Congress to enforce it through legislation? Would there be some sort of due process violation or an argument that the state has to provide some sort of forum?

MR. NIELSON: Well, that's what I'm trying to say. If you read First English that way to say that not only is it there's a substantive obligation, but there has to be a -- some sort of judicial forum for -- for, you know, vindication of that --

JUSTICE BARRETT: I -- not, I mean, a judicial forum. It could be --

MR. NIELSON: Sure.

JUSTICE BARRETT: -- an administrative forum. I mean, I -- I'm taking --

[55]MR. NIELSON: Okay. Sure. Sure.

JUSTICE BARRETT: -- your argument about that.

MR. NIELSON: Okay.

JUSTICE BARRETT: You're -- you're really saying that the state could shut down and give no administrative forum, no legislative forum, no judicial forum, and because the Fifth Amendment doesn't create an implied cause of action, then the property owner would have to say, Congress, can you please use your Section 5 power?

MR. NIELSON: The answer would be first try to get an injunction. That doesn't always work for the reasons that you say. In that scenario, yeah, that's what the Constitution says.

CHIEF JUSTICE ROBERTS: Well, but we're talk --

JUSTICE GORSUCH: Why -- why -- why -- I'm -- I'm sorry, Chief.

CHIEF JUSTICE ROBERTS: I'm sorry. We're talk -- those are two governments. I mean, we're talking about the ability of the government to take property without paying for [56]it. The -- the states and Congress may have

common cause on that. And the idea that, well, you look to a different government --

MR. NIELSON: Mm-hmm.

CHIEF JUSTICE ROBERTS: -- to tell this government that that's not something governments can do, that's not much of a remedy.

MR. NIELSON: Well, this Court has cases that says we trust that Congress takes itself seriously. We trust that the states take their oath seriously. That's one of the premises of Alden v. Maine, that they're going to do that. But --

JUSTICE GORSUCH: Well, we also -- we also assume people act in their self-interest.

MR. NIELSON: Sure.

JUSTICE GORSUCH: And the -- our whole system of separated powers is premised on that idea. And self-interest here that would be created isn't a rogue state but an incentive for governments not -- not -- to -- to withdraw their -- their existing causes of action. I think that's the thrust --

MR. NIELSON: Yeah.

JUSTICE GORSUCH: -- of Justice [57]Barrett and the Chief's questions.

MR. NIELSON: What we --

JUSTICE GORSUCH: And I guess I'm wondering --

MR. NIELSON: Sorry.

JUSTICE GORSUCH: -- why wouldn't the injunction order the state to pay?

MR. NIELSON: So that's a question that has not been litigated, whether you could have injunctive relief to pay.

JUSTICE GORSUCH: Say you have to provide --

MR. NIELSON: Correct.

JUSTICE GORSUCH: -- just compensation. We're not telling you how.

MR. NIELSON: Yep.

JUSTICE GORSUCH: We're not telling you in what forum.

MR. NIELSON: And -- and -- and --

JUSTICE GORSUCH: But -- but the Constitution commands it.

MR. NIELSON: Sure. As I said, that's -- if you want to read First English that way, Texas has no quarrel with that because we provide it. And we don't just provide

through a [58]commission, though I think we have the constitutional right to do so. We do it in court. We --

JUSTICE BARRETT: But you have to answer -- I'm sorry. You have to answer the hypothetical.

MR. NIELSON: Yeah.

JUSTICE BARRETT: I think Justice Gorsuch's premise is that Texas isn't doing this.

MR. NIELSON: Okay. So, if we say that a Texas doesn't or -- or some state doesn't have a -- a court proceeding and you don't have any sort -- other sort of commission, you still can get an injunction, and if you know the state doesn't have any of those things, you can get that injunction very, very, very early.

JUSTICE GORSUCH: And wouldn't the injunction say, Texas, you have an obligation --

MR. NIELSON: Mm-hmm.

JUSTICE GORSUCH: -- to pay?

MR. NIELSON: And this is where I -- I'm not quarreling because Texas --

JUSTICE GORSUCH: Okay.

MR. NIELSON: -- as a matter of --

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[59]JUSTICE KAVANAUGH: You don't want to concede that?

MR. NIELSON: -- first principles -- as a matter of first principles, I don't know how you get there. But I'm saying that Texas has no quarrel with it --

JUSTICE GORSUCH: Okay. And -- and --

MR. NIELSON: -- because Texas does -- what you're saying --

JUSTICE KAVANAUGH: What do you mean --

JUSTICE GORSUCH: I've got -- I -- I've got it. I've got it. I just want to -- I just want to clear -- clear up two other things.

MR. NIELSON: Sure.

JUSTICE GORSUCH: What is the common law cause of action and what is the state constitutional cause of action that does exist that you say could have but wasn't brought?

MR. NIELSON: That's right. So the -- the easiest place to see it because it's the most recent and I think the most clear is the Texas Supreme Court's City of Baytown --

JUSTICE GORSUCH: Right. That just says, though, as I understand it from your [60]colleague --

MR. NIELSON: Yeah.

JUSTICE GORSUCH: -- go look at the federal Constitution. So how does that help you?

MR. NIELSON: Well, they look at both. They say, we resolve takings claims under our constitutions, plural, and then they cite both. And then they --

JUSTICE GORSUCH: So Texas has represented to this Court that there is a state constitutional cause of action?

MR. NIELSON: Yes, Your Honor.

JUSTICE GORSUCH: Okay. And is there a common law cause of action --

MR. NIELSON: Well, that --

JUSTICE GORSUCH: -- that would achieve the same thing?

MR. NIELSON: -- that's what I'm -- that's what I'm -- I must have -- I must have misunderstood --

JUSTICE GORSUCH: Beyond --

MR. NIELSON: -- what you were saying. That is the -- the cause of action.

JUSTICE GORSUCH: That is the cause of [61] action?

MR. NIELSON: Yeah.

JUSTICE GORSUCH: Okay. And it wasn't pled here, is what you're --

MR. NIELSON: No, Your Honor. They --

JUSTICE GORSUCH: What does --

MR. NIELSON: -- vigorously resisted --

JUSTICE GORSUCH: Fine. Fine.

MR. NIELSON: -- the idea that they have to --

JUSTICE GORSUCH: Oh, okay. I got it. And what -- what cause of action remains pendent as you understand it?

MR. NIELSON: So they still have claims for federal due process, and they still have claims for the Texas Constitution.

JUSTICE GORSUCH: Would you oppose leave to amend to add a Texas constitutional claim on -- on an email?

MR. NIELSON: On behalf of the State of Texas, we would not oppose that in the district court.

JUSTICE GORSUCH: Okay. Thank you.

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JUSTICE KAVANAUGH: Justice Gorsuch --

[62]JUSTICE SOTOMAYOR: Sorry. But I -- I -- I -- I'm sorry.

JUSTICE KAVANAUGH: Go ahead.

JUSTICE SOTOMAYOR: Point of clarification.

MR. NIELSON: Sure.

JUSTICE SOTOMAYOR: Tell me how they plead this. Let's assume we affirm the court below. There's no freestanding right to come into federal court and sue Texas under the Fifth Amendment.

How would they go to the Texas court and make their Fifth Amendment claim?

MR. NIELSON: So --

JUSTICE SOTOMAYOR: What would they say in the Texas court?

MR. NIELSON: So -- yes. So what they would say here, and, candidly, the pleadings have never been as pellucid as I think anyone would have liked, but what I think that they -- they would say is, we are bringing our claim under state law, see City -- see, e.g., City of Baytown. I think that would be sufficient to get us there.

JUSTICE SOTOMAYOR: That -- that's -- [63]my gosh. I've never heard of pleadings in any state where you had to mention the law at issue.

MR. NIELSON: Well, that's the --

JUSTICE SOTOMAYOR: Usually you mention the facts --

MR. NIELSON: Well --

JUSTICE SOTOMAYOR: -- or you state the facts and then you --

MR. NIELSON: Well --

JUSTICE SOTOMAYOR: But putting that aside, here, they say violation of Article I, Section 17 of the Texas Constitution for the taking, damaging, or the destruction of their property. That's Count 1.

MR. NIELSON: Yes, Your Honor.

JUSTICE SOTOMAYOR: And Count 2 says violation of the Fifth Amendment of the U.S. Constitution.

MR. NIELSON: Yes, Your Honor.

JUSTICE SOTOMAYOR: Summarizing basically. I don't know what else they would have had to do in Texas court if I cite that case.

MR. NIELSON: It --

JUSTICE SOTOMAYOR: They said, I'm [64]suing you in Texas court. You're the one who removed to federal court.

MR. NIELSON: Yes, Your Honor.

JUSTICE SOTOMAYOR: This seems to me like a totally made-up case because they did exactly what they had to do under Texas law. It's you who are telling me -- it's almost a bait and switch -- that you wanted to get to federal court to basically have a class action and you couldn't do it in state court, so -- but you had to fight something, which -- I don't know what you're fighting because you're telling me that Texas lets them have a cause of action under the Fifth Amendment.

MR. NIELSON: Yes, Your Honor. There's no bait and switch here, I want to be clear on that, no bait and switch.

JUSTICE SOTOMAYOR: Well, you're the one who removed.

MR. NIELSON: We removed, and they didn't come back and say, oh, no, you misunderstand what we're saying. Instead, every step along the way, they have doubled down all the way going to cert, you know, seek certiorari review from this Court.

[65]So, if we misunderstood what they were saying --

JUSTICE SOTOMAYOR: So, if -- if they go back down and say to the district court, this has been remanded to the district court, all we want is just compensation under the Texas Constitution and the Fifth Amendment under that case that you're mentioning, that's okay and you're not going to resist that?

MR. NIELSON: We -- we -- we would not resist that, Your Honor.

JUSTICE SOTOMAYOR: Okay.

JUSTICE KAVANAUGH: On Justice Gorsuch's injunction-to-pay hypothetical, I just want to make sure I'm clear on that.

MR. NIELSON: Yeah.

JUSTICE KAVANAUGH: I thought you were saying we don't need to answer that question in this case because Texas provides forums for compensation.

MR. NIELSON: Yes, Your Honor. Conceptually, I don't know how you get an injunction to pay money.

JUSTICE KAVANAUGH: But -- but --

MR. NIELSON: I'm not familiar with [66]that, but that's blowing apart --

JUSTICE KAVANAUGH: I -- I understand that, but even in the --

MR. NIELSON: Yeah.

JUSTICE KAVANAUGH: -- the theoretical possibility of it is just not present here, right?

MR. NIELSON: Correct, Your Honor.

And, as I said, it's hard for me to quarrel with it because Texas does pay money. But, conceptually, I don't know how you get there.

JUSTICE KAVANAUGH: Yeah.

MR. NIELSON: If I may --

JUSTICE JACKSON: What about a declaration? What about a declaration? Is that something different?

MR. NIELSON: A declaration? I --

JUSTICE JACKSON: Could you sue for -- for --

MR. NIELSON: Sure.

JUSTICE JACKSON: -- declaratory judgment that Texas or whatever state is not paying you?

MR. NIELSON: So my understanding of a declaratory judgment action is it sounds in [67]equity,

not in damages. So I think it would fall within the -- the universe of Ex parte Young type remedies. So we wouldn't have any objection to that either, though, again, I -- I -- I'm a little bit shooting from the hip, so I apologize it wasn't briefed on that one, so I'm -- I'm a bit nervous on that.

JUSTICE JACKSON: Yes.

MR. NIELSON: Though, I mean, I -- if I -- if I may, I would like just to make a couple of affirmative points.

CHIEF JUSTICE ROBERTS: Well, no, you can do that later.

MR. NIELSON: Oh, I apologize, Your Honor.

CHIEF JUSTICE ROBERTS: Yeah.

Justice Thomas?

Justice Alito?

JUSTICE ALITO: Well, why don't you quickly make an affirmative point.

(Laughter.)

MR. NIELSON: Well, I would just like to say that as far as I am aware, Texas is the only party here that has offered evidence on the original public meaning of the actual language [68]of the text, not the ideas, the actual language of the Constitution. And when courts looked at

that language, they read it precisely the same way that Texas does now.

CHIEF JUSTICE ROBERTS: Anything further?

JUSTICE ALITO: Thank you.

CHIEF JUSTICE ROBERTS: Justice Sotomayor?

Justice Gorsuch?

Justice Jackson?

Thank you, counsel.

MR. NIELSON: Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Mr. Kneedler.

ORAL ARGUMENT OF EDWIN S. KNEEDLER
FOR THE UNITED STATES, AS AMICUS CURIAE,
SUPPORTING THE RESPONDENT

MR. KNEEDLER: Mr. Chief Justice, and may it please the Court:

The Fifth Amendment to the United States Constitution does not of its own force create a cause of action against the government under the Fifth Amendment against the United States Government for damages.

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Numerous provisions of the [69]Constitution make that clear, including the text of the just compensation clause itself. It says property shall not be taken, no person -- property shall not be taken for public use without just compensation.

The right is not to have the property taken without compensation. It's not a right to compensation. And this -- it's prohibitory. It has a condition for the -- governmental action to be lawful. That condition is the payment of compensation. If there's not compensation, then the action is unlawful, and what lies is an injunction to cease the taking of the property.

This Court in -- in a number of recent -- relatively recent cases has made that point. In Ruckelshaus versus Monsanto, in Dames & Moore, in the railroad reorganization cases, the question really was, should there be an injunction preventing this statute from going into effect, or is there compensation available under the Tucker Act such that an injunction would not be appropriate?

In all of those cases, that's what the Court held, that there was compensation available. But that -- the the very question [70]presupposed that there might be situations in which compensation was not available. That's the violation.

And the -- the same thing, if you look at the overall context of the Fifth Amendment, that is also true. It -- the preceding clause, as Justice Alito pointed out, says that no person shall be deprived of property without due

process. The prohibition is the -- deprivation, the condition -- without -- without the condition of due process.

If a court finds a violation, it doesn't order due process. It orders -- it enjoins the conduct that was undertaken without due process. The government can always go back and do it over again with due process.

And -- and, finally, there's another clause in the Fifth Amendment that is written in exactly the same way, the indictment clause. It says a person shall not be held for a capital or otherwise infamous crime unless on a presentment of an indictment. An indictment is the condition precedent to having a lawful holding of somebody for a crime, and one --

CHIEF JUSTICE ROBERTS: Mr. Kneedler, [71] in the --

MR. KNEEDLER: Yeah.

CHIEF JUSTICE ROBERTS: -- brief that you -- you filed in First English 38 years ago, you argued that the Constitution does not of its own force furnish a basis for a court to award money damages against the government.

Now, in the decision in First English, Justice Rehnquist rejected the idea that "the Constitution does not, of its own force, furnish a basis for the court to award money damages against the government."

Now it seems to me that the question is -- turns on basis. And what you seem to be saying is it created a general theory of what the government had to do. But that doesn't mean that anybody could take that and recover compensation. They have to go get an injunction or they -- they can't proceed at all because there's no cause of action?

MR. KNEEDLER: Yes, Your --

CHIEF JUSTICE ROBERTS: I mean, are you just rearguing the point that the Court rejected?

MR. KNEEDLER: Not at all. Not at [72]all. But our point -- our point, that portion of our brief was really going to the cause of action question and -- and for the reasons that we said in that brief and this brief, and -- and I don't think the Court rejected this.

For all the reasons we said, not just the text of the clause, but -- but the Appropriations Clause, the Fifth Amendment only applied to the United States, the Appropriations Clause would have prohibited any court from awarding a money judgment or an injunction to pay money because only Congress can authorize the payment of money from the Treasury.

CHIEF JUSTICE ROBERTS: Well, but it's --

MR. KNEEDLER: OPM versus Richmond makes that clear.

CHIEF JUSTICE ROBERTS: Well, the Constitution can do it too, which is what the rest of that footnote rejecting the arguments that the government made in First English said. It says that the "cases made clear that it is the Constitution that dictates the remedy for interference with property rights amounting to a taking."

[73]So I -- I'm not sure how you get around the fact that the Constitution speaks in terms of just compensation and not an injunction.

MR. KNEEDLER: Well, as I said, it speaks in terms of compensation in terms of defining the right, which is not to have property taken without just -- just compensation. But that footnote, I think it's important to understand the context of that footnote.

In fact, all of First English was about the Agins rule in the -- in the -- in California, which said there was not even a taking. Sometimes they said you -- no compensation, but there was no taking until a court first determined that there was a taking.

And that was the rule, that was the controversy at the time, the so-called temporary taking. Does -- does the taking arise in a regulatory context at the time the regulation is effective or later? That was the issue that the Court rejected, and in that respect, it said no, compensation is owed from the moment of -- of the Constitution. And what --

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[74]CHIEF JUSTICE ROBERTS: Thank you, counsel.

JUSTICE ALITO: Mr. Kneedler, I have a little trouble understanding your argument about the Tucker Act. In your view, neither the Tucker Act nor the Takings Clause provides a cause of action, but then you say the combination of the two somehow provides a cause of action.

And the Petitioner says that what you're saying is that nothing plus nothing equals something. So this -- you must be relying on some kind of higher math that I can't understand. Where -- what is the cause of action --

MR. KNEEDLER: No, I -- I --

JUSTICE ALITO: -- in a Tucker Act suit?

MR. KNEEDLER: I -- as I said, I think it's the combination of the two. It's not zero plus zero; it's one-half plus one-half. The -- the -- as we say, the -- the -- the Constitution, the Fifth Amendment itself, does not create a -- a -- a cause of action. It would have -- would -- would have been [75]extraordinary. We went for 200 years, as pointed out, with that not being the case.

But what the Tucker Act does is, as the Court said two terms ago, three terms ago, I guess, it provides the framework under which it's -- it can be determined whether Congress has provided the ability to -- to sue under the Tucker Act.

The Tucker Act standard is whether the particular substantive provision that is being relied upon creates a -- can reasonably be read to mandate compensation if there is a violation. By definition -- and the Court made this point in Bormes -- the Tucker Act is there for something where there is an obligation but no elements of a cause of action. So the -- the -- for example, the Fifth Amendment or the statute that may be involved, particular statute that may be involved, by definition does not create a cause of action.

Congress provided in the Tucker Act that you can recover compensation if -- if the other provision of law can reasonably be construed. That's a -- that's a Tucker Act standard for when --

[76]JUSTICE ALITO: All right. Suppose there -- suppose that the Takings Clause was not in the Constitution, but Congress enacted a statute that said the federal government shall not take private property for public use without just compensation.

Would that be a money-mandating statute that creates a cause of action?

MR. KNEEDLER: I don't think so. I -- because it's a -- it's a -- it's a prohibition, I think it's the same -- the same as the Fifth Amendment itself. It -- it is a directive to Congress not to -- or executive not to take property without affording compensation.

Now it may be that the particular statute would be understood or could be interpreted that way, but,

here, we're talking about the Constitution, and no other provision of the Constitution provides of its own force a remedy, particularly a remedy for damages.

And that would have been extraordinary at the time the Constitution was adopted because of the Appropriations Clause, sovereign immunity, and the Debt Clause. If -- if compensation is not paid, that is a debt of the [77]United States, and it's clear --

JUSTICE ALITO: I -- I find it hard to understand how that would not be a statute that mandates the payment of money. It says you -- you can't take property for a public use without just compensation. It's talking about paying money. If that's not a money-mandating provision, then --

MR. KNEEDLER: It might -- it might be -- it might be money -- money-mandating under the Tucker Act. I -- I think I understood you to say it -- this wasn't the Tucker Act.

JUSTICE ALITO: No.

MR. KNEEDLER: But that's because the Tucker Act has been under --

JUSTICE ALITO: It's another -- it's another statute, and we would interpret it like we interpreted the statute in Maine Community Health. Does it -- does it mandate the payment of money? I would think the answer to that would be yes. And if that's the case with the statute, why isn't it the same with the --

MR. KNEEDLER: Because the --

JUSTICE ALITO: -- with the Fifth Amendment?

[78]MR. KNEEDLER: -- the money mandating is not -- is not something under the Tucker Act. It is -- it is a provision in the Tucker Act that --

JUSTICE ALITO: All right.

MR. KNEEDLER: It -- it's not -- it's not the other statute. It's a provision in the Tucker Act. And that is a Tucker Act-specific standard for when Congress --

JUSTICE ALITO: Thank -- thank -- thank you.

JUSTICE JACKSON: Mr. --

JUSTICE ALITO: Thank you, Mr. Kneedler.

JUSTICE JACKSON: -- Mr. Kneedler, I thought your answer to Justice Alito was going to be going back to what you said at the beginning, which is the compensation is conditional in the same way as the Due Process Clause is conditional.

I thought that was very interesting, and maybe you want to repeat it.

MR. KNEEDLER: Yeah. No, no, that is -- that -- I -- I think that's a fundamental point about the text, not -- of the just [79]compensation clause itself, but the entire

Fifth Amendment is pro -- is prohibitory. I mentioned the indictment clause, but the self-incrimination clause is the same way. The Double Jeopardy Clause is -- is the same.

JUSTICE JACKSON: And so, to the extent that we see a condition there, it -- you -- you're not interpreting that as mandating that condition necessarily. It's about the prohibition?

MR. KNEEDLER: Right. Exactly. If I could -- I'm -- I'm sorry.

CHIEF JUSTICE ROBERTS: No.

MR. KNEEDLER: If I could go back to the Chief Justice's question about First English, the language in that footnote is directed to, it says -- remedial. But what it is referring to is the -- computation of just compensation as a remedial matter.

If you have a cause of action, how do you calculate the remedy? All of the cases, it says, as the cases in the text make clear, it -- it -- it -- it's a remedy, and it does provide a basis for compensation, but in a cause of action where there already is one.

[80]CHIEF JUSTICE ROBERTS: Thank you.

MR. KNEEDLER: Every one of the cases the Court cited --

CHIEF JUSTICE ROBERTS: Thank -- thank you, counsel.

MR. KNEEDLER: I'm sorry.

CHIEF JUSTICE ROBERTS: Justice Thomas?

JUSTICE THOMAS: No.

CHIEF JUSTICE ROBERTS: Anything further?

JUSTICE SOTOMAYOR: Is your position -- is there any daylight between Texas's position and the government's position here?

MR. KNEEDLER: Well, some --

JUSTICE SOTOMAYOR: Your -- you representing the government?

MR. KNEEDLER: Yeah. To the extent there was a suggestion that there could be an injunction to pay money, we would disagree with that because of the Appropriations Clause, I think. The Fifth Amendment cannot be read --

JUSTICE SOTOMAYOR: So would it be --

MR. KNEEDLER: -- to allow that.

JUSTICE SOTOMAYOR: -- a matter of [81] semantics, you can't take this property? You have to stop flooding it? You have to do --

MR. KNEEDLER: You have to -- you have to stop whatever it is that would constitute a taking. And -- and -- and --

JUSTICE SOTOMAYOR: All right. And just to clarify your answer to Justice Alito in my head, you're saying it's the Tucker Act plus the statute --

MR. KNEEDLER: Yes.

JUSTICE SOTOMAYOR: -- mandating payment that gets you into court?

MR. KNEEDLER: That is -- that's -- that's correct, and it's certainly not the -- it's certainly not the other provision itself, the just -- the just compensation clause or the other statute, which by definition --

JUSTICE SOTOMAYOR: So that's your half-point/half-point --

MR. KNEEDLER: Yes.

JUSTICE SOTOMAYOR: -- equals one?

MR. KNEEDLER: Yes.

JUSTICE SOTOMAYOR: Okay.

MR. KNEEDLER: Sorry.

CHIEF JUSTICE ROBERTS: Justice Kagan?

[82]Justice Gorsuch?

JUSTICE GORSUCH: Two questions. First, the rogue state example, why shouldn't we worry about that? It -- why shouldn't we worry about the incentive structure we create that would allow states to withdraw compensation schemes, and maybe the federal government too, to exploit this loophole?

MR. KNEEDLER: With respect, it's not a loophole. It's a -- it's a fundamental aspect of the Constitution that the Constitution does not -- does not require this.

And the rogue state is answered by it's a prohibition, and if -- if Congress does not provide the condition necessary to render it lawful, you have an injunction -- injunctive action. And as the Court said in Knick, that was the way --

JUSTICE GORSUCH: Okay.

MR. KNEEDLER: -- that just compensation issues were raised before.

JUSTICE GORSUCH: Okay. And then, second, this may be a question better directed to Mr. McNamara when he speaks on rebuttal, but Justice Sotomayor pointed out an interesting [83]feature of the procedural history of this case. The complaint has two counts about takings. One is under the state constitution, and the other is under the federal Constitution.

How do we read what the Fifth Circuit did here? Did it only dismiss the second, the federal claim, and is the first claim under, what is it, City of Bayview and the -- and the Texas Constitution, still live? Do they even need to amend their complaint to add it? Is it already there?

MR. KNEEDLER: There's a footnote in the court of appeals' opinion that says that the Texas Constitution or Texas provides a cause of action. And that is not further elaborated upon, but it -- it's --

JUSTICE GORSUCH: No. Exactly.

MR. KNEEDLER: -- it's remanded for further proceedings, so --

JUSTICE GORSUCH: So do you take it that that first count under the state constitution is still alive and available to the plaintiffs?

MR. KNEEDLER: I -- it is still alive and available. If it required an amendment to [84]the complaint, I -- I took --

JUSTICE GORSUCH: Do you think it requires amendment --

MR. KNEEDLER: I --

JUSTICE GORSUCH: -- to the complaint, or because it was remanded for further proceedings and the

court only expressly addressed the federal Constitution, that that first count is still alive?

MR. KNEEDLER: I think it would depend on whether that first count, in -- in relying on the state constitution, was just relying on a state substantive right to compensation or whether it was also relying --

JUSTICE GORSUCH: Well, Texas --

MR. KNEEDLER: -- on a cause of action.

JUSTICE GORSUCH: -- has represented to us that it provides a cause of action --

MR. KNEEDLER: Right. And -- and --

JUSTICE GORSUCH: -- right? So --

MR. KNEEDLER: -- so -- so, if -- if the -- if the complaint is read to be invoking the state cause of action for the federal taking, then, yes, I think that would be open on [85]remand.

JUSTICE GORSUCH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

Justice Barrett?

JUSTICE BARRETT: Mr. Kneedler, just want to clarify something. So your position in response to, say, the

rogue state hypothetical, when you said an injunction is the solution, it's not an injunction to pay money because you said the United States thinks that can't happen.

So is it your position that if, say, a state or the United States takes property, refuses to get -- give just compensation for it, that the property owner could get an injunction essentially saying, give me my property back if you're not going to pay, and perhaps get that injunction but not get reimbursed for the temporary taking that happened in between the seizure and the award of the injunction?

MR. KNEEDLER: That -- that is -- that is correct. And it -- the same thing would be true, you -- there could be a temporary deprivation of due process, and if you get an injunction preventing the government from doing [86]whatever it did without due process, there is an in -- interim period, but a person could go to court, get a TRO, get a preliminary injunction to -- to prevent that from going on a long -- a long time. That's just the nature of litigation and an injunction, but it doesn't lead to the question of damages.

And this Court's cases, First English and others, had to do with the calculation whether interest should be paid, and that's what the Court meant about the Fifth Amendment being a basis for the award of compensation, not that there was a cause of action.

CHIEF JUSTICE ROBERTS: Justice Jackson?

JUSTICE JACKSON: And just to clarify from what Justice Barrett just said, the government's position would be that you might be able to have a cause of action, say, under state law or whatnot for that temporary taking. It's not that you would be out the compensation entirely, right?

MR. KNEEDLER: Right. It -- that -- that would depend on -- on state law and the availability of a state cause of action on that. [87]But we're -- I'm only talking about the federal causes of action, which that -- there's no basis for an award of money out of the Treasury and overcoming sovereign immunity and all that in federal court for a compensation even for that interim period.

But the interim period is endemic to -- to litigation, due process violation being held on -- on an indictment, but that is the proper remedy and that's the -- the remedy that existed until the Tucker Act was passed. It was the remedy that this Court said in Knick was the way to vindicate Fifth Amendment rights -- until the Tucker Act or state constitutions came along and provided a monetary remedy.

JUSTICE JACKSON: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Rebuttal, Mr. McNamara.

Appendix G

REBUTTAL ARGUMENT OF ROBERT J. McNAMARA ON BEHALF OF THE PETITIONERS

MR. McNAMARA: Thank you, Your Honor.

To begin with Justice Gorsuch's question, I think it's important to remember the procedural posture here. I understood my friend [88]from Texas to say that the City of Baytown decision means that Texas courts hear claims "under the federal Constitution."

The complaint pleads a claim under the federal Constitution, and to the extent Texas's only complaint with that was that it failed to cite directly to a Texas Supreme Court decision, it's not clear why Texas moved to dismiss it, sought an interlocutory appeal of that decision as a dispositive issue and then extinguished it on the merits in the Fifth Circuit.

To the extent that claim exists, that claim has been extinguished and that warrants reversal.

To the original meaning, and I think, Your Honor, the -- the rogue state example is not a hypothetical. It's a real example because state after state has looked to federal law and to First English as the thing that prevents the state from denying compensation.

That's true in Oregon, as I mentioned, but also New Mexico, South Carolina, Nebraska, the list goes on of states that provide compensation under the Fifth Amendment

because they understand the Fifth Amendment to require [89]compensation.

And they're correct to understand that, Your Honor. The original understanding, as evidenced by writings from James Madison to St. George Tucker, is that the Fifth Amendment creates an obligation to pay, which is why you can sue under the Tucker Act because the Fifth Amendment creates an obligation to pay.

Only in the absence of a court of competent jurisdiction to enforce that obligation does -- do the federal courts resort to cases like Meigs v. McClung's Lessee, where the Court ejected the United States military from its own base because it didn't have clean title. That -- that is the last resort in the absence of a court that has the jurisdiction to enforce that obligation.

That's why, in Maine Community Health, this Court specifically pointed to the Takings Clause as the analogy for what sort of money-mandating inquiry it means to create the obligation to pay.

But, more broadly, Your Honor, I -- I think Texas's understanding of the Fifth Amendment would relegate property rights to the [90]status of the poor relation of the Bill of Rights.

It would be the only acknowledged ongoing obligation in the Constitution that is entitled to no enforcement, that is left entirely to the discretion of the government entities that are supposedly obligated to pay. But, surely,

as evidenced by the writings and by the adoption of the Fifth Amendment itself, the Framers meant for property rights to mean more than that.

If the Court has no further questions, we'll rest on our briefs.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 12:23 p.m., the case was submitted.)

APPENDIX H — SECOND AMENDED MASTER COMPLAINT IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, GALVESTON DIVISION, FILED SEPTEMBER 9, 2024

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

Civil Action No. 3:20-cv-00223

RICHARD & WENDY DEVILLIER, *et al.*,

Plaintiffs, individually and on behalf of all other persons similarly situated,

v.

THE STATE OF TEXAS,

Defendant.

SECOND AMENDED MASTER COMPLAINT

Richard & Wendy Devillier; Steven & Rhonda Devillier; David & Angela McBride; Bert Hargraves; Barney & Crystal Threadgill; Barbara Devillier; David Ray; Gary Herman; Rhonda Glanzer; Chris & 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 & Angela Fregia; Jerry & Mary Devillier; Zalphia Hankamer; Larry Bollich; Susan Bollich; Sheila Marino; William Meissner; Taylor McBride; Brian & Kathleen Abshier;

Jina Daigle; Coulon Devillier; Halley Ray Sr., Halley Ray Jr. & Sheila Moor; John Rhame; Alex & Tammy Hargraves; William Devillier; Kyle & Allison Wagstaff; Kevin Sonnier; Eugenia Molthen; Bradley Moon; John Roberts; Marilyn Roberts; Savanna Sanders; Robert & Tracey Brown; Josh Baker; Lee Blue; Russell Brown; Margaret Carroll; Kevin Cormier; James & Melissa Davis; Maria Gallegos & Christopher Ferguson; Angela Hughes; Robert Laird; Harold Ledoux; Kacey Sandefur; Tifani Staner; Stephen Stelly; Randall & Patti Stout; Chris Day; Calvin Hill; Michael & 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 & James Coggin; Clovis Melancon; Leroy Speights; Crossroads Asphalt Preservation, Inc.; Fesi Energy, LLC; Brian Fischer; and Curtis Laird; Devon Boudreaux; Richard Belsey; Sharon Clubb; Janet Dancer; Porter May; Cindy Perez; Cecile Jimenez; Scott Hamric; Bruce & 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; Randy & Monica Brazil; Herbert & Kerry Dillard; Southeast Texas Olive, LLC; and Gulf Coast Olive Investments, LLC (each an "Individual Plaintiff") appear individually and on behalf of all persons similarly situated (collectively the "Class Plaintiffs"), and respectfully submit this Second Amended Master Complaint[1] seeking declaratory and

1. By order (ECF #41), the cases of *Sonnier v. State*, No. 3:20-cv-00379; *Boudreaux v. State*, No. 4:21-cv-01521; and

injunctive relief, as well as just compensation, under both the Texas Constitution and the United States Constitution for the taking of, damage to, and destruction of private property by Defendant, the State of Texas (the "State") by and through the design, construction, operation, and maintenance of Interstate Highway 10 ("IH-10").

NEED FOR ACTION

1. The State, acting through the Texas Department of Transportation ("TxDOT"), designed, constructed, operates, and maintains IH-10, a major east-west transportation corridor running through Houston and the southern portion of the United States.

2. The State's recent construction of projects in Chambers County and Jefferson County are designed to raise the elevation of IH-10, to widen IH-10 from four to six lanes, and to install a solid concrete traffic median barrier down IH-10's centerline to enhance public safety and facilitate use of its eastbound (southside) lanes as an evacuation route during periods of flooding by confining water to the westbound lanes (northside).

3. The State's installation of an impenetrable bulwark down the center of the elevated IH-10 effectively created a weir,[2] obstructing the natural flow of rainfall runoff. As

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Southeast Texas Olive, L.L.C. v. State, No. 3:21-cv-00104; were consolidated into this action for all purposes.

2. A weir is defined as "[a] dam placed across a river or canal to raise or divert the water . . . or to regulate or measure

a result, and consistent with the projects' design and the State's intent, the State flooded Class Plaintiffs' real and personal property. At no point did the State compensate Class Plaintiffs, or their predecessors-in-interest, for any right to utilize their private property as a detention area for storm water runoff. Nor did Class Plaintiffs give the State permission to do so.

4. The actions by TxDOT to enhance public safety and the capacity of IH-10, to provide an evacuation route via its eastbound lanes, and to retain stormwater runoff and prevent the flooding of property south of the highway, all of which caused the flooding of the Individual Plaintiffs' and Class Plaintiffs' properties, were public projects; likewise, the actions were undertaken, paid for, overseen, and effected by the State for public use and to further a public purpose.

5. The virtually unconstrained power of the government to take a citizen's private property without their consent is balanced only by the constitutional guarantee that the government must compensate the owner for taking their property. Article I, Section 17 of the Texas Constitution guarantees that "[n]o person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being

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the flow." The American Heritage Dictionary of the English Language at 2025 (3d ed. 1992). Here, the term is used in its "more general definition in engineering to apply to any hydraulic control structure that allows water to flow over its top, often called its crest." *What is a Weir*, Practical Engineering, https://practical.engineering/blog/2019/3/9/what-is-a-weir.

made . . . ." Likewise, the Takings Clause of the Fifth Amendment to the U.S. Constitution (made applicable to the States through the Fourteenth Amendment) provides "nor shall private property be taken for public use, without just compensation."

6. These constitutional protections, both at the state and federal level, mandate that Class Plaintiffs should not be forced to bear those burdens which, in all fairness and justice, should be borne by the public as a whole. Through the recent IH-10 projects, however, TxDOT knowingly and intentionally caused the flooding of each Class Plaintiffs' property.

7. The Individual Plaintiffs seek to represent on a class-wide basis all persons who own or lease real or personal property located north of Interstate Highway 10 that has been flooded with water retained by the State's design, construction, operation, and maintenance of the highway. As required by Federal Rule of Civil Procedure 23, the specific definition of the class certified will be determined by the Court.

JURISDICTION AND VENUE

8. This Court has both subject matter jurisdiction over the Individual and Class Plaintiffs' claims under 28 U.S.C. § 1331, § 1441, and § 1367.

9. This Court has personal jurisdiction over the State of Texas and the State's sovereign immunity from suit for all claims and all Plaintiffs has been waived by

the removal by the State of the original actions filed by these Plaintiffs to this Court.

10. Venue is proper in this Court pursuant to 28 U.S.C. § 1391.

PARTIES

11. The following are Individual Plaintiffs in this action: Richard & Wendy Devillier; Steven & Rhonda Devillier; David & Angela McBride; Bert Hargraves; Barney & Crystal Threadgill; Barbara Devillier; David Ray; Gary Herman; Rhonda Glanzer; Chris & 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 & Angela Fregia; Jerry & Mary Devillier; Zalphia Hankamer; Larry Bollich; Susan Bollich; Sheila Marino; William Meissner; Taylor McBride; Brian & Kathleen Abshier; Jina Daigle; Coulon Devillier; Halley Ray Sr., Halley Ray Jr. & Sheila Moor; John Rhame; Alex & Tammy Hargraves; William Devillier; Kyle & Allison Wagstaff; Kevin Sonnier; Eugenia Molthen; Bradley Moon; John Roberts; Marilyn Roberts; Savanna Sanders; Robert & Tracey Brown; Josh Baker; Lee Blue; Russell Brown; Margaret Carroll; Kevin Cormier; James & Melissa Davis; Maria Gallegos & Christopher Ferguson; Angela Hughes; Robert Laird; Harold Ledoux; Kacey Sandefur; Tifani Staner; Stephen Stelly; Randall & Patti Stout; Chris Day; Calvin Hill; Michael & 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 & James Coggin; Clovis Melancon; Leroy Speights; Crossroads Asphalt Preservation, Inc.; Fesi Energy, LLC; Brian Fischer; and Curtis Laird; Devon Boudreaux; Richard Belsey; Sharon Clubb; Janet Dancer; Porter May; Cindy Perez; Cecile Jimenez; Scott Hamric; Bruce & 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; Jeffrey; Randy & Monica Brazil; Herbert & Kerry Dillard; Southeast Texas Olive, LLC; and Gulf Coast Olive Investments, LLC. Each of the Individual Plaintiffs, like each of the Class Plaintiffs (collectively, "Plaintiffs"), owned and/or leased real and personal property located north of IH-10, and each alleges their property was taken, destroyed, and/or damaged by the State by its design, construction, operation, and/or maintenance of IH-10.

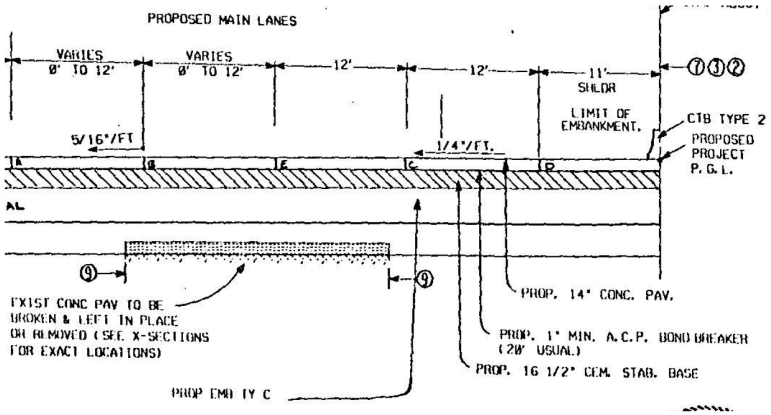
12. Defendant, the State of Texas, is a sovereign entity and body politic with the power of eminent domain. Defendant, the State answers for its agencies, including but not limited to TxDOT. The State is a governmental entity and through its officials, employees, agents, and contractors performed the work on IH-10 which Plaintiffs claim caused the taking, damage, and destruction of their real and personal property; work which was done by the State for public use and/or purpose.

Appendix H

FACTS COMMON TO ALL CLAIMS

13. In 1956, President Dwight D. Eisenhower signed the Federal-Aid Highway Act into law, allocating billions of dollars for the construction of the Interstate Highway System (the "Highway System"), which, in present day, includes IH-10. The Federal Highway Administration dispenses funds to state governments which, in turn, build and maintain the Highway System within their respective boundaries. The states must follow federal regulations that govern the building and maintenance of the Highway System—including any impact of a particular project's design and operation on the hydrology (rainfall runoff characteristics) of the surrounding property.

14. As various plan sets show, during the design and construction of Federal Aid Projects, TxDOT significantly raised the elevation of IH-10 and installed a new precast concrete barrier in the median between the east/west-bound lanes of IH-10. The barrier was installed in grouted sections so as to form a complete seal, which rises multiple feet above the now-elevated grade level of the highway.



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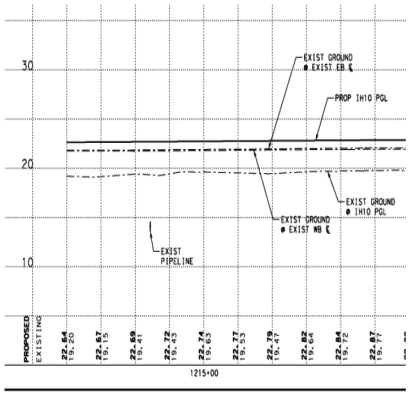
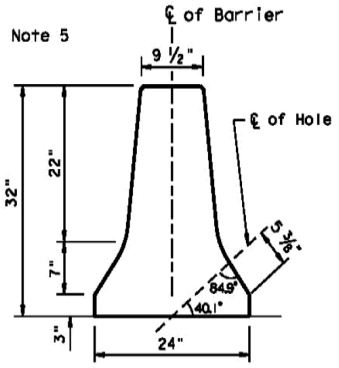




15. The miles of uninterrupted median barrier along IH-10 without slots at the base prevent the passage of water between the north and south sides.

16. The functional effect of installing the solid median barrier on an elevated IH-10 is to create a weir that blocks stormwater runoff on the north side of the

highway centerline. The weir backs up and stores water on private property located north of the highway.

17. The State's design, construction, and maintenance of these barriers/dams was no mistake. Rather, the State has admitted that the barriers/dams—in addition to maintaining traffic safety—are part of its flood control efforts and keep the southern portion (eastbound lanes) of IH-10 open during severe rainfall events that would otherwise overtop the roadway and inhibit traffic from using that portion of the roadway as an evacuation route.

18. Indeed, the State was told before it undertook its work on IH-10 of concerns that the proposed highway improvements would cause flooding upstream of the highway. Not only did the State ignore the drainage and flooding concerns of local residents, but it also altered proposed drainage plans prepared by its own contractors and agents to decrease drainage capacity that would pass under the highway in favor of retaining and storing the water north of IH-10, knowingly and intentionally choosing to inundate Plaintiffs' properties to protect properties south of IH-10 from flooding.

19. Indeed, even after the State's design, construction, maintenance, and operation of the highway and its median barrier caused the flooding of—and significant damage to—Plaintiffs' real and personal property, the State continued to erect the impermeable traffic barrier/dam, extending the barrier further east down the center of the highway despite knowing the damage it would cause to Plaintiffs' properties by the rainfall runoff it blocks.

20. The State (a) knew that its actions would cause or were causing damage to Plaintiffs' properties; (b) knew that the damage to Plaintiffs' properties was substantially certain to result from its actions; (c) knew that the damage to Plaintiffs' properties was necessarily an incident to, or necessarily a consequential result of, its actions; and/or (d) knew or should have known that the inundation of Plaintiffs' properties was the natural, probable, and foreseeable consequence of its acts.

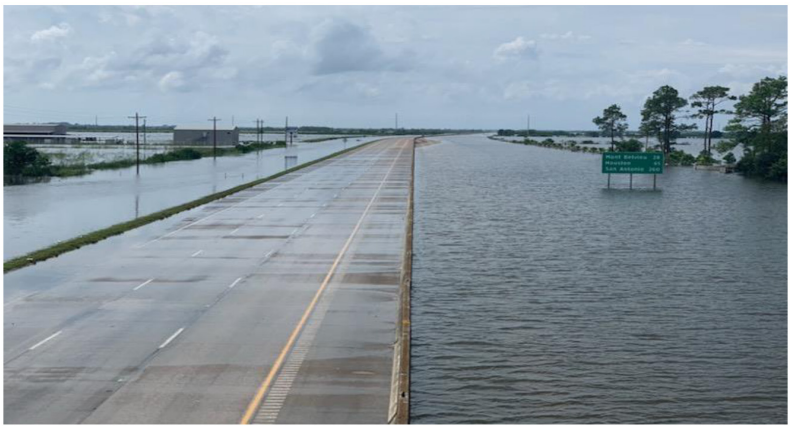
21. While the public generally benefits from the access to transportation along at least a portion of this roadway during such rainfall events, the burden of that benefit falls on Plaintiffs, each of which are forced to store the retained waters on their property without their consent or compensation.

22. For example, in August 2017, Tropical Storm Harvey brought its rainfall to much of southeast Texas. During and after Harvey, the IH-10 median barrier functioned as a leak-proof dam, preventing rainfall runoff from overtopping the roadway and proceeding south in its ordinary course and instead backing water up onto private property to the north of the highway.

23. While performing its public uses of providing a safety barrier separating the traffic flow, keeping the eastbound traffic lanes open, and retaining stormwater runoff to protect property south of the highway, the storm water runoff detained by the IH-10 median barrier backed up onto and flooded Plaintiffs' private property, causing significant damage to Plaintiffs' properties and severe loss of property rights.

Appendix H

24. Likewise, in September 2019, TxDOT's median barrier/dam along IH-10 blocked rainfall runoff from overtopping the roadway during and after Tropical Storm Imelda. During Imelda eastbound traffic lanes remained open and conferred a benefit to the public at large—and specifically protected the property located south of the highway—by blocking storm water runoff and flooding Plaintiffs' property, again causing significant damage and severe loss of property rights.



25. The damage and destruction of Plaintiffs' real and personal property was the intended, direct, natural, and/or foreseeable result of State-authorized affirmative actions, done for a public use and/or purpose.

26. Harvey and/or Imelda were not "rare" or "unprecedented" rain events for this region of southeast Texas. The history of hurricanes, tropical storms, and other large storms that have released significant amounts of rainfall in the area is well documented. The permanent placement of an impenetrable traffic median barrier/dam down the center of IH-10 changed the natural watercourses and guarantees that the flooding of Plaintiffs' properties will inevitably reoccur, as when Imelda followed Harvey only two years later. Moreover, detained water from storms less severe than Harvey and Imelda will be held on Plaintiffs' property because of the State's design, construction, and maintenance of the median barrier/dam down the center of IH-10.

27. Each Plaintiff owned homes, fixtures, businesses, and/or personal property protected from the taking, damaging, or destruction by the State without compensation. The flooding suffered by each Plaintiff interfered with the ability to use their land and personal property for their intended purposes. Plaintiffs had reasonable expectations that they would be able to occupy and use their homes, businesses, and personal property for the purposes and in the manner for which they were purchased or leased. But the backwater stored onto each Plaintiff's property severely interfered with their reasonable investment-backed expectations regarding the

occupancy and use of their property. Many Plaintiffs were displaced from their homes and had to stay in hotels or alternative accommodations following Harvey and Imelda due to this government-induced flooding.

28. Portions of Plaintiffs' homes, businesses, and/or other improvements have been damaged and/or destroyed, necessitating remedial measures such as tearing out of soiled walls, removing mold-prone insulation, replacing ruined floors, replacing garage doors and other exterior features, and requiring the repair of a vast array of structural components. Moreover, many Plaintiffs' properties suffered significant erosion and loss of crops, grasses, and groundcover essential to the use to which Plaintiffs had put the properties. And those Plaintiffs using their property for commercial purposes were deprived of the use of, and temporarily any access to, their property, losing the benefits and profits attendant to the continued operation of their commercial ventures. Each and every one of these impacts were not only severe but also reasonably foreseeable to the State because of the design, construction, and maintenance of IH-10's median barrier.

29. The impoundment of rainwater runoff on Plaintiffs' property for days on end, destroying Plaintiffs' real and personal property and denying them access to that property, is not something Plaintiffs expected or reasonably could have expected when purchasing and developing their property. Many of these tracts have been owned by Plaintiffs' forebearers and family members for decades. And, before the State's design, construction,

and maintenance of the IH-10 median barrier, Plaintiffs' properties had never been subject to flooding of the nature, character, extent, and duration as they experienced after TxDOT built the barriers/dams along the elevated IH-10.

30. And Plaintiffs' problems are not all in the past. Neither Harvey nor Imelda was a "one off" or "unique" flood event for what these Plaintiffs face since the State's erection of the barrier, and they will not be the last flooding Plaintiffs experience because of the State's actions. During foreseeable and anticipated storm events (even those of a lesser magnitude than Harvey and Imelda), IH-10 will continue to capture and store rainfall runoff onto Plaintiffs' properties.

31. Plaintiffs have already suffered the permanent damage and destruction of real property due to flooding, which necessitated repairs such as tearing out soiled walls, removing mold-prone insulation, replacing ruined floors, replacing garage doors and other exterior features, and requiring the repair of other structural issues.

32. In addition to the physical damage to real property, Plaintiffs' real property values, including the market value of homes, businesses, and/or other improvements, have suffered a severe diminution in value.

33. And Plaintiffs suffered the permanent damage, destruction, and loss of personal property including appliances, furniture, tools, machinery, livestock, crops, vehicles, air conditioning units, and similar personal property in addition to the tragic loss of hereditary items and mementoes which can never be replaced.

34. The State does not possess any legal right to store rainfall runoff on Plaintiffs' private property. The State has never made an offer to Plaintiffs to purchase an easement or other property interest for the storage of floodwaters. The State has never attempted to use its power of eminent domain to acquire an easement or other property interest from Plaintiffs for the purpose of storing rainfall runoff. The State has never compensated or offered to compensate Plaintiffs to use their property to store water.

35. The following summarizes the foundation of claims presented by Individual Plaintiffs on their own behalf as well as on behalf of Class Plaintiffs, who are similarly situated:

a. each of the Individual Plaintiffs owned and/or leased real and personal property located north of IH-10 in Chambers, Liberty or Jefferson County, Texas;

b. each of the Individual Plaintiffs owned and/or leased the above-referenced property at the time the property suffered devastating flooding during Tropical Storms Harvey (August 2017) and/or Imelda (September 2019);

c. each of the Individual Plaintiffs' real and personal property was inundated, destroyed, and/or damaged as a result of the affirmative actions of the State in designing, constructing, operating, and/or maintaining IH-10;

d. each of the Individual Plaintiffs' property was damaged by actions of the State which the State either (a) knew would be caused by its actions; (b) knew was substantially certain to result from its actions; (c) knew was necessarily an incident to, or necessarily a consequential result of, its actions; and/or (d) knew or should have known was the natural, probable, and foreseeable consequence of its actions; and

e. each of the Individual Plaintiffs, as a consequence of the foregoing, is entitled to a recovery of just compensation for the losses suffered by the taking, damaging, and/or destruction of their real and personal property.

CLASS ALLEGATIONS

36. In addition to asserting claims on their own behalf, Individual Plaintiffs bring this matter as a class action. Individual Plaintiffs seek to represent the following Class with regard to a determination of the liability of the State for the claims asserted herein:

Persons (whether individuals, entities, or others) that leased and/or owned real and/or personal property located north of Interstate Highway 10 in Chambers, Liberty, and/or Jefferson County, Texas, which was flooded during Tropical Storms Harvey and/or Imelda by stormwater runoff retained by

the State's design, construction, operation, and maintenance of Interstate Highway 10. Excluded from the Class are the State and Federal Governments, the Court, and Court personnel.

37. The Class is so large that joinder of all members is impracticable. Public records confirm that the putative Class comprises hundreds of properties and includes at least 1,000 members.

38. There are questions of law or fact common to the determination of liability on behalf of the Class which are capable of class-wide resolution, and the claims or defenses of Individual Plaintiffs with regard to the determination of the State's liability are typical of the claims or defenses concerning the liability of the State to each member of the Class.

a. Questions of fact common to all putative Class members regarding a determination of liability include those underlying the design, construction, operation, and maintenance of IH-10 (actions undertaken and performed by the State and its agents which apply with uniform effect to each member of the putative Class); whether the intended detention of storm water runoff on the Class' private property during Harvey and/or Imelda was severe enough to constitute a compensable taking under the Texas and/or the U.S. Constitution; what

was the hydrologic and hydraulic effect of raising the profile of and installing the concrete barrier on IH-10; what is the size of the reservoir pool created by the State's highway design and construction; and the actions by the State in planning for potential rainfall events and the drainage facilities and capacity needed to avoid inundating private property.

b. Question of law common to all putative Class members related to the liability of the State include the State's immunity from liability for state and federal takings claims seeking monetary damages or declaratory relief from a federal court; whether Plaintiffs' federal takings claims must be brought pursuant to 42 U.S.C. § 1983 or whether such claims are self-effecting under the Fifth Amendment to the U.S. Constitution and could be filed in federal court pursuant to 28 U.S.C. § 1331; whether the State can obtain dismissal of Plaintiffs' claims through pleadings or defenses in this Court which it could not have raised in the Texas state court where these consolidated actions were originally filed; and whether the State has erected or imposed barriers to the prosecution of an inverse condemnation claim in its own courts that violate the procedural and/or substantive due process protections accorded private property

rights under the Fourteenth Amendment to the U.S. Constitution.

c. These questions of law and fact concerning the liability of the State for the claims brought by Plaintiffs are common to all members of the putative Class, and they predominate over any questions affecting the liability inquiry concerning any individual members of the Class.

39. Individual Plaintiffs' claims are typical of the claims of Class Plaintiffs. Individual Plaintiffs and Class Plaintiffs were inundated by water intentionally stored by the State on and over their real and personal property in August/September 2017 and September 2019 in the same manner, by the same mechanism, and following the same set of factual events and actions. The relief Individual Plaintiffs seek is typical of the relief requested by Class Plaintiffs. And the issues to be joined at trial for Individual Plaintiffs concerning the liability of the State, both factually and legally, are the same as those that would be joined for Class Plaintiffs.

40. Individual Plaintiffs, as representatives of the Class, will fairly and adequately protect the interests of the Class and Class Plaintiffs. Individual Plaintiffs' interests are consistent with, and not antagonistic to, those of the Class they seek to represent and Class Plaintiffs. Individual Plaintiffs and Class Plaintiffs all seek just compensation under the Texas Constitution and the U.S. Constitution. Individual Plaintiffs are ready and

able to fairly and adequately protect the interests of the Class and strongly believe the State must provide just compensation for taking private property which flooded during Harvey and Imelda which was caused by the State's actions. Plaintiffs are represented by experienced, qualified, and competent counsel who are committed to prosecuting this action. Counsel is knowledgeable about, and experienced in, conducting class action litigation, complex multi-plaintiff litigation, takings litigation, and flooding litigation. Counsel has and will continue to devote the appropriate resources necessary to prosecute these claims.

41. The elements of Rule 23(b)(1) are met since the prosecution of separate actions by or against individual members of the Class could create a risk of inconsistent or varying adjudications with respect to individual members of the Class which would establish incompatible standards of conduct for the party opposing the Class. Individualized litigation would present the potential for varying, inconsistent, or contradictory judgments and would magnify the delay and expense to all parties and to the court system resulting from multiple trials of the same factual issues.

42. The elements of Rule 23(b)(2) are met since the State has acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final declaratory or injunctive relief regarding the State's liability with respect to the Class as a whole.

43. The elements of Rule 23(b)(3) are met since maintaining a class action with regard to the issue of

the State's liability to Class Members would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated without sacrificing procedural fairness or bringing about other undesirable results. Certification is not sought on the question of damages due the Class, or any group of Individual Plaintiffs or Class members. Absent Class treatment, courts would be flooded by takings claims from hundreds of litigants. Class-wide determination of the State's liability will avoid duplication and enable faster processing of the multitude of claims since questions of law or fact common to Class Members as to the State's liability predominate over any questions concerning liability which affect only individual member. Moreover, prosecution of the liability question as a class action is superior to other available methods for fairly and efficiently adjudicating a multitude of individual claims.

CAUSES OF ACTION

44. While the standards and controlling authority governing claims under the Texas Constitution and the U.S. Constitution differ, the facts in this case mandate that the State compensate both Individual Plaintiffs and Class Plaintiffs under either provision. In addition, Plaintiffs seek declaratory and injunctive relief regarding the State's failure to institute condemnation actions for the permanent flowage easement it has taken from them. Finally, in the alternative, Plaintiffs plead claims under the procedural and substantive due process guarantees of the Fourteenth Amendment to the U.S. Constitution should their direct claim for compensation against the State under the Fifth Amendment (through the Fourteenth)

and/or Article I Section 17 of the Texas Constitution be found invalid.

COUNT 1: Violation of Article I, Section 17 of the Texas Constitution for the Taking, Damaging, or Destruction of their Property.

45. Plaintiffs re-allege and incorporate the preceding paragraphs of this Complaint.

46. To establish an inverse condemnation claim under Article I, Section 17 of the Texas Constitution, a property owner must show that there has been: (1) an intentional government act by a government entity; (2) that resulted in the taking, damaging, or destroying of a property owner's property; (3) done for public use. Individual Plaintiffs' and Class Plaintiffs' claims fulfill each of these requirements.

A. The Design, Construction, Operation, and/or Maintenance of IH-10 was an Intentional Governmental Act by a Governmental Entity.

47. The State is a governmental entity.

48. The design, construction, operation, and maintenance of IH-10 was done by the State through its officials, employees, agents, and/or contractors.

49. The design, construction, operation, and maintenance of IH-10 by the State intentionally included, *inter alia*, the elevation of the highway's grade line and the installation of a concrete traffic barrier in the median of the highway.

B. The Design, Construction, Operation, and/or Maintenance of IH-10 Constitutes Public Use.

50. The intrastate and interstate travel promoted by the State's design, construction, operation, and maintenance of IH-10 is a public use.

C. The State's Actions Demonstrate the Requisite Intention for Plaintiffs' Inverse Condemnation Claims.

51. As to Individual Plaintiffs' and Class Plaintiff's claims under Article I, Section 17 of the Texas Constitution, the element of intent is shown where the governmental entity that physically damages private property to confer a public benefit (1) knows that a specific act is causing identifiable harm; or (2) knows that the specific property damage is substantially certain to result from an authorized government action—that is, that the damage is necessarily an incident to, or necessarily a consequential result of, the government's action. Both of those standards are met here.

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1. The State had actual knowledge that its actions would cause damage to Individual Plaintiffs' and Class Plaintiffs' properties.

52. The State was aware at the time it designed, constructed, operated, and/or maintained the IH-10 projects that its actions would cause physical damage to Individual Plaintiffs' and Class Plaintiffs' private property.

53. Prior to August 2017, some of Individual Plaintiffs' and Class Plaintiffs' properties suffered short-lived, intermittent flooding from heavy rainfall events, but the storm's runoff was able to (and did) naturally flow over IH-10, ultimately to the Gulf of Mexico. During Tropical Storm Harvey, however, Plaintiffs experienced significantly greater flooding of (and damage to) their properties, and the inundation lasted for a greater period of time—well after Harvey had moved on—than ever before because the rainfall runoff was retained behind the elevated and improved IH-10. This effect and the inundation of Plaintiffs' properties upstream of the highway was the known and intended result of the State's design, Construction, operation, and maintenance of IH-10. The State intentionally used Plaintiffs' properties north of the highway as a detention reservoir for excess storm water that it knew would not be accommodated by the drainage facilities of the highway.

54. Indeed, during the design and prior to the construction of the highway, affected citizens told State

officials (including officials at TxDOT) of the foreseeable drainage problems and damage that would be caused to their properties by the State's actions. After their predictions came true during the Harvey storm, individuals complained to the State again about the flooding caused by the State's design and construction of Interstate Highway 10, but the State did nothing to alleviate the problem. Indeed, the State continued its ongoing modifications to IH-10, extending even further the impenetrable barrier down the center of the highway despite having been told of the damage caused by the inundation of properties by the rainfall runoff it retained. It was only a matter of time before the State's action submerged Plaintiffs' properties again.

55. And that time soon came. In September 2019, Tropical Storm Imelda hit southeast Texas and again the State's traffic barrier arrested the rainfall runoff. Even though the State had been previously told of the damage caused during Harvey by the weir it had erected in the middle of IH-10, the State continued its operation and maintenance of the highway and persisted with the erection of the impermeable barrier as well—in fact, the barrier installed in the later phases of its highway "improvements" is even taller that that erected in the initial phases.

56. Indeed, as Imelda approached one Chambers County resident—Steven Devillier—sought to prevent a repeat of the devastation wreaked by Harvey. Devillier asked government officials for permission to remove some of the barrier, but when his request was relayed to TxDOT, it was denied. The Beaumont Enterprise related the story:

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"[Steven] Devillier lives near Winnie in Chambers County, on the north side of Interstate 10. When Hurricane Harvey struck the region in 2017, a solid concrete barrier that divides the freeway's eastbound and westbound lanes had acted like a dam, holding back water headed toward the Gulf of Mexico.

…

Since Harvey, Devillier says, he had been trying to get something done about the freeway partition. Could the divider be redesigned to allow water to flow through? Could drainage underneath be improved?

The barrier seemed to hold back water to the north, swamping the freeway lanes headed toward Houston. The build-up, he believes, caused his and other homes to be inundated, family members included. The freeway was closed for three days.

Devillier says he and his cousin petitioned authorities for change that didn't come fast enough.

As Imelda bore down, Devillier begged the Chambers County judge for permission to demolish the barrier with a track hoe, he said. The county engineer said officials

> passed the request to the Texas Department of Transportation, believing it was not the county's decision to make.
>
> TxDOT, according to a spokesperson, had been working with University of Texas researchers to study how the barrier affected flood-prone areas. The agency wasn't ready to see the barricade immediately taken down.
>
> The barrier kept the eastbound lanes of the freeway open, spokesperson Sarah Dupre wrote in an email, allowing authorities to reach an otherwise sealed-off Winnie.

57. Thereafter, thousands of acres north of the IH-10 barrier was again flooded by rainfall runoff retained by the State's projects.

58. Because of the benefits to the general public, including the enhanced safety and the creation of an evacuation route via the eastbound lanes of the freeway, the State chose to design, construct, operate, and maintain the operation of IH-10 in a manner that it knew would flood Plaintiffs' properties. That intentional choice by the State has forced Plaintiffs to bear the burden of providing the public benefits sought by the State, and Plaintiffs are constitutionally entitled to compensation for their losses.

2. The State possessed knowledge that damage to Plaintiffs' properties was substantially certain to result from its actions.

59. The State actions that form the basis of Plaintiffs' claims were public works performed pursuant to Federal Aid Projects. Compliance with the federal and state rules and regulations applicable to that work was mandatory. The analyses, studies, and documentation required by those rules and regulations provide objective evidence that the State knew harm to Plaintiffs' properties was substantially certain to result from its actions.

60. Compliance with federal regulations, specifically 23 C.F.R. Part 650, Subpart A is required when a proposed project includes a new or expanded encroachment on a floodplain regulated by FEMA.

61. FEMA's Flood Insurance Rate Map ("FIRM") panels show that a portion of the State's projects cross FEMA Special Flood Hazard Areas.

62. Traffic median barriers the State added to IH-10 constitute floodplain encroachments under the terms of the National Flood Insurance Program.

63. 23 C.F.R. Part 650, Subpart A required TxDOT to prepare location hydraulic studies for each of the projects that would include a discussion of (a) the hydraulic risks associated with implementation of the action, (b) the impacts from the action on natural and beneficial floodplain

values, (c) the support of probable incompatible floodplain development, (d) the measures to minimize floodplain impacts associated with the action, and (e) the measures to restore and preserve the natural and beneficial floodplain values impacted by the action, along with an evaluation and discussion of the practicability of alternatives to any longitudinal encroachments. TxDOT's understanding of and need for compliance with these regulations created objective evidence of the State's knowledge of the damage to Individual Plaintiffs' and Class Plaintiffs' properties that would occur from its actions.

64. Similarly, compliance with Presidential Executive Order 11988 was required for the State's work on Interstate Highway 10.

65. Presidential Executive Order 11988 requires each actor, in carrying out federal programs, (1) to reduce the risk of flood loss, to minimize the impact of floods on human safety, health and welfare, and to restore and preserve the natural and beneficial values served by floodplains; and (2) to evaluate the potential effects of any actions in a floodplain to ensure its planning programs reflect consideration of flood hazards and floodplain management and to consider alternatives that will not impact a floodplain. Additional federal regulations required the State to implement its Federal Aid Projects in a manner (a) to prevent uneconomic, hazardous, or incompatible use and development of floodplains; (b) to avoid, where practicable, encroachments by its actions; (c) to minimize the adverse impacts its actions may have on base floodplains, including direct or indirect support for

development; and (d) to preserve the natural and beneficial floodplain values that may be adversely affected.

66. Finally, Texas state statutes and regulations, including TxDOT's own rules and policies, require an investigation, analysis, and documentation that provide objective evidence of the State's knowledge of the expected flooding of Plaintiffs' properties created by the State's actions. The standards and criteria presented in the TxDOT Hydraulic Design Manual are the minimum standards and criteria acceptable for projects involving new drainage structures or replacement of existing structures (as TxDOT's work on IH-10 did). All drainage facilities were required to have been designed for existing land use conditions and should have included capacity to convey stormwater runoff from all existing adjacent properties for the design year storm so that the projects would not induce flooding or cause any adverse flooding impact on upstream facilities.

67. To that end, during the projects' design work the State is required to study the natural and established patterns of drainage—including that beyond the vicinity of each proposed project—to minimize or avoid damage to adjacent property.

68. The State is required to investigate the established patterns of drainage so that the project's drainage design would include capacity to convey stormwater runoff from all existing adjacent properties based on existing land use conditions at the time of the design. Hydrologic analyses were necessary for each

project, and all sources of potential risk must have been considered as part of the investigation for the projects' hydraulic structures—including the consequences associated with the probability of flooding, property loss, and/or hazard to life during the service life of the project—to determine whether modified site-specific standards or criteria would be appropriate for the project.

69. At the time of design, all drainage facilities must be designed for existing land use conditions and so that any project does not cause an adverse flooding impact on facilities existing upstream of the project. TxDOT hydraulic engineers must review the potential liabilities stemming from the impact of any highway project on a floodplain. This includes instances where, as here, the rehabilitation or maintenance of a roadway results in a higher profile, such as the case presented here. TxDOT engineers must evaluate the impact of its work to ensure consistency with the federal requirements regarding the impact of a highway on a floodplain.

70. In the course of its work, the State is required to study the antecedent conditions and basic hydrologic data surrounding the project and determine and prepare an event-based model for the project's design flood. Likewise, the state is required to determine the direct runoff, the peak stage, the peak flow, the flood peak, the effective precipitation, the annual exceedance probability, the overland flow, the direct excess, the surface runoff, and the design runoff for the design flood as well as for the design storm.

71. Because of this hydrologic investigation, TxDOT determined the elevations that make up the flood profile and knew that the traffic median barrier would retain direct runoff. The State knew that stormwater runoff flowed from north to south when it raised the grade level of IH-10 and installed a dam down its centerline. The State also knew that the concrete traffic barrier installed by the State would reach a height greater than twelve inches (12") above the base flood elevation north of the highway.

72. Indeed, after Harvey (and prior to Imelda), TxDOT employees were told that the traffic median barrier previously installed in the center of IH-10 had resulted in the flooding of private property. The State had actual knowledge of the flooding its latest project would cause before it raised the grade level of IH-10 and installed a dam down its centerline prior to Imelda.

3. In the alternative, subjective knowledge by the State that its action will cause specific harm to a specific piece of property should not be required to recover on a Takings claim under the Texas Constitution.

73. Texas courts have held that the similarity of the federal and state takings provisions permit application of federal jurisprudence as a guide to the standard for determination of claims brough under Article I, Section 17 of the Texas Constitution.

74. However, as shown below in Count 2, the intent or knowledge requirement to demonstrate a taking under the Texas Constitution arguably differs from the showing

required to recover under the Fifth Amendment to the U.S. Constitution. Given the recent change in takings jurisprudence by the U.S. Supreme Court, any difference between the intent/knowledge standards should be eliminated. The rights and protection accorded Texas property owners under the State constitution's takings provision should not provide less security against having their property taken without just compensation than its federal counterpart. The ability of a property owner to litigate both a Fifth Amendment takings claim and a claim under Article I, Section 17 of the Texas Constitution in the same suit should bring the intent standard applicable to each in harmony to eliminate an unnecessary and perfidious dichotomy between the state and federal claims.

75. Government actors should be treated the same as other litigants vis-à-vis how the element of "intent" is applied under Texas law when that element is adjudicated in an action to which they only are subject—a takings claim. A finding of reckless (or willful) disregard of facts by the State should support a determination of the requisite intent for an inverse condemnation claim under the Texas Constitution.

76. Therefore, as an alternative, Plaintiffs bring their nonfrivolous argument for the extension, modification, or reversal of existing Texas law, and seek recovery of just and adequate compensation pursuant to Article I, Section 17 of the Texas Constitution for the permanent and/or temporary taking, damaging, and/or destruction of their real and personal property with a finding that the State knew or should have known the consequences of its actions absent its reckless (or willful) disregard of facts.

Appendix H

COUNT 2: The Taking of Property Without Just Compensation in Violation of the Fifth Amendment to the United States Constitution.

77. Plaintiffs re-allege and incorporate the preceding paragraphs of this Complaint.

78. In addition to, and in the alternative to, their claim under the Texas Constitution, Plaintiffs seek recovery for the State's permanent and/or temporary taking of their real and personal property without paying just compensation in violation of the Takings Clause of the Fifth Amendment of the U.S. Constitution, a self-executing constitutional provision applicable to the State through the Fourteenth Amendment of the U.S. Constitution.

79. Federal takings jurisprudence directs that whether government-induced increased water runoff onto private property constitutes inverse condemnation under the Fifth Amendment is determined by a two-question test: (1) did the plaintiff possess a protectable property interest in what they allege the government has taken and (2) were the effects the plaintiff experienced the predictable result of governmental action which was sufficiently substantial to justify a takings remedy.

80. In addition, the second question—whether the effects the plaintiff experienced was the predictable result of governmental action which was sufficiently

substantial to justify a takings remedy—is assessed through the conceptual framework applicable to the type of claim asserted. The government can take property by two means: physically or by regulation. Furthermore, a taking can be either permanent or temporary in duration. And takings can be further divided into two categories: categorical and non-categorical. Categorical takings deprive the owners of all economically viable use of their property while non-categorical takings (such as easements) deprive the owner of some amount of the economic use of the property. The State-caused flooding imposed on Plaintiffs effected (1) a temporary categorical physical taking of their real property; (2) a permanent non-categorical physical taking of a flowage easement over their real property, and (3) a permanent categorical physical taking of their personal property.

A. Each Plaintiff Possesses a Protectable Interest in Their Property.

81. The existence of a protectable property interest under the Fifth Amendment is determined by reference to state law. Texas law recognizes that the term property means not only the thing owned, but also every right which accompanies ownership. Each Plaintiff had property rights in both real and personal property protected by the Fifth Amendment that were taken by the State's actions.

B. The State's Physical Invasion of Plaintiffs' Property, Depriving Them of the Use, Enjoyment, Exclusive Possession, and Right to Alienate their Property, Constitutes a Taking Under the Fifth Amendment.

82. Plaintiffs' properties were physically invaded by stormwater runoff the State stored on their land, in their homes, and/or in their businesses. The inundation itself lasted for a several days, and that was followed by a long period of cleanup, replacement, and repair after both Harvey and Imelda. Indeed, some properties were not completely repaired after Harvey when Imelda struck, and some remain unfinished to this day. The physical inundation of the real and personal property owned and/or leased by Plaintiffs was greater than ever before and caused by the State's design, construction, operation, and maintenance of IH-10—a public use. The physical possession of Plaintiffs' property, both real and personal, constitutes a *per se* taking of that property by the State under the Fifth Amendment to the U.S. Constitution, as made applicable to the State by the Fourteenth Amendment and the convention of adoption upon entry of the State into the Union.

C. The Effects Plaintiff Experienced Were the Predictable Result of the State's Action and Were Sufficiently Substantial to Justify a Takings Remedy.

83. Independently, an analysis of factors examined under federal takings jurisprudence demonstrates that

not only was the flooding Plaintiffs experienced the predictable result of the State's action, but also the effects suffered were sufficiently severe to constitute a taking.

1. The time and duration of the invasion.

84. Because Plaintiffs' properties were physically invaded by the flooding from the State's actions (whether temporarily or permanently), the temporal element of the federal analysis is used only to determine the measure of just compensation under the Fifth Amendment, not whether a claim arose at all. This element supports the finding of a taking.

2. The severity of the interference.

85. Plaintiffs meet the severity burden since their real and personal property interests have been subjected to an invasion that significantly diminished, destroyed, and/or completely precluded Individual Plaintiffs' and Class Plaintiffs' access to, right to use, and enjoyment of that property. This element supports the finding of a taking.

3. Plaintiffs' properties were flooded by the State's actions.

86. The question presented by the third factor is whether the invasion of Individual Plaintiffs' and Class Plaintiffs' properties was caused by the State's action. In essence, a comparison of the results from government-authorized actions for a public purpose with what

the result would have been without or "but for" those government-authorized actions. Plaintiffs' properties are located behind a permanent structure that blocks and backs up rainfall runoff at a level that floods those properties. The inundation of Plaintiffs' properties was the direct, natural, and foreseeable result of authorized activities by the State in furtherance of a public purpose: the design, construction, operation, and maintenance of IH-10. "But for" the State-authorized action, Plaintiffs' properties would not have been flooded in the manner and to the extent they were flooded. This factor supports the finding of a taking.

4. The degree to which the invasion was intended.

87. The intent to find a taking under the Fifth Amendment is shown by evidence that Plaintiffs' injuries were the direct, natural, or probable result of the authorized government action. It is not necessary to show that the State subjectively intended to take specific parcel or item of property owned by any specific Plaintiff, only that the flooding of Plaintiffs' land was the natural and probable consequence of the State's acts. Before the State's actions, rainfall runoff overtopped IH-10 and proceeded south to the Gulf. But, after the State raised the highway elevation and built a solid barrier/dam through the roadway median, those structures retained stormwater runoff on Plaintiffs' property. Because an analysis by the State of the hydrological impact caused by its design, construction, operation, and maintenance of IH-10 would have confirmed that Plaintiffs' property

would be flooded thereby, this factor supports the finding of a taking.

5. The character of the land at issue.

88. Plaintiffs' properties are homes, farms, ranches, and businesses whose use is grossly inconsistent with—and exceptionally vulnerable to—significant damage from flooding of the kind and severity experienced because of TxDOT's IH-10 projects. The character of the land, as reflected in its use by Plaintiffs, supports the finding of a taking.

6. Individual Plaintiffs' and Class Plaintiffs' reasonable investment-backed expectations.

89. Finally, the State's actions ran counter to, and severely interfered with, Plaintiffs' reasonable investment-backed expectations in the safety and security of the residential and commercial properties that they rented or owned, as well as the use and enjoyment of their personal property destroyed by the subject flooding.

90. When Individual Plaintiffs and Class Plaintiffs acquired their property interests, they did so in light of the then-existing flood risk and drainage profiles. But the State created a new hydrologic landscape and implemented a *de facto* flood control effort that did not exist, or was not evident, when Plaintiffs purchased or leased their private property. Most of Individual Plaintiffs' and Class Plaintiffs have invested their life savings into

their properties without any expectation of the flood certainty that the State has created. The State-created flooding has severely impacted the economically viable and productive use of the land, decimating Plaintiffs' reasonable investment-backed expectations. This factor too supports the finding of a taking.

COUNT 3: Deprivation of Property Interests Without Procedural Due Process in Violation of the Fourteenth Amendment to the United States Constitution.

91. Plaintiffs re-allege and incorporate the preceding paragraphs of this Complaint.

92. In the alternative to Count 1, to the extent that any Plaintiffs' inverse condemnation claim under Court 1 of this Master Complaint be denied based on a determination that it must be shown that the State possessed actual knowledge that its actions were certain to inundate specific parcels of property owned by that Plaintiff, Plaintiffs assert application of that standard of intent to their inverse condemnation claim under Article I, Section 17 of the Texas Constitution violates the rights, privileges, and/or immunities secured by the Fourteenth Amendment to the U.S. Constitution by depriving Plaintiffs of a property interest without procedural due process of law.

93. Plaintiffs claim an unconstitutional violation of their rights to procedural due process under the Fourteenth Amendment to the U.S. Constitution (a) from

the failure of the State to institute a pre-deprivation process or procedure under the Texas Property Code when taking a permanent flowage easement over their property, and (b) from the State's creation and assertion of an intent requirement for their inverse condemnation actions which demands proof of actual knowledge on the part of the State that its action was certain to inundate the specific parcels of property owned by Plaintiffs.

94. Plaintiffs did not have the opportunity to have their claim for compensation as provided for by the Texas Constitution because the State never undertook the process provided under the Texas Property Code for the condemnation of a permanent flowage easement over their property which would have permitted the State to store stormwater runoff detained by its project. Plaintiffs were thus deprived of the procedural due process rights they should (and would) have been accorded by the conduct of formal condemnation proceedings pursuant to the Texas Property Code.

95. And Plaintiffs assert that their inverse condemnation claims under Court 1 of this Master Complaint should not be subjected to a determination that the State possessed actual knowledge that its actions were certain to inundate the specific parcels of property owned by Plaintiffs, as such requirement constitutes a denial of procedural due process in the bringing of a claim for inverse condemnation under the Texas Constitution. Such a standard for the intent or knowledge requirement necessary to pursue an inverse condemnation claim under the Texas Constitution differs from the proof

required to recover under the Fifth Amendment to the U.S. Constitution and is so onerous, in and of itself, as to constitute a denial of procedural due process under the Fourteenth Amendment to the U.S. Constitution. The rights and protection accorded Texas property owners under the State Constitution's takings provision should not provide less security against having their property taken without just compensation than its federal counterpart (which contains no such requirement).

96. The ability of a property owner to litigate both a Fifth Amendment Takings claim and a claim under Article I, Section 17 of the Texas Constitution in the same state court action should bring the intent standard applicable to each in harmony so that (a) an unnecessary and perfidious dichotomy between the state and federal claims is eliminated and (b) the long-recognized policies behind the guarantee of compensation embodied by Takings provisions are promoted. The State's reckless disregard, willful ignorance, and/or intentional avoidance of knowledge and facts should support a finding of the requisite intent for a takings claim under Article 1, Section 17 of the Texas Constitution.

97. In the event a constitutional "floor" for the intent required for an inverse condemnation claim is not set equivalent to that imposed by the Takings Clause of the U.S. Constitution, procedural due process should require that the intent element of an inverse condemnation claim under Article I Section 17 of the Texas Constitution is satisfied by proof showing reckless disregard, willful ignorance, and/or intentional avoidance of knowledge and

facts on the part of the State – as imposed by Texas law on any other civil litigant.

COUNT 4: Deprivation of Property Interests Without Substantive Due Process in Violation of the Fourteenth Amendment to the United States Constitution.

98. Plaintiffs re-allege and incorporate the preceding paragraphs of this Complaint.

99. In the alternative, should Plaintiffs' inverse condemnation claims under Court 2 be denied based on a determination that the Plaintiffs have no right to directly assert an inverse condemnation claim against the State of Texas for just compensation under the Fifth Amendment to the U.S. Constitution, Plaintiffs assert that their substantive rights to due process protection secured by the Fourteenth Amendment to the U.S. Constitution have been violated by the State's taking of their real and personal property rights.

100. The State's exercise of control over, and destruction of, Plaintiffs' property implicates Plaintiffs' constitutionally protected rights in that real and personal property. The State's taking, damaging, and/or destruction of Plaintiffs' property rights support the filing of an inverse condemnation claim by Plaintiffs under the Fifth Amendment to the U.S. Constitution, and the failure of the State to prosecute any action to take those rights is not rationally related to a legitimate governmental interest, especially when weighed against the rights and

protection accorded Texas property owners under the Fifth Amendment to the U.S. Constitution (as applicable to the State under the Fourteenth).

101. The substantive principles applied to inverse condemnation claims under the Fifth Amendment to the U.S. Constitution should serve as the constitutional minimum required of the State of Texas in assessing whether adequate compensation is due Texas property owners when their property is taken, damaged, or destroyed by the State for a public purpose. The failure to permit Plaintiffs to purse an inverse condemnation claim against the State of Texas for just compensation under the Fifth Amendment to the U.S. Constitution violates the Plaintiffs' substantive rights to due process guaranteed by the Fourteenth Amendment to the U.S. Constitution.

COUNT 5: Request for Declaratory and Injunctive Relief.

102. Plaintiffs re-allege and incorporate the preceding paragraphs of this Complaint.

103. Plaintiffs seek a judgment declaring: (a) that the State of Texas is liable to them for taking, damaging, and/or destroying property rights without adequate compensation as required by Article I, Section 17 of the Texas Constitution, and/or the Fifth and Fourteenth Amendments to the U.S. Constitution, and (b) that the State's actions violated the due process protections guaranteed by the Fourteenth Amendment to the U.S. Constitution.

104. In support, Plaintiffs plead that they seek relief from uncertainty and insecurity with respect to rights, status, and other legal relations in their real property as against the defendant State in that their rights, status, or other legal relations in their title to property are affected by the State's action. Plaintiffs seek a declaration of the constitutionality of the disputed State actions, including a declaration that Plaintiffs' property rights were their taken, damaged, and/or destroyed without adequate compensation under Article I, Section 17 of the Texas Constitution and/or the Fifth and Fourteenth Amendments to the U.S. Constitution.

105. Plaintiffs likewise request further and supplemental prospective injunctive relief requiring the State to remedy its taking, damaging, and/or destruction of property rights without adequate compensation by instituting the process set forth in Chapter 21 of the Texas Civil Practice & Remedies Code to formally condemn those property interests previously taken, damaged, and/or destroyed without adequate compensation.

COUNT 6: State Common Law Cause of Action Seeking Just Compensation for Violation of the Fifth Amendment to the United States Constitution.

106. Plaintiffs re-allege and incorporate the preceding paragraphs of this Complaint.

107. In addition to, and in the alternative to, their claim under the Texas Constitution and/or their claim

directly under the U.S. Constitution's Fifth Amendment, Plaintiffs seek recovery for the State's permanent and/or temporary taking of their real and personal property without paying just compensation in violation of Texas common law's recognition of the Takings Clause of the Fifth Amendment of the U.S. Constitution. *See generally City of Baytown v. Schrock*, 645 S.W.3d 174, 176 & n.1 (Tex. 2022) (citing both state and federal constitutional takings claims and noting "[o]ur Constitutions require the government [i.e., the State] to compensate property owners when [the State] takes their property for public use" and explaining that "[t]his constitutional right waives the government's [i.e., the State's] immunity from lawsuits—immunity that otherwise often insulates the public treasury from claims for damages." (emphasis added)).[3]

108. Federal takings jurisprudence directs that whether government-induced increased water runoff onto private property constitutes inverse condemnation under the Fifth Amendment is determined by a two-

3. For further information about this claim and this particular "procedural vehicle by which a property owner may seek to vindicate [their] right" under the Fifth Amendment in Texas, *see DeVillier v. Texas*, 601 U.S. 285, 291-293 (2024). According to the concession by the State during oral argument before the U.S. Supreme Court (on which the Supreme Court relied in rendering its ruling), Texas state courts accept and adjudicate a state common law cause of action by which a party may bring an inverse condemnation claim to enforce the guarantee of just compensation under the Takings Clause of the Fifth Amendment to the U.S. Constitution. *Id.* at 293.

question test: (1) did the plaintiff possess a protectable property interest in what they allege the government has taken and (2) were the effects the plaintiff experienced the predictable result of governmental action which was sufficiently substantial to justify a takings remedy.

109. In addition, the second question—whether the effects the plaintiff experienced was the predictable result of governmental action which was sufficiently substantial to justify a takings remedy—is assessed through the conceptual framework applicable to the type of claim asserted. The government can take property by two means: physically or by regulation. Furthermore, a taking can be either permanent or temporary in duration. And takings can be further divided into two categories: categorical and non-categorical. Categorical takings deprive the owners of all economically viable use of their property while non-categorical takings (such as easements) deprive the owner of some amount of the economic use of the property. The State-caused flooding imposed on Plaintiffs effected (1) a temporary categorical physical taking of their real property; (2) a permanent non-categorical physical taking of a flowage easement over their real property, and (3) a permanent categorical physical taking of their personal property.

A. Each Plaintiff Possesses a Protectable Interest in Their Property.

110. The existence of a protectable property interest under Takings Clause jurisprudence is determined by reference to state law. Texas law recognizes that the

term property means not only the thing owned, but also every right which accompanies ownership. Each Plaintiff had property rights in both real and personal property protected by the Fifth Amendment that were taken by the State's actions.

B. The State's Physical Invasion of Plaintiffs' Property, Depriving Them of the Use, Enjoyment, Exclusive Possession, and Right to Alienate their Property, Constitutes a Taking Under Takings Clause jurisprudence.

111. Plaintiffs' properties were physically invaded by stormwater runoff the State stored on their land, in their homes, and/or in their businesses. The inundation itself lasted for a several days, and that was followed by a long period of cleanup, replacement, and repair after both Harvey and Imelda. Indeed, some properties were not completely repaired after Harvey when Imelda struck, and some remain unfinished to this day.

112. The physical inundation of the real and personal property owned and/or leased by Plaintiffs was greater than ever before and caused by the State's design, construction, operation, and maintenance of IH-10—a public use. The physical possession of Plaintiffs' property, both real and personal, constitutes a *per se* taking of that property by the State under the jurisprudence applied when adjudicating an inverse condemnation claim under the Takings Clause of the Fifth Amendment to the U.S. Constitution—a state common law claim recognized by the courts of Texas.

C. The Effects Plaintiff Experienced Were the Predictable Result of the State's Action and Were Sufficiently Substantial to Justify a Takings Remedy.

113. Independently, an analysis of factors examined under Takings Clause jurisprudence demonstrates that not only was the flooding Plaintiffs experienced the predictable result of the State's action, but also the effects suffered were sufficiently severe to constitute a taking.

1. The time and duration of the invasion.

114. Because Plaintiffs' properties were physically invaded by the flooding from the State's actions (whether temporarily or permanently), the temporal element of the federal analysis is used only to determine the measure of just compensation under Takings Clause jurisprudence, not whether a claim arose at all. This element supports the finding of a taking.

2. The severity of the interference.

115. Plaintiffs meet the severity burden since their real and personal property interests have been subjected to an invasion that significantly diminished, destroyed, and/or completely precluded Individual Plaintiffs' and Class Plaintiffs' access to, right to use, and enjoyment of that property. This element supports the finding of a taking.

3. Plaintiffs' properties were flooded by the State's actions.

116. The question presented by the third factor is whether the invasion of Individual Plaintiffs' and Class Plaintiffs' properties was caused by the State's action. In essence, a comparison of the results from government-authorized actions for a public purpose with what the result would have been without or "but for" those government-authorized actions. Plaintiffs' properties are located behind a permanent structure that blocks and backs up rainfall runoff at a level that floods those properties. The inundation of Plaintiffs' properties was the direct, natural, and foreseeable result of authorized activities by the State in furtherance of a public purpose: the design, construction, operation, and maintenance of IH-10. "But for" the State-authorized action, Plaintiffs' properties would not have been flooded in the manner and to the extent they were flooded. This factor supports the finding of a taking.

4. The degree to which the invasion was intended.

117. The intent to find a taking under Takings Clause jurisprudence is shown by evidence that Plaintiffs' injuries were the direct, natural, or probable result of the authorized government action. It is not necessary to show that the State subjectively intended to take specific parcel or item of property owned by any specific Plaintiff, only that the flooding of Plaintiffs' land was the natural and probable consequence of the State's acts. Before the

State's actions, rainfall runoff overtopped IH-10 and proceeded south to the Gulf of Mexico. But, after the State raised the highway elevation and built a solid barrier/dam through the roadway median, those structures retained stormwater runoff on Plaintiffs' property. Because an analysis by the State of the hydrological impact caused by its design, construction, operation, and maintenance of IH-10 would have confirmed that Plaintiffs' property would be flooded thereby, this factor supports the finding of a taking.

5. The character of the land at issue.

118. Plaintiffs' properties are homes, farms, ranches, and businesses whose use is grossly inconsistent with—and exceptionally vulnerable to—significant damage from flooding of the kind and severity experienced because of TxDOT's IH-10 projects. The character of the land, as reflected in its use by Plaintiffs, supports the finding of a taking.

6. Individual Plaintiffs' and Class Plaintiffs' reasonable investment-backed expectations.

119. Finally, the State's actions ran counter to, and severely interfered with, Plaintiffs' reasonable investment-backed expectations in the safety and security of the residential and commercial properties that they rented or owned, as well as the use and enjoyment of their personal property destroyed by the subject flooding.

120. When Individual Plaintiffs and Class Plaintiffs acquired their property interests, they did so in light of the then-existing flood risk and drainage profiles. But the State created a new hydrologic landscape and implemented a *de facto* flood control effort that did not exist, or was not evident, when Plaintiffs purchased or leased their private property. Most of Individual Plaintiffs' and Class Plaintiffs have invested their life savings into their properties without any expectation of the flood certainty that the State has created. The State-created flooding has severely impacted the economically viable and productive use of the land, decimating Plaintiffs' reasonable investment-backed expectations. This factor too supports the finding of a taking.

PRAYER

Plaintiffs pray that the Court enter judgment finding they are entitled to recover based on the allegations above in an amount to be determined by the trier of fact and awarding all other relief this Court is empowered to provide and to which Plaintiffs show themselves entitled.

Dated: September 9, 2024

Respectfully submitted,

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Appendix H

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APPENDIX I — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED NOVEMBER 23, 2022

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-40750

RICHARD DEVILLIER; WENDY DEVILLIER; STEVEN DEVILLIER; RHONDA DEVILLIER; BARBARA DEVILLIER; *et al.*,

Plaintiffs-Appellees,

versus

STATE OF TEXAS,

Defendant-Appellant.

Filed November 23, 2022

OPINION

Appeal from the United States District Court
for the Southern District of Texas
No. 3:20-CV-223

Before HIGGINBOTHAM, SOUTHWICK, and HIGGINSON, *Circuit Judges.*

PER CURIAM:

The State of Texas appeals the district court's decision that Plaintiffs' federal Taking Clause claims against the State may proceed in federal court. 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,[1] we VACATE the district court's decision for want of jurisdiction and REMAND with instructions to return this case to the state courts. The Supreme Court of Texas recognizes takings claims under the federal and state constitutions,[2] with differing remedies and constraints turning on the character and nature of the taking;[3] nothing in this description of Texas law is intended to replace its

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1. *See Hernandez v. Mesa*, 140 S. Ct. 735, 742 (2020) ("[A] federal court's authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress."); *Azul–Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992) (holding that a takings plaintiff has "no cause of action directly under the United States Constitution"), *cert. denied*, 506 U.S. 1081 (1993).

2. *See City of Baytown v. Schrock*, 645 S.W.3d 174, 178 (Tex. 2022) ("Under our [federal and state] constitutions, waiver occurs when the government refuses to acknowledge its intentional taking of private property for public use. A suit based on this waiver is known as an 'inverse condemnation' claim."); *see also Gutersloh v. Texas*, No. 93-8729, 25 F.3d 1044, 994 WL 261047, *1 (5th Cir. 1994) (unpublished per curiam) ("[The State] . . . admits, the courts of the State of Texas are open to inverse condemnation damage claims against state agencies on the basis of the Fifth Amendment, as applied to the states through the Fourteenth Amendment, as well as on the basis of the Texas Constitution and laws.").

3. *See Allodial Ltd. P'ship v. N. Tex. Tollway Auth.*, 176 S.W.3d 680, 683–84 (Tex. App.—Dallas 2005, pet. denied) (noting that Texas courts apply a two-year limitations period to takings claims for "damaged" property and a ten-year limitations period to takings claims for "taken" property).

role as the sole determinant of Texas state law.[4] As such, this Court lacks jurisdiction to review these claims.[5]

4. *See, e.g., San Jacinto River Auth. v. Medina*, 627 S.W.3d 618, 623 (Tex. 2021), reh'g denied (Sept. 3, 2021) ("[T]he owner of private property may bring a common-law action for inverse condemnation.").

5. *Mitchell v. Advanced HCS, L.L.C.*, 28 F.4th 580, 588 (5th Cir. 2022) (noting that federal-question jurisdiction will lie over state-law claims only if "resolving a federal issue is necessary to resolution of the state-law claim" (quoting *Lamar Co., L.L.C. v. Miss. Transp. Comm'n*, 976 F.3d 524, 529 (5th Cir. 2020))).

APPENDIX J — REVISED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JANUARY 10, 2023

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-40750

RICHARD DEVILLIER; WENDY DEVILLIER; STEVEN DEVILLIER; RHONDA DEVILLIER; BARBARA DEVILLIER; *et al.*,

Plaintiffs-Appellees,

versus

STATE OF TEXAS,

Defendant-Appellant.

Filed January 10, 2023

REVISED OPINION

Appeal from the United States District Court
for the Southern District of Texas
No. 3:20-CV-223

Before HIGGINBOTHAM, SOUTHWICK, and HIGGINSON, *Circuit Judges.*

PER CURIAM:

The State of Texas appeals the district court's decision that Plaintiffs' federal Taking Clause claims against the State may proceed in federal court. 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,[1] we VACATE the district court's decision and REMAND for further proceedings. Nothing in this opinion is intended to displace the Supreme Court of Texas's role as the sole determinant of Texas state law.[2]

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1. *See Hernandez v. Mesa*, 140 S. Ct. 735, 742 (2020) ("[A] federal court's authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress."); *Azul–Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992) (holding that a takings plaintiff has "no cause of action directly under the United States Constitution"), *cert. denied*, 506 U.S. 1081 (1993).

2. The Supreme Court of Texas recognizes takings claims under the federal and state constitutions, with differing remedies and constraints turning on the character and nature of the taking. *See City of Baytown v. Schrock*, 645 S.W.3d 174, 178 (Tex. 2022) ("Under our [federal and state] constitutions, waiver occurs when the government refuses to acknowledge its intentional taking of private property for public use. A suit based on this waiver is known as an 'inverse condemnation' claim."); *see also Gutersloh v. Texas*, No. 93-8729, 25 F.3d 1044, 994 WL 261047, *1 (5th Cir. 1994) (unpublished per curiam) ("[The State] . . . admits, the courts of the State of Texas are open to inverse condemnation damage claims against state agencies on the basis of the Fifth Amendment, as applied to the states through the Fourteenth Amendment, as well as on the basis of the Texas Constitution and laws."); *Allodial Ltd. P'ship v. N. Tex. Tollway Auth.*, 176 S.W.3d 680, 683–84 (Tex. App.—Dallas 2005, pet. denied) (noting that Texas courts apply a two-year limitations period to takings claims for "damaged" property and a ten-year limitations period to takings claims for "taken" property).

APPENDIX K — EN BANC POLL OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED MARCH 23, 2023

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-40750

RICHARD DEVILLIER; WENDY DEVILLIER; STEVEN DEVILLIER; RHONDA DEVILLIER; BARBARA DEVILLIER; *et al.*,

Plaintiffs-Appellees,

versus

STATE OF TEXAS,

Defendant-Appellant.

Filed March 23, 2023

ON A POLL ON THE COURT'S OWN MOTION

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 3:20-CV-223
USDC No. 3:20-CV-379
USDC No. 3:21-CV-104
USDC No. 4:21-CV-1521

Before HIGGINBOTHAM, SOUTHWICK, and HIGGINSON, *Circuit Judges.*

Appendix K

PER CURIAM:

At the request of one of its members, the court was polled, and a majority did not vote in favor of rehearing (Fed. R. App. P. 35 and 5th Cir. R. 35).

In the en banc poll, five judges voted in favor of rehearing (Smith, Elrod, Engelhardt, Oldham, and Wilson), and eleven voted against rehearing (Richman, Jones, Stewart, Southwick, Haynes, Graves, Higginson, Willett, Ho, Duncan, and Douglas).

Appendix K

PATRICK E. HIGGINBOTHAM, *Circuit Judge*, concurring in denial of rehearing en banc:

Property Owners filed suits in Texas state courts claiming that the flooding of their land by the State of Texas constituted a taking under the Takings Clause. The State removed the cases to federal court asserting federal question jurisdiction. The State moved to dismiss the takings claims, arguing that the Fifth Amendment does not create an implied cause of action, the State is immune from monetary liability, and some claims were barred by the limitations period. The district court denied the motion, finding that the Plaintiffs-Property Owners could advance their claims directly under the Takings Clause. The panel disagreed. The Fifth Amendment Takings Clause does not provide a right of action in federal court for takings claims against a state.[1] The pathway for enforcement in takings by the state is rather through the state courts to the Supreme Court. On that passage, the Supreme Court of Texas applies both federal and state law.[2] Its decisions on state law control, and Texas

1. *See Hernandez v. Mesa*, — U.S. —, 140 S. Ct. 735, 742, 206 L.Ed.2d 29 (2020) ("[A] federal court's authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress."); *Azul–Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992) (holding that a takings plaintiff has "no cause of action directly under the United States Constitution"), *cert. denied*, 506 U.S. 1081, 113 S.Ct. 1049, 122 L.Ed.2d 357 (1993).

2. The Supreme Court of Texas recognizes takings claims under the federal and state constitutions, with differing remedies and constraints turning on the character and nature of the taking. *See Guetersloh v. Texas*, No. 93-8729, 25 F.3d 1044, 1994

state law provides the procedures for fulfilling the State's obligations under the Takings Clause for takings by the state.[3]

In short, the en banc court did not err in rejecting the contention that "self-executing," as used in *Knick*, creates federal jurisdiction and need not find a jurisdictional grant such as 42 U.S.C. § 1983. Nor did the en banc court err in leaving undisturbed the panel's remand to the district judge for further proceedings, which should be understood to include a return to the state courts for their upward trek.[4]

WL 261047, *1 (5th Cir. 1994) (unpublished) (per curiam) ("[T]he courts of the State of Texas are open to inverse condemnation damage claims against state agencies on the basis of the Fifth Amendment, as applied to the states through the Fourteenth Amendment, as well as on the basis of the Texas Constitution and laws."); *City of Baytown v. Schrock*, 645 S.W.3d 174, 178 (Tex. 2022) ("Under our [federal and state] constitutions, waiver occurs when the government refuses to acknowledge its intentional taking of private property for public use. A suit based on this waiver is known as an 'inverse condemnation' claim."); *Allodial Ltd. P'ship v. N. Tex. Tollway Auth.*, 176 S.W.3d 680, 683–84 (Tex. App.—Dallas 2005, pet. denied) (noting that Texas courts apply a two-year limitations period to takings claims for "damaged" property and a ten-year limitations period to takings claims for "taken" property).

3. *See Knick v. Township of Scott*, — U.S. —, 139 S. Ct. 2162, 2170, 204 L.Ed.2d 558 (2019) ("The Fifth Amendment right to full compensation arises at the time of the taking . . . .").

4. The Property Owners may yet raise their Takings Clause argument to the Supreme Court, and we granted their motion to stay the mandate to facilitate certiorari.

Appendix K

I.

Takings by the state have been addressed and overseen by state courts throughout our history, with review by state supreme courts and then review by the Supreme Court. It signifies that it is that genre of cases—and not takings by municipalities—that is at issue. As I will explain, this flow of cases is no accident.

The en banc court rejected the contention that the "self-executing" character of the Takings Clause grants direct access to federal courts, and for good reason. It is plain that "self-executing" speaks only to the completeness of the claim itself, the point at which a takings claim is ready for *a* court. Chief Justice Roberts explains:

> 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.[5]

The completeness of the claim is the sole usage of the term. Its purpose was to retreat from the earlier *Williamson County* doctrine.[6] The Court then explains that the claim can be immediately pursued in the federal courts by 42 U.S.C. § 1983,[7] which by its terms does not

5. *Id.* at 2171 (quoting *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987)).

6. *Id.* at 2179.

7. *Id.* at 2177 ("We conclude that a government violates the Takings Clause when it takes property without compensation,

reach actions against the state—as distinguished from local governments and municipalities. The Supreme Court was explicit: because takings claims against municipalities can be brought under this provision, it "ha[d] no occasion to consider [the Solicitor General's] "novel [ ] argument" that state takings claims can be brought directly in federal court pursuant to 28 U.S.C. § 1331.[8] In other words, lifting a term of art from its context—the retreat from *Williamson County*—effectively denies its true meaning.

That § 1983 by its terms does not reach state conduct does not mean that *Knick* left takings by the state without a pathway. To the contrary, *Knick* did not abandon federal review of state takings; it left undisturbed the sole pathway through the state courts with review by the state supreme court and the United States Supreme Court, a process hundreds of years old. Leaving the pathway of state takings to the state courts is a direct response to the unique makeup of takings under the Fifth Amendment: an amalgam of state and federal law. This effectively allows the United States Supreme Court to address state takings when issues of property law are settled by the state supreme court, this because the state supreme court is final on matters of state law.

In turn, this passageway for state takings informs the lower federal courts with takings cases from municipalities and local government entities of the controlling state law

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and that a property owner may bring a Fifth Amendment claim under § 1983 at that time.").

8. *Id.* at 2174 n.5.

defining property rights. Again, this is neither accident nor is it an exhaustion requirement. It is the familiar service of federalism expressed in the choice of routes for review of state actions in their upward path to the Supreme Court.

Casting aside both the utility and the service to federalism of the pathway to the Supreme Court through state courts by granting immediate access into the lower federal courts of state takings would reflect a distrust of the state courts to apply federal law as they are obligated to do.[9] State judges take the same oath to faithfully apply the law as do federal judges, and with all deference to our federal brethren, leaving in place passages to state supreme courts for state takings claims brings the well-equipped eyes of those dealing with state property interests on a daily basis, as they have done all these many years. In sum, the contentions we reject would work a profound upset of state-federal relations. This strained effort to drain state courts of state takings claims as reflected in the procedural gymnastics of this case come with no rational justification. Whatever its fuel, it is without legal foundation.

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9. *See Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507, 82 S.Ct. 519, 7 L.Ed.2d 483 (1962) ("We start with the premise that nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law."); *Tafflin v. Levitt*, 493 U.S. 455, 458, 110 S.Ct. 792, 107 L.Ed.2d 887 (1990) ("Under [our] system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States."); *Claflin v. Houseman*, 93 U.S. 130, 136, 23 L.Ed. 833 (1876).

Appendix K

At present, and for the past 100 years, all but one of the states have met their obligations under the Fifth Amendment to provide procedural pathways for the termination of condemnation cases.[10] As Justice Black reminded us in *Testa v. Katt*, federal law is state law.[11] It is not foreign law.[12] The state courts are thus obligated to follow federal law perforce constitutional law. Here, the Takings Clause, by its own language, charges the states to provide just compensation for takings.[13] Texas did that, providing a pathway through state courts of takings claims both in its constitution and legislation for more than a century.

From the beginning the Fifth Amendment charged the states to provide compensation for its takings to protect the peoples' property. State courts were the enforcers of all claims against the state for all state takings in all but one state. When § 1983 arrived, offered by an act of Congress under the Fourteenth Amendment, it did not provide a right of actions against states. This left in place the pathway to the Supreme Court of takings

10. And even in Ohio, mandamus provides a remedy. *See Knick*, 139 S. Ct. at 2169.

11. *See generally* 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967 (1947); *see also Claflin*, 93 U.S. at 136 ("The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are.").

12. *See Claflin*, 93 U.S. at 136 (noting that "[t]he United States is not a foreign sovereignty as regards the several States").

13. U.S. Const. amend. V ("Nor shall private property be taken for public use, without just compensation.").

by the states as distinguished from the pathways of cities and municipalities, a familiar review regime and an extraordinarily large structure nationwide that has operated for over a century. Yet despite any need, our dissenting colleagues seek to gratuitously puncture it. The en banc court refused to do so, and the peoples' property remains fully protected from takings by the government.

If the present effort of this suit is an expression of distrust of state courts, it comes with a large price, both to this Court and to this structure. In short, no case has been made for rerouting state takings to the lower federal courts, bypassing the superintendence of the state supreme courts who share their responsibility for the last word on state law with the United States Supreme Court's final word on their federal component. So, our question is, what is the need? There simply is no rational reason to disturb the procedural paths of this genre of cases. It is in place and working effectively, as it has throughout our history. To do so would upset the structures of all but one of the states in the union, a pristine exemplar of federalism—not just a political slogan, but the heart of our splitting of the atom of sovereignty.

We have a Congress. It wrote § 1983. It can accomplish what is proposed, but it is telling that it has not. This move is above our paygrade.

Appendix K

STEPHEN A. HIGGINSON, *Circuit Judge*, concurring in denial of rehearing en banc:

This case is about whether there is an implied cause of action in the Fifth and Fourteenth Amendments for claims that "due process of law . . . requires compensation to be made . . . to the owner of private property taken for public use under the authority of a state." *Chi., B. & Q.R. Co. v. City of Chi.*, 166 U.S. 226, 235, 17 S.Ct. 581, 41 L.Ed. 979 (1897). Because implying constitutional causes of action is "a disfavored judicial activity," *Egbert v. Boule*, — U.S. —, 142 S. Ct. 1793, 1803, 213 L.Ed.2d 54 (2022) (citation omitted), and because implying such a cause of action here would infringe separation-of-powers principles, I concur in denial of rehearing en banc.

Three terms ago, in *Maine Community Health Options v. United States*, every Justice agreed 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." — U.S. —, 140 S. Ct. 1308, 1328 n.12, 206 L.Ed.2d 764 (2020) (cleaned up); *see id.* at 1334 & n.3 (Alito, J., dissenting). It follows that any cause of action in the Takings Clause to sue the federal government for just compensation, if it exists, is implied.

Eight of the Justices who decided *Maine Community Health Options* appear to have assumed that the Takings Clause creates an implied cause of action to sue the United States. Those Justices pointed out that property owners can bring takings claims against the United States "through the Tucker Act," which "waive[s] immunity for

certain damages suits in the Court of Federal Claims" but "does not create substantive rights." *Me. Cmty. Health Options*, 140 S. Ct. at 1327, 1328 n.12 (cleaned up); *see* 28 U.S.C. § 1491. Thus, a plaintiff relying on the Tucker Act's immunity waiver must identify a claim "in some other source of law, such as the Constitution." *United States v. Mitchell*, 463 U.S. 206, 216, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983) (cleaned up). To establish such a claim, the plaintiff "must demonstrate that the source of substantive law . . . can be fairly interpreted as mandating compensation by the Federal Government for the damages sustained," *id.* at 216-17, 103 S.Ct. 2961 (cleaned up), either "expressly or by implication," *id.* at 217 n.16 103 S.Ct. 2961 (citation omitted). Applying those principles, *Maine Community Health Options* suggested that the Takings Clause impliedly creates a cognizable claim under the Tucker Act because the Takings Clause imposes "a mandatory . . . obligation to pay" on the United States. 140 S. Ct. at 1328 n.12; *see United States v. Causby*, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946) (holding that "[i]f there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to hear and determine").

So, if the Fifth Amendment had applied directly to the states at the Founding, this might be a straightforward case. But the Takings Clause is incorporated against the states through the Due Process Clause of the Fourteenth Amendment. *See Chi., B. & Q.R. Co.*, 166 U.S. at 235, 17 S.Ct. 581. The question before us, then, is whether the Due Process Clause of the Fourteenth Amendment "made applicable to the States" an implied cause of action against

the federal government, along with the rest of the Takings Clause. *Dolan v. City of Tigard*, 512 U.S. 374, 383, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994).

One answer to the incorporation dilemma is the proposition that an implied cause of action, if it exists, would be part of the property owner's "irrevocable right to just compensation . . . upon a taking." *Knick v. Township of Scott*, — U.S. —, 139 S. Ct. 2162, 2172, 204 L.Ed.2d 558 (2019). Accordingly, when the substantive right guaranteed by the Takings Clause was incorporated against the states, so was a corresponding implied cause of action against the states, or so the argument goes. This line of reasoning appears to follow the "well-established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government." *McDonald v. City of Chi.*, 561 U.S. 742, 766 n.14, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010).

However, that theory assumes that an implied cause of action against the federal government for takings claims is intrinsic to the property owner's right to just compensation as opposed to a distinct right that would require separate incorporation against the states. *See Ramos v. Louisiana*, — U.S. —, 140 S. Ct. 1390, 1405 n.63, 206 L.Ed.2d 583 (2020) ("The scope of an incorporated right and whether a right is incorporated at all are two different questions."). Since a cause of action against the federal government is not express in the Fifth Amendment, *see Me. Cmty. Health Options*, 140 S. Ct. at 1328 n.12, if such a cause of action exists, it must be

"judicially created," *Egbert*, 142 S. Ct. at 1802.[1] And it is not obvious why a cause of action fashioned by judges—not the Constitution—would be coextensive with a substantive constitutional right such that incorporation of one would incorporate the other. Nor is it obvious that a judicially created cause of action is always or ever a constitutional right that can be incorporated through the Fourteenth Amendment.[2]

There is at least one other reason to think that a judicially created cause of action to enforce the Takings Clause, separate and distinct from the right to just compensation, was *not* automatically incorporated against the states along with the substantive right. The

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1. It may be that an implied cause of action against the federal government in the Takings Clause is not "implied" as that term has been used in the Supreme Court's post-*Bivens* decisions. *See, e.g., Egbert*, 142 S. Ct. at 1802. After all, unlike other provisions in the Bill of Rights, the Takings Clause refers to "compensation," and the Supreme Court has explained that under the Takings Clause, "the compensation remedy is required by the Constitution," *First English Evangelical Lutheran Church of Glendale v. L.A. Cnty.*, 482 U.S. 304, 316, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). But I take the *Maine Community Health Options* dictum at its word—the reference to compensation in the Takings Clause does not create an express constitutional cause of action—and so some kind of judicial genesis seems necessary to bring the remedy into being.

2. Otherwise, why not say that the causes of action implied in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) and *Carlson v. Green*, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980), were incorporated along with the Fourth and Eighth Amendments?

Takings Clause is "*enforced against the States under the Fourteenth Amendment* according to the same *standards* that protect . . . against federal encroachment." *Malloy v. Hogan*, 378 U.S. 1, 10, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964) (emphasis added); *see McDonald v. City of Chi.*, 561 U.S. 742, 765, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010). Accordingly, while a property owner has the same "irrevocable right to just compensation immediately upon a taking" by a state as by the federal government, *Knick*, 139 S. Ct. at 2172, the enforcement of that right against a state is contingent on the Due Process Clause. For a takings claim against a state to be "under the Fourteenth Amendment" in more than name only, *Malloy*, 378 U.S. at 10, 84 S.Ct. 1489, the relevant cause of action would presumably need to be implied in the Due Process Clause as well.[3]

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3. In *Mapp v. Ohio*, the Court noted that the federal exclusionary rule was "judicially implied" but applied it to the states because the Court understood it as "of constitutional origin," "an essential part of the right of privacy," and "an essential part of . . . [the] Fourteenth Amendment[ ]." 367 U.S. 643, 648, 657, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Later, the Court recognized that the rule "is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States v. Calandra*, 414 U.S. 338, 348, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974); *see Davis v. United States*, 564 U.S. 229, 237-38, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011). It is not entirely clear whether, under modern incorporation doctrine and this modern understanding of the exclusionary rule, *Mapp* would have been decided differently. *Cf. McDonald*, 561 U.S. at 785, 130 S.Ct. 3020 ("Although the exclusionary rule is not an individual right but a judicially created rule, this Court made the rule applicable to the

The upshot of this analysis is that an implied cause of action for takings claims against states has not been incorporated by the Due Process Clause of the Fourteenth Amendment and therefore would need to be independently implied from the constitutional text. "When a party seeks to assert an implied cause of action under the Constitution itself . . . [t]he question is 'who should decide' whether to provide for a damages remedy, Congress or the courts?" *Ziglar v. Abbasi*, 582 U.S. 120, 135, 137 S.Ct. 1843, 198 L.Ed.2d 290 (2017) (citation omitted). We will not recognize an implied constitutional cause of action if "there is any reason to think that Congress might be better equipped to create a damages remedy." *Egbert*, 142 S. Ct. at 1803.

There are four warning signs that this court would "arrogate legislative power" by implying a cause of action against the states in the Takings Clause of the Fifth Amendment as incorporated by the Due Process Clause of the Fourteenth Amendment. *Egbert*, 142 S. Ct. at 1803 (cleaned up). An alternative remedial structure already exists in state inverse-condemnation law. *See Ziglar*, 137 S. Ct. at 1858 (citing *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 73-74, 122 S.Ct. 515, 151 L.Ed.2d 456 (2001) (state tort law)); *Minneci v. Pollard*, 565 U.S. 118, 129, 132 S.Ct.

States" (cleaned up)). In any event, *Mapp* did pass on whether the implied "sanction of exclusion" was an essential part of the Due Process Clause of the Fourteenth Amendment. *Mapp*, 367 U.S. at 655, 81 S.Ct. 1684. To perform the same analysis with respect to an implied *cause of action* against the states may trigger the separation-of-powers inquiry that the Court has said controls the implication of constitutional causes of action. *See Ziglar v. Abbasi*, 582 U.S. 120, 135, 137 S.Ct. 1843, 198 L.Ed.2d 290 (2017).

617, 181 L.Ed.2d 606 (2012) (state tort law). In 42 U.S.C. § 1983, Congress decided to provide a damages remedy for takings claims against municipalities and certain local government units, *see Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658, 691 & n.54, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), but not states, *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). Implying a judicial remedy against states implicates federalism, and the elected legislative branch is better equipped to balance federal and state interests in this area than our court. And we "cannot predict the systemwide consequences of recognizing a cause of action" under the Fifth and Fourteenth Amendments for takings claims against states. *Egbert*, 142 S. Ct. at 1803 (cleaned up).

The dissent does not grapple with the incorporation dilemma or justify implying a cause of action in the Fifth and Fourteenth Amendments. *See Me. Cmty. Health Options*, 140 S. Ct. at 1328 n.12 (2020) ("[T]he Constitution did not expressly create a right of action when it mandated just compensation for Government takings of private property for public use."). Instead of offering a theory of incorporation or implication, the dissent contends that federal courts have long entertained takings claims against states, invokes cases where "[t]he Court affirmed the self-executing nature of the Fifth Amendment," and identifies *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987), as a case where the Supreme Court held that a statutory cause of action is not required to recover just compensation under the Takings Clause. But the dissent's authorities fall short of supporting its argument.

First, the dissent invokes pre-incorporation cases where federal courts considered takings claims against states. However, as the dissent notes, Congress had provided a jurisdictional basis for federal courts to hear state-law takings causes of action pre-incorporation. So those cases don't illuminate whether the Due Process Clause of the Fourteenth Amendment incorporated an implied cause of action for takings claims against states or whether the cause of action should be implied now.

Second, the dissent relies on post-incorporation cases adjudicating takings claims against municipalities, not states. *See Vill. of Norwood v. Baker*, 172 U.S. 269, 19 S.Ct. 187, 43 L.Ed. 443 (1898); *Cuyahoga River Power Co. v. City of Akron*, 240 U.S. 462, 36 S.Ct. 402, 60 L.Ed. 743 (1916); *Del., L. & W.R. Co. v. Town of Morristown*, 276 U.S. 182, 48 S.Ct. 276, 72 L.Ed. 523 (1928); *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).[4] These claims today could be brought under § 1983, and at most, these cases support an inference that a cause of action exists against local governments. Regardless, these cases may have simply "assumed without . . . deciding" "[t]he question whether a cause of action exists," because absence of a cause of action is not a jurisdictional issue.

4. One exception is *Dohany v. Rogers*, which was an early twentieth-century suit "to enjoin the state highway commissioner and others from acquiring a right of way . . . and from prosecuting a proceeding in the state courts for the acquisition of the right of way . . . on the ground that the state statutes under which the proceeding was had infringed the State Constitution and the Fourteenth Amendment." 281 U.S. 362, 363, 50 S.Ct. 299, 74 L.Ed. 904 (1930). *Dohany* did not adjudicate a takings claim for compensation against a state.

Burks v. Lasker, 441 U.S. 471, 476 n.5, 99 S.Ct. 1831, 60 L.Ed.2d 404 (1979).

Even if these older cases did assume without deciding that an implied cause of action existed, that's unsurprising because the Supreme Court's more recent decisions have cast aside the method of finding causes of action in the Constitution where Congress is silent and an alternative remedial framework exists. *See Egbert*, 142 S. Ct. at 1803; *Ziglar*, 137 S. Ct. at 1854. And a procedural vehicle exists in every state's law to enforce takings claims.[5] *See Knick*, 139 S. Ct at 2168 & n.1.

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5. Relying on a proposed amicus brief submitted in this case, the dissent argues that Louisiana "does not afford its citizens a state-law takings remedy." To support this assertion, the amicus, in turn, seems to rely on our recent decision in *Ariyan, Inc. v. Sewerage & Water Board of New Orleans*, 29 F.4th 226 (5th Cir. 2022), *cert. denied*, — U.S. —, 143 S. Ct. 353, 214 L.Ed.2d 170 (2022). There, the plaintiffs had won final judgments for violations of Louisiana law against the Board in state court, but the Board failed to satisfy those judgments. *See id.* at 228-29, 231-32. So the plaintiffs filed a § 1983 suit alleging that the Board's failure to timely pay just compensation once the compensation had been awarded violated the Takings Clause. *See id.* at 229. We held that plaintiffs had failed to state a claim for a violation of the Takings Clause because "there is no property right to timely payment on a judgment" awarded for a state-law claim. *Id.* at 228. But *Ariyan* isn't the end of the story for plaintiffs bringing takings claims against Louisiana state governmental entities. *Ariyan* did not decide that a state's refusal to pay just compensation for a federal takings claims would be constitutional under the Fifth Amendment requirement of a just compensation remedy, *see First English*, 482 U.S. at 316, 107 S.Ct. 2378. Nor did *Ariyan* hold that it would be constitutional for a state to refuse to pay a judgment for a state-law takings claim where the plaintiff had no procedural vehicle to bring a federal takings claim. Those issues remain live after *Ariyan*.

Next, the dissent says that the Supreme Court has "affirmed the self-executing nature of the Fifth Amendment again and again throughout the twentieth century." But the dissent does not and cannot maintain that these cases implied a cause of action against the states in the Fifth and Fourteenth Amendments. With two exceptions, the cases that the dissent cites did not involve claims against states or present the question of whether an implied federal constitutional cause of action exists against states. *See Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 104 S.Ct. 2187, 81 L.Ed.2d 1 (1984); *United States v. Clarke*, 445 U.S. 253, 100 S.Ct. 1127, 63 L.Ed.2d 373 (1980); *United States v. Dickinson*, 331 U.S. 745, 67 S.Ct. 1382, 91 L.Ed. 1789 (1947); *United States v. Causby*, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946); *Jacobs v. United States*, 290 U.S. 13, 54 S.Ct. 26, 78 L.Ed. 142 (1933). And neither of the cases that did arguably raise the issue—*First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987), and *Knick v. Township of Scott*, — U.S. —, 139 S. Ct. 2162, 204 L.Ed.2d 558 (2019)—resolved it.

In *First English*, the petitioner had sued in state court alleging that a County ordinance denied it "all use of" its property. *Id.* at 308, 107 S.Ct. 2378. The complaint "invoked only the California Constitution," *id.* at 313, 107 S.Ct. 2378 n.8, and sought damages for the lost use of the property, *id.* at 308, 107 S.Ct. 2378. But under a California Supreme Court decision, *Agins v. Tiburon*, 24 Cal.3d 266, 157 Cal. Rptr. 372, 598 P.2d 25 (1979), "compensation [was] not required until the challenged regulation or ordinance has

been held excessive in an action for declaratory relief or a writ of mandamus and the government has nevertheless decided to continue the regulation in effect," *First English*, 482 U.S. at 308-09, 107 S.Ct. 2378. Relying on *Agins*, the state trial court struck First English's allegation that the ordinance denied it all use of its property. *Id.* at 309, 107 S.Ct. 2378. In affirming the trial court, the state intermediate court of appeals followed *Agins* "because the United States Supreme Court ha[d] not yet ruled on the question of whether a state may constitutionally limit the remedy for a taking to nonmonetary relief." *Id.* (citation omitted). The California Supreme Court denied review. *Id.* The Supreme Court reversed, "merely hold[ing] that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Id.* at 321, 107 S.Ct. 2378.

Before reaching the merits, the Court addressed several challenges to the Court's jurisdiction that the County raised, including that First English "failed to preserve for review any claim under federal law." *Id.* at 313, 107 S.Ct. 2378 n.8. After all, First English's complaint didn't raise any federal claims. *Id.* But First English had argued in the state appellate court that the *Agins* rule was unconstitutional, and the state appellate court applied *Agins* to dismiss the action nonetheless. *Id.* Because the state appellate court "rejected on the merits the claim that the [*Agins*] rule violated the United States Constitution," the state court "considered and decided the constitutional claim" that the ordinance violated the federal Takings

Clause by failing to provide just compensation. *Id.* On this basis, the Court found that it had appellate and certiorari jurisdiction. *Id.*

The United States filed an amicus brief in support of the County. The United States acknowledged that "a temporary taking of property is clearly within the constitutional proscription that private property shall not be taken for public use without just compensation." Brief for the United States as Amicus Curiae Supporting Appellee, *First English*, 482 U.S. 304 (No. 85-1199), 1986 WL 727420, at *11. But the United States argued that neither the Fifth Amendment nor Fourteenth Amendment, "of its own force, furnish[es] a basis for a court to award money damages against the government." *Id.* at *14. In defending this contention, the United States claimed that "the Takings Clause is strictly prohibitory and does not, without further legislative action, mandate a monetary award against the government," and made a similar argument with respect to the Fourteenth Amendment. *Id.* at *14, *26-*30. The United States also noted that § 1983 provides a statutory remedy upon which First English had not relied in state court or the Supreme Court. *See id.* at *30-*32. Collectively, these arguments attacked the core of First English's position—that the Fifth Amendment requires compensation as a remedy for "temporary" regulatory takings. *First English*, 482 U.S. at 310, 107 S.Ct. 2378.

Even assuming that the United States "squarely presented" the Supreme Court "with the question . . . whether [§ 1983] is an indispensable prerequisite for

recovering just compensation," as the dissent asserts, the Court treated the United States' arguments as a challenge to First English's merits theory. *See First English*, 482 U.S. at 316 n.9, 107 S.Ct. 2378 (merits section of opinion). And all the Court said in response was that the United States was wrong that "the Fifth Amendment, combined with principles of sovereign immunity, establishes that the Amendment itself is only a limitation on the power of the Government to act, not a remedial provision," and that "the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government." *Id.* (citations omitted). Rather, "the Constitution . . . dictates the remedy for interference with property rights amounting to a taking." *Id.* This is essentially what the Court eventually held as to the ultimate issue in the case: "invalidation of the ordinance without payment of fair value for the use of the property . . . would be a constitutionally insufficient remedy." *Id.* at 322, 107 S.Ct. 2378. So the Court did not silently hold that there is an implied cause of action against the states in the Fifth and Fourteenth Amendments. It certainly did not do so by directing future readers to seek out the United States' amicus brief as a guide to interpreting the holding of the case.

Knick doesn't resolve the issue, either. There, the Court held that a "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." 139 S. Ct. at 2168 (emphasis added). It is difficult to understand why the Court would have emphasized

that § 1983 provides the mechanism to bring takings claims if § 1983 is not a necessary ingredient for the suit. Therefore, *Knick* only shows that the dissent's approach would undermine the scheme Congress has set forth to enforce the Takings Clause.

In short, we have long outgrown the "*ancien regime* that freely implied rights of action." *Oliva v. Nivar*, 973 F.3d 438, 442 (5th Cir. 2020) (cleaned up); *Cantú v. Moody*, 933 F.3d 414, 421 (5th Cir. 2019) (similar). This case, I ultimately conclude, is no exception. Accordingly, I concur in the denial of rehearing en banc.

Appendix K

ANDREW S. OLDHAM, *Circuit Judge*, joined by SMITH, ELROD, ENGELHARDT, and WILSON, *Circuit Judges*, dissenting from the denial of rehearing en banc:

The panel decision renders federal takings claims non-cognizable in state or federal court. This breaks with centuries of precedent. And the panel did it in a one-paragraph decision with one sentence of analysis. The panel's sources for this remarkable holding? A *Bivens* case and a 1992 Ninth Circuit decision. No matter what one thinks about the merits of this question, it plainly requires more explanation than that.

In two concurring opinions respecting the denial of en banc rehearing, two members of the panel purport to provide the reasoning that the published panel opinion did not. And both of my esteemed colleagues say this appeal is much ado about nothing because plaintiffs are free to litigate their federal takings claims in state court.

Wrong. Plaintiffs already tried that, but the State removed the cases. And rather than ordering the case remanded to state court, the panel held that plaintiffs' claims "arise under" federal law for removal purposes but "arise under" state law for merits purposes. Based on that deeply wrong misstep, the panel then adjudicated plaintiffs' federal takings claims *on the merits. Finis. Res judicata.* The case is now over, barring Supreme Court intervention. And not just for these plaintiffs. The panel decision is an insuperable obstacle to any plaintiff asserting any federal takings claim against any State in federal *or state* court. If this case is not enbancworthy, then it's unclear how any case ever will be.

Appendix K

I.

The plaintiffs are 72 individuals, one corporation, and four limited liability companies who own property on the north side of Interstate Highway 10 ("IH-10") in Chambers County, Texas. Plaintiffs originally filed four separate actions in Texas state court. They alleged that their properties were "inundated, destroyed, and/or damaged as a result of the affirmative actions of the State [of Texas] in designing, constructing, operating, and/or maintaining IH-10." ROA.1176. Specifically, plaintiffs alleged that the State constructed an impenetrable concrete barrier along the interstate for purposes of storing stormwater on plaintiffs' private property without their consent or compensation in violation of both the Texas and U.S. Constitutions. The concrete barrier looks like this:

Appendix K

Plaintiffs alleged that the concrete barrier created a dam that barricaded rainfall from flowing into the Gulf of Mexico and instead flooded plaintiffs' properties:

Plaintiffs alleged the State thus took their property without just compensation. *See, e.g., Pumpelly v. Green*

Bay & Miss. Canal Co., 80 U.S. (13 Wall.) 166, 20 L.Ed. 557 (1871) (creation of a dam that flooded plaintiff's property constituted compensable taking); *United States v. Dickinson*, 331 U.S. 745, 67 S.Ct. 1382, 91 L.Ed. 1789 (1947) (same); *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 133 S.Ct. 511, 184 L.Ed.2d 417 (2012) (even temporary floods caused by government can constitute compensable takings).

The State of Texas removed all four actions to federal court under 28 U.S.C. § 1441. The United States District Court for the Southern District of Texas consolidated the four cases. Plaintiffs then filed a "First Amended Master Complaint," which is the live pleading in this case. Plaintiffs raised four claims: (1) an unconstitutional taking without just compensation under Article I, § 17 of the Texas Constitution; (2) an unconstitutional taking without just compensation under the Fifth Amendment's Takings Clause, as incorporated against the States by the Fourteenth Amendment; (3) deprivation of a property without procedural due process under the Fourteenth Amendment; and (4) deprivation of a property without substantive due process under the Fourteenth Amendment. Plaintiffs sought damages, as well as declaratory and injunctive relief.

The State then moved to dismiss (1) the state-law takings claim and (2) the federal takings claim. Regarding the federal claim, the State argued that "42 U.S.C. § 1983 is the only vehicle by which a constitutional violation can be alleged." ROA.1204–05. Because the State is not a "person" amenable to suit under § 1983, *Will v. Mich. Dep't*

of State Police, 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989), the State argued that it can never be amenable to a federal taking claim in federal court. ROA.1205–06. The State also argued that it enjoys sovereign immunity against federal takings claims—even after the State chose to remove the case to federal court.

The magistrate judge recommended denying the State's motion in a powerful and incisive opinion. The magistrate judge (correctly) noted: "This thinking [by the State] eviscerates hundreds of years of Constitutional law in one fell swoop, and flies in the face of commonsense. It is pretzel logic." ROA.1279. The district court agreed with the magistrate judge and adopted the report and recommendation. Then the district court certified its order for interlocutory review under 28 U.S.C. § 1292(b).

We accepted the certification and vacated the district court's order. The panel decision is one paragraph long. In one sentence, the panel dispensed with plaintiffs' federal claim: "Because we hold that the Fifth Amendment Takings Clause as applied to the [S]tates through the Fourteenth Amendment does not provide a right of action for takings claims against a [S]tate, we VACATE the district court's decision for want of jurisdiction and REMAND with instructions to return this case to the state courts." *Devillier v. Texas*, 53 F.4th 904, 905 (5th Cir. 2023) (per curiam).

That sentence is plainly wrong for a host of reasons. First and foremost, the absence of a cause of action is a merits problem, not a jurisdictional one. *See Steel Co.*

v. Citizens for a Better Env't, 523 U.S. 83, 89, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) ("It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case."); *Bell v. Hood*, 327 U.S. 678, 682, 66 S.Ct. 773, 90 L.Ed. 939 (1946) ("Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover."); 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1350 (3d ed. Apr. 2022 update) [Wright & Miller] ("Nor, as many courts have noted, should a motion under Rule 12(b)(1) be confused with a motion under Rule 12(b)(6) to dismiss for failure to state a claim for relief under federal or state law because the two are analytically different; as many courts have observed, the former determines whether the plaintiff has a right to be in the particular court and the latter is an adjudication as to whether a cognizable legal claim has been stated.").

Second, the panel apparently forgot that the case came to us on a § 1292(b) certification and that other federal claims remained pending in the district court, so "this case" could not be "return[ed] . . . to the state courts." *Devillier*, 53 F.4th at 904–05.

Third, rather than discussing any of the Supreme Court's decisions under the Takings Clause, the panel's only support for its assertion was a footnote reference to two unrelated cases: The Supreme Court's most recent *Bivens* decision, *Hernandez v. Mesa*, — U.S. —, 140 S. Ct.

735, 206 L.Ed.2d 29 (2020), and the Ninth Circuit's aged decision in *Azul–Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704 (9th Cir. 1992).

Fourth, one-paragraph opinions with one-sentence explanations are usually reserved for our summary calendar, not pathbreaking constitutional rulings depriving property owners of any forum, state or federal, for claims under centuries-old constitutional provisions.

Both sides pointed out these and other errors in cross-petitions for rehearing. And the Institute for Justice filed a motion for leave to file an amicus brief supporting rehearing en banc because "the Panel failed to discuss or even mention the line of Supreme Court cases establishing, repeatedly and clearly, that the Fifth Amendment's Takings Clause is self-executing and needs no statutory recognition." IJ Amicus at 2. The putative amicus also argued:

> [T]he Panel's holding has immense practical ramifications for this Circuit in particular. Regardless of whether Texas allows its courts to hear and enforce takings claims against state entities, Louisiana does not. The holding below, unless corrected, leaves property owners in Louisiana without any vehicle for vindicating fundamental constitutional rights. Such a result, correct or otherwise, deserves more explanation than the Panel provided.

Id. at 3.

Again without explanation, the panel denied IJ's motion for leave to file its amicus brief. And again without explanation, it then denied the petitions for rehearing. Crucially, however, it revised its one-sentence rejection of plaintiffs' takings claims to make clear that it was rejecting them on the merits—and hence *with prejudice to refiling them anywhere.* Specifically, the panel deleted its previous reference to the district court's jurisdiction and replaced it with this: "Because we hold that the Fifth Amendment Takings Clause as applied to the [S]tates through the Fourteenth Amendment does not provide a right of action for takings claims against a [S]tate, we VACATE the district court's decision and REMAND for further proceedings." *Devillier v. Texas*, 53 F.4th 904 (5th Cir. 2023) (per curiam) (footnote omitted). The panel left unchanged its footnoted reference to a *Bivens* case and a Ninth Circuit decision from 1992. *See id.* at 904 n.1. And it again refused even to discuss a single one of the myriad Takings Clause cases or arguments proffered by the plaintiffs and the Institute for Justice.

II.

This appeal should've begun and ended with the State's decision to remove to federal court under 28 U.S.C. § 1441. That's for two reasons.

First, the State's decision to remove obviously constitutes a waiver of its sovereign immunity. *See Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 122 S.Ct. 1640, 152 L.Ed.2d 806 (2002). In 2019, the Supreme Court held that federal takings plaintiffs are free

to bring their claims in federal court in the first instance. *See Knick v. Township of Scott*, — U.S. —, 139 S. Ct. 2162, 204 L.Ed.2d 558 (2019) (overruling *Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985)). That decision created newfound attention on the question of whether States enjoy sovereign immunity against post-*Knick* takings claims. *See, e.g., Bay Point Props., Inc. v. Miss. Transp. Comm'n*, 937 F.3d 454 (5th Cir. 2019). But cases like *Bay Point* concern takings claims brought originally in federal court against *non-consenting* States. Regardless of whether the State can assert sovereign immunity when it's haled into federal court against its will for taking property, *Lapides* says the State cannot assert sovereign immunity after *the State* chooses the federal forum by filing a notice of removal.

Second, the State removed under § 1441 on the theory that plaintiffs' claims "arise under" federal law. But as Justice Holmes put it more than a century ago, "[a] suit arises under the law that creates the cause of action." *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260, 36 S.Ct. 585, 60 L.Ed. 987 (1916). That means, as a general matter, suits are removable under § 1441 *only* when federal law creates the cause of action:

> [A] federal court does not have original jurisdiction over a case in which the complaint presents a state-law cause of action. . . . For better or worse, under the present statutory scheme as it has existed since 1887, a defendant may not remove a case to federal court unless

> the *plaintiff* 's complaint establishes that the case "arises under" federal law. A right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action.

Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal., 463 U.S. 1, 10–11, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983) (quotations and footnote omitted).

Consider, for example, *Merrell Dow Pharmaceuticals v. Thompson*, 478 U.S. 804, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986). In that case, the plaintiff brought a state tort action predicated on the allegation that a drug company violated a federal misbranding standard. The drug company tried to remove on the theory that the federal misbranding standard was an essential element to plaintiff's cause of action and obviously appeared on the face of the complaint. *See Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152–53, 29 S.Ct. 42, 53 L.Ed. 126 (1908). The Supreme Court held the action was not removable because to hold otherwise would "flout" Congress's decision not to create a federal cause of action for such misbranding claims. *Merrell Dow*, 478 U.S. at 812, 106 S.Ct. 3229. Because the State—and only the State—created the plaintiff's cause of action, the Court held the suit had to stay in state court. The fact that the entirety of the case was predicated on a federal misbranding standard was irrelevant.[1]

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1. There are exceptions to the rule that §§ 1331 / 1441 jurisdiction attaches only where the plaintiff raises a cause of action created by federal law. *See, e.g., Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 125 S.Ct.

The State's decision to invoke § 1441 means one of two things must be true. First, federal law gives the plaintiffs a federal cause of action to litigate their federal takings claims, and hence the suit arises under federal law—as the State effectively conceded in its notice of removal. If that's true, the opinion written by the magistrate judge and adopted by the district court was correct and should be affirmed.

Second, and alternatively, federal law does not give plaintiffs a cause of action to litigate their federal takings claims—as the panel opinion concluded in its one-paragraph opinion. It's true, after all, that § 1983 does not supply a cause of action to sue the State under *Will*, and in the absence of another federal cause of action,[2] that might mean plaintiffs are left exclusively with state-law claims. In that case, however, the correct

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2363, 162 L.Ed.2d 257 (2005). *But see id.* at 320–21, 125 S.Ct. 2363 (Thomas, J., concurring) (urging the Court to return to the simplicity of the *American Well Works* rule). The State, as the party invoking federal jurisdiction, has never urged such exceptions, however. *See Ctr. for Biological Diversity v. EPA*, 937 F.3d 533, 542 (5th Cir. 2019) ("Arguments in favor of standing, like all arguments in favor of jurisdiction, can be forfeited or waived.").

2. It's unclear that plaintiffs do not have another federal cause of action. For example, it's unclear why plaintiffs' demand for injunctive relief does not trigger our en banc holding that plaintiffs can use *Ex Parte Young* as a cause of action even when they cannot use § 1983. *See Green Valley Special Util. Dist. v. City of Schertz, Tex.*, 969 F.3d 460, 475 (5th Cir. 2020) (en banc) (citing *Ex parte Young*, 209 U.S. 123, 149, 28 S.Ct. 441, 52 L.Ed. 714 (1908)). *But see id.* at 494 (Oldham, J., concurring) (questioning this holding).

outcome is to remand plaintiffs' takings claims to state court because we have no arising-under jurisdiction to hear the claims. *See Franchise Tax Bd.*, 463 U.S. at 8, 103 S.Ct. 2841 ("If it appears before final judgment that a case was not properly removed, because it was not within the original jurisdiction of the United States district courts, the district court *must* remand it to the state court from which it was removed." (emphasis added)).

The panel tried to follow this second route in its first opinion. It said: "[W]e VACATE the district court's decision *for want of jurisdiction* and REMAND with instructions to *return this case to the state courts*." *Devillier*, No. 21-40750, 2022 U.S. App. LEXIS 32519 at *1 (emphases added). But then the State reminded the panel that the "[a] long line of precedent makes clear that lack of a cause of action is not a jurisdictional defect." Texas Pet. for Reh'g at 5 (citing, inter alia, *Steel Co.* and *Bell v. Hood*). So the panel amended its decision to say:

> [W]e VACATE the district court's decision ~~for want of jurisdiction~~ and REMAND ~~with instructions to return this case to the state courts~~ for further proceedings.

Devillier, 53 F.4th at 904. This second decision was thus a merits determination and hence a with-prejudice dismissal. *See Steel Co.*, 523 U.S. at 88–89, 118 S.Ct. 1003.

But § 1441 precludes this disposition of the case. We cannot affirm the exercise of federal jurisdiction because plaintiffs' claims arise under federal law and then dismiss

the claims with prejudice because plaintiffs' claims arise under state law. The panel's contrary holding means plaintiffs' claims are gone forever. *See, e.g.*, WRIGHT & MILLER, *supra*, § 4439 ("[D]ismissal for failure to state a claim precludes a second action that presents the same claim through a better complaint.").

The panel's decision is not just wrong, it also has staggering implications because it renders federal takings claims non-cognizable in any court at any time ever. Under the old *Williamson County* regime, before *Knick* overruled it, plaintiffs were forced to litigate their federal takings claims in state court. And the only federal review a property owner could get was from the Supreme Court exercising its certiorari jurisdiction under 28 U.S.C. § 1257 to review the state court's treatment of the Takings Clause. *See San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 125 S.Ct. 2491, 162 L.Ed.2d 315 (2005). Numerous plaintiffs took that route, sued their States in state court, and then obtained review in the Supreme Court under § 1257. *See, e.g., Murr v. Wisconsin*, — U.S. —, 137 S. Ct. 1933, 1941–42, 198 L.Ed.2d 497 (2017); *Stop the Beach Renourishment, Inc. v. Fla. Dept. of Env't Prot.*, 560 U.S. 702, 711–12, 130 S.Ct. 2592, 177 L.Ed.2d 184 (2010); *Palazzolo v. Rhode Island*, 533 U.S. 606, 615–16, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1009–10, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 829–31, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987).

The plaintiffs in this case attempted to litigate their claims in state court—just as the plaintiffs did in *Murr*,

Stop the Beach, Palazzolo, Lucas, and *Nollan*. And obviously the plaintiffs didn't need a federal cause of action to do that; the state courts are full of litigants who do not have federal causes of action. And even without a federal cause of action, the plaintiffs could've litigated their federal takings claims all the way through the state court system and then gone to the Supreme Court of the United States under § 1257—just as the plaintiffs did in *Murr, Stop the Beach, Palazzolo, Lucas*, and *Nollan*. That's because the Supreme Court can exercise its § 1257 jurisdiction to review federal issues decided by state courts even if the petitioner lacks a federal cause of action and hence could not satisfy the inferior federal courts' arising-under jurisdiction. *See Penobscot Nation v. Ga.-Pac. Corp.*, 254 F.3d 317, 324 (1st Cir. 2001) (Boudin, C.J.) ("The Supreme Court is entitled to review a state-court decision that decides a federal issue even if the action is one that could not have been brought in a federal district court under statutory 'arising under' jurisdiction."). A Supreme Court certiorari petition provides relatively little federal protection for a federal takings claim, which is one reason the Supreme Court overturned *Williamson County*. But at least it was something.

The panel decision reduces the Takings Clause to nothing. Think about what now happens when landowners in our Circuit have their property taken by the State. The landowner can try to bring a federal takings claim in state court; the State removes; the federal court must assert jurisdiction and dismiss the claim with prejudice under the panel's published decision in this case. Likewise if the landowner tries to bring suit originally in federal district

court. So the landowner now has only two choices—both of which render the Takings Clause a dead letter. The landowner can abandon the federal claim and sue solely under state law in state court—as if the People never bothered to ratify the federal Takings Clause in the first place. Of course, as the Institute for Justice pointed out in its inexplicably rejected amicus brief, that does nothing for landowners in Louisiana because that State does not afford its citizens a state-law takings remedy. *See* IJ Amicus Br. at 9–10 (citing *Ariyan, Inc. v. Sewerage & Water Bd. of New Orleans*, 29 F.4th 226, 228 (5th Cir. 2022) ("[S]ince Louisiana courts lack the power to force another branch of government to make an appropriation, the prevailing plaintiff has no judicial mechanism to compel the defendant to pay. The plaintiff who succeeds in an action against a governmental unit thus becomes a supplicant, relying on the grace of the government to appropriate funds to satisfy her judgment." (quotation omitted))). A Louisiana landowner must instead "rely exclusively upon the generosity of the judgment debtor." *Ariyan*, 29 F.4th at 232 (quotation omitted). The landowner's only other alternative is to ask the Supreme Court to reverse us.

Finally, under the panel's decision, the federal Due Process Clause claims pending in federal district court fail too. After all, plaintiffs cannot use § 1983 to raise those claims either. So the panel has held that all of plaintiffs' federal constitutional claims arise under federal law for purposes of allowing the State to remove but arise under state law for purposes of the merits. That is transparently wrong. And it requires dismissing all of plaintiffs' claims

with prejudice to refiling anywhere *even if* the claims are correct on the merits.

III.

Now let's talk about the merits. The State's position, adopted by the panel, is that claims under the Takings Clause can be raised *only* under § 1983. I am not sure how § 1983 and the Supreme Court's implied-rights-of-action cases apply in this area. But I am sure of three things: (A) the panel's decision reflects a deeply ahistorical understanding of takings litigation in our Nation; (B) the Supreme Court in *First English* specifically rejected the Solicitor General's contention that Takings Claims are actionable only under § 1983 or some other federal statutory cause of action; and (C) these issues plainly warranted *some* discussion in the panel's opinion—which ignored all of them.

A.

At the Founding, it was clear that the Takings Clause afforded a remedy for uncompensated takings separate and apart from any statute. For example, in proposing the Takings Clause as part of the Bill of Rights, James Madison emphasized that federal courts would enforce the clause directly: "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights . . . ." James Madison, *Amendments to the Constitution* (June 8, 1789), *in* 12 THE PAPERS OF JAMES MADISON 197, 207 (Charles F. Hobson et al. eds., 1979) [MADISON PAPERS]; *see also* William Michael Treanor, *The*

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Original Understanding of the Takings Clause and the Political Process, 95 COLUM. L. REV. 782, 794–95 & n.69 (1995); Douglas W. Kmiec, *The Original Understanding of the Taking Clause Is Neither Weak Nor Obtuse*, 88 COLUM. L. REV. 1630, 1660–61 & nn.158–61 (1988). Thus in his famous essay, *Property*, Madison emphasized that the Constitution itself protected property owners from uncompensated takings:

> If there be a government then which prides itself in maintaining the inviolability of property; which provides that none shall be taken *directly* even for public use without indemnification to the owner, and yet *directly* violates the property which individuals have in their opinions, their religion, their persons, and their faculties; nay more, which *indirectly* violates their property, in their actual possessions, in the labor that acquires their daily subsistence, and in the hallowed remnant of time which ought to relieve their fatigues . . . such a government is not a pattern for the United States.

James Madison, *Property*, NAT'L GAZETTE (Mar. 27, 1792), *reprinted in* 14 MADISON PAPERS, *supra*, at 266, 267–68.

Still, the Marshall Court held that the Takings Clause applied only to takings by the federal government and not to takings by the States. *See Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250–51, 8 L.Ed. 672 (1833) (Marshall, C.J.). And even as to takings by the federal government, Congress chose to remedy them with "private" acts before the Civil War. *See* RICHARD H. FALLON, JR., JOHN F.

MANNING, DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 897 (7th ed. 2015) [HART & WECHSLER]. "While Congress was the forum for takings claims, it did not have discretion to deny takings claims mandated by the Takings Clause." Treanor, *supra*, at 794 n.69. Rather, early Congresses' approach to paying for taken property apparently derived from their views about sovereign immunity rather than any doubt that the Fifth Amendment, standing alone, required a just-compensation remedy for takings. Hart & Wechsler, *supra*, at 896–97. As the Supreme Court put it in citing cases going back to 1837:

> By this legislation congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial, and not a legislative, question. The legislature may determine what private property is needed for public purposes; that is a question of a political and legislative character. But when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.

Monongahela Navigation Co. v. United States, 148 U.S. 312, 327, 13 S.Ct. 622, 37 L.Ed. 463 (1893) (citing, *inter*

alia, Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 36 U.S. (11 Pet.) 420, 9 L.Ed. 773 (1837)).

And starting at the Founding, federal courts entertained suits arising from uncompensated takings by States. The first Congress enacted two statutes—the Process Acts of 1789 and 1792—that directed inferior federal courts to borrow common-law causes of action from the States where they sat. *See* Act of Sept. 29, 1789, ch. 21, 1 Stat. 93; Act of May 8, 1792, ch. 36, 1 Stat. 275; Anthony J. Bellia, Jr. & Bradford R. Clark, *The Original Source of the Cause of Action in Federal Courts: The Example of the Alien Tort Statute*, 101 Va. L. Rev. 609, 627–28 (2015). As a result, federal courts adjudicated a whole host of takings-related claims under various causes of action. *See, e.g., Van Horne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (C.C.D. Pa. 1795); *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 3 L.Ed. 453 (1812); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135, 3 L.Ed. 162 (1810); *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 52, 3 L.Ed. 650 (1815); *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 5 L.Ed. 547 (1823); *Bonaparte v. Camden & A.R. Co.*, 3 F. Cas. 821, 831 (C.C.D. N.J. 1830) (No. 1617); *Yates v. Milwaukee*, 77 U.S. (10 Wall.) 497, 507, 19 L.Ed. 984 (1870). Undoubtedly, federal courts played a "robust role in protecting property rights against states and local encroachments well before the advent of the Fourteenth Amendment." Ann Woolhandler & Julia D. Mahoney, *Federal Courts and Takings Litigation*, 97 Notre Dame L. Rev. 679, 686 (2022).

It's unclear why Congress's enactment of § 1983 in 1871 could somehow strip federal courts of their powers to hear takings claims. *See* Woolhandler & Mahoney, *supra*, at 686–91. Between 1871 and the incorporation of the Takings Clause in 1897, federal courts continued to hear state takings claims without mention of § 1983. *See Pumpelly*, 80 U.S. (13 Wall.) 166, 20 L.Ed. 557; *Miss. & Rum River Boom Co. v. Patterson*, 98 U.S. (8 Otto) 403, 25 L.Ed. 206 (1878); *N. Transp. Co. v. City of Chicago*, 99 U.S. 635, 25 L.Ed. 336 1878; *Hollingsworth v. Parish of Tensas*, 17 F. 109 (C.C.W.D. La. 1883); *Pac. R.R. Removal Cases*, 115 U.S. 1, 5–6, 5 S.Ct. 1113, 29 L.Ed. 319 (1885); *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 238–41, 17 S.Ct. 581, 41 L.Ed. 979 (1897) (incorporating the Takings Clause).

Post-incorporation, federal courts adjudicated these claims under the Constitution directly, and plaintiffs did not need to (nor did they) invoke § 1983. *See, e.g., Village of Norwood v. Baker*, 172 U.S. 269, 277, 19 S.Ct. 187, 43 L.Ed. 443 (1898) ("The plaintiff's suit proceeded upon the ground, distinctly stated, that the assessment in question was in violation of the fourteenth amendment . . . . It has been adjudged that the due process of law prescribed by that amendment requires compensation to be made or secured to the owner when private property is taken by a state, or under its authority, for public use."); *Cuyahoga River Power Co. v. City of Akron*, 240 U.S. 462, 36 S.Ct. 402, 60 L.Ed. 743 (1916); *Del., L. & W.R. Co. v. Town of Morristown*, 276 U.S. 182, 48 S.Ct. 276, 72 L.Ed. 523 (1928); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); *Dohany v. Rogers*, 281 U.S. 362, 50 S.Ct. 299, 74 L.Ed. 904 (1930).

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The Court has not only entertained claims outside of the § 1983 cause of action, but it has also stated that Congress cannot render the Takings Clause unenforceable by failing to create an independent cause of action. As the Court said one-hundred years ago in 1923, "[j]ust compensation is provided for by the Constitution and the right to it cannot be taken away by statute." *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 304, 43 S.Ct. 354, 67 L.Ed. 664 (1923). And as the Court specified in 1933:

> The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution. . . . The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. . . . The suits were thus founded upon the Constitution of the United States.

Jacobs v. United States, 290 U.S. 13, 16, 54 S.Ct. 26, 78 L.Ed. 142 (1933).

The Court affirmed the self-executing nature of the Fifth Amendment again and again throughout the twentieth century. *See, e.g., First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal.*, 482 U.S. 304, 315, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987) (holding that the Fifth Amendment doesn't just create a right but "necessarily implicates the constitutional obligation to pay just compensation" in the event of a

taking and that the "*self-executing character* of the constitutional provision" bestows a landowner with a cause of action (quotation omitted) (emphasis added)); *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 5, 104 S.Ct. 2187, 81 L.Ed.2d 1 (1984) (When ousted by the United States, "the owner has a right to bring an inverse condemnation suit to recover the value of the land on the date of the intrusion by the Government." (quotation omitted)); *United States v. Clarke*, 445 U.S. 253, 257, 100 S.Ct. 1127, 63 L.Ed.2d 373 (1980) ("A landowner is entitled to bring such an [inverse condemnation] action as a result of the self-executing character of the constitutional provision with respect to compensation." (quotation omitted)); *Dickinson*, 331 U.S. at 748, 67 S.Ct. 1382 ("But whether the theory of these suits be that there was a taking under the Fifth Amendment, and that therefore the Tucker Act may be invoked because it is a claim founded upon the Constitution, or that there was an implied promise by the Government to pay for it, is immaterial. In either event, the claim traces back to the prohibition of the Fifth Amendment . . . ."); *United States v. Causby*, 328 U.S. 256, 267, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946) ("If there is a taking, the claim is founded upon the Constitution . . . ." (quotation omitted)).

And if that wasn't enough, the Court gave us another reminder as recently as 2019. *See Knick*, 139 S. Ct. at 2171 ("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." (quoting *First English*, 482 U.S. at 315, 107 S.Ct. 2378)). And *Knick* reaffirmed: "*Jacobs* 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 entitlement to compensation as soon as the government takes his property without paying for it." *Id.* at 2170.

B.

The State of Texas is not the first party to try this § 1983-or-bust approach to the Takings Clause. In *First English*, the United States filed an amicus brief on behalf of Los Angeles. *See* Brief for the United States as Amicus Curiae Supporting Appellee, *First English*, 482 U.S. 304 (No. 85-1199), 1986 WL 727420. It repeatedly argued that "the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government," *id.* at *14, that "the Takings Clause is strictly prohibitory and does not, without further legislative action, mandate a monetary award against the government," *ibid.*, that the Takings Clause does not provide a remedy where state law does, *id.* at *25, that "the Takings Clause's prohibition of uncompensated takings does not imply a constitutionally-based compensation remedy," *id.* at *26, that "this Court has been reluctant to permit a cause of action in federal court directly under the Fourteenth Amendment, unaided by congressional legislation," *id.* at *30, that "Congress's enactment of 42 U.S.C. 1983 has eliminated any need for this Court to explore implicit constitutional remedies to be applied against governmental bodies acting in the area of local land-use regulation," *id.* at *31, and that "[t]here is no occasion to resort to a federal remedy under Section 1983

where the state has made provision for the payment of compensation in an action for inverse condemnation in state court," *id.* at *32.

The Solicitor General pointed out that First English "*did not rely on 42 U.S.C. 1983* in the California courts; nor has it done so in this Court." *Id.* at *32 (emphasis added). The Solicitor General contended that this failure was fatal to the Court's ability to reach the merits of the takings issue because, in the Government's view, § 1983 was the sine qua non to both jurisdiction and the merits. *See id.* at *7–8 (arguing First English failed to plead a federal issue necessary for the Supreme Court's appellate jurisdiction); *id.* at *9 (emphasizing Court should "be reluctant" to reach the merits "where appellant declined to rely on 42 U.S.C. 1983"). In all but urging the Court to dismiss for lack of jurisdiction, the Solicitor General further argued that First English's failure to invoke § 1983 put the case in an "uninviting posture" and made it "far from a model of pleading practice." *Id.* at *9–10.

The Supreme Court was thus squarely presented with the question—in a case *where the takings plaintiff did not rely on § 1983*—whether that statutory cause of action is an indispensable prerequisite for recovering just compensation. And the Supreme Court emphatically held *no.* As most relevant here, the Court said:

> The Solicitor General urges that the prohibitory nature of the Fifth Amendment, combined with principles of sovereign immunity, establishes that the Amendment itself is only a limitation

> on the power of the Government to act, not a remedial provision. *The cases cited in the text* [*including* Kirby, Causby, Seaboard Line, *and* Monongahela Navigation], *we think, refute the argument of the United States that 'the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government.'* Though arising in various factual and jurisdictional settings, these cases make clear that it is the *Constitution* that dictates the remedy for interference with property rights amounting to a taking.

First English, 482 U.S. at 316 n.9, 107 S.Ct. 2378 (emphases added) (quoting Brief for the United States as Amicus Curiae Supporting Appellee, *supra*, at *14).

True, many plaintiffs invoke § 1983 to bring takings claims against defendants (like cities and counties) that are amenable to suit under that statute. After all, a § 1983 claim carries with it the promise of fees under 42 U.S.C. § 1988. And many of the defendants that take property are suable under § 1983. But the popularity of § 1983 claims does not imply that § 1983 is plaintiffs' *only* avenue for relief. Indeed, *First English* specifically rejected the State's (and the panel's) assertion to the contrary. And it would be surprising (to say the least) if Congress's enactment of § 1983—which *expanded* the remedies for constitutional violations—somehow *eliminated* plaintiffs' well-established rights, existing since the dawn of the Republic, to vindicate their federal rights against non-§ 1983 defendants (like States).

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C.

Takings litigation has a rich history in our Nation, separate and apart from any statute. And the Supreme Court has said that the Takings Clause provides a remedy to property owners, separate and apart from any statute. So if we're going to say that it's § 1983 or the (ahem) highway, we have an awful lot of explaining to do. Way more than the panel's one sentence. And all of the explanation in the world cannot justify holding that plaintiffs' federal takings claims are not cognizable in any court at any time.

The panel's disposition of this case is far worse than the bad-old days of *Williamson County.* The *Williamson County* regime made it impossible to bring suit in federal court against States (or any other defendant) for taking property in violation of the Takings Clause. Rather, the Court held that all federal takings claims must be brought in state court—subject to review, if at all, only in the Supreme Court on certiorari. *See Williamson County*, 473 U.S. at 194–97, 105 S.Ct. 3108. The panel decision in our case appears to embrace that same result: Yes, plaintiffs who lost land alongside IH-10, you have a federal right under the Takings Clause, but no, it cannot be vindicated in the inferior federal courts.

But two points about this *Williamson County*-revivified holding bear emphasis. First, the Supreme Court overturned *Williamson County* in *Knick*, and it's not our prerogative to say otherwise. *See Knick*, 139 S. Ct. at 2179. And second, the panel's decision is even worse

than *Williamson County* because under today's decision, plaintiffs who sue in state court can have their cases removed and dismissed before *any* court *ever* passes on the merits.

IV.

Given the terseness of the panel's disposition, it's hard to know for sure what all went into its two decisions. It's also hard to know why the panel did not cite the Supreme Court's takings precedents, much less explain them away. Today, two members of the panel issue comparatively scopious opinions to defend the rejection of plaintiffs' claims. There are at least five problems with this *post hoc* approach (in addition to the others referenced above).

A.

First, the parties have a right to know why their claims are being adjudicated on the merits and barred from refiling in any court at any time. And they have a right to know that before their time for seeking rehearing expires—to say nothing of the time for petitioning the Supreme Court for certiorari. But in this case the parties cross-moved for rehearing, a putative amicus sought to participate in rehearing, and all of the motions were denied before they had any understanding of *why*. What's worse, the plaintiffs *even had to file their petition for certiorari* before they had an explanation for why their claims were adjudicated on the merits and subjected to res judicata. *See* Petition for Writ of Certiorari, *Devillier v. Texas* (No. 22-913). And it is little comfort to say the

plaintiffs had the panel opinion's lonely paragraph of explanation, which pales in comparison to what we offer (for example) in single-judge opinions for *pro se* litigants who request a certificate of appealability. *See, e.g., Faye v. Vannoy*, No. 17-30809, 2018 WL 11446637, at *1 (5th Cir. Nov. 7, 2018).

B.

Second, the most telling thing about today's concurring opinions is what they do *not* say. Neither offers a single word of explanation, rebuttal, or disagreement with Part II of this dissent. That is, our en banc court apparently agrees that (1) plaintiffs' claims arise under federal law for purposes of making them removable under 28 U.S.C. § 1441; (2) plaintiffs' claims nonetheless do not arise under federal law for purposes of the merits; and (3) plaintiffs' claims are forever barred from refiling anywhere.

C.

Third, JUDGE HIGGINSON says the panel footnoted a *Bivens* case because, in its view, this is a case about "implied cause[s] of action." *Ante*, at 420 (Higginson, J., concurring). But the fact that the Fourth Amendment does not specify a remedy for the illegal search-and-seizure of Webster Bivens doesn't say anything about the Fifth Amendment's very specific remedy for the unconstitutional taking of plaintiffs' land. And the Supreme Court has repeatedly admonished that takings claims—and plaintiffs' entitlements to "just compensation"—exist independent of any statute. *See, e.g., First English*, 482

U.S. at 315–16 & n.9, 107 S.Ct. 2378; *Seaboard Air Line Ry.*, 261 U.S. at 304, 43 S.Ct. 354. The Court has never said anything even close to that about the Fourth Amendment. That's not to say plaintiffs are necessarily right. It's just to say that *Bivens* doesn't prove they're wrong.

Moreover, the panel's footnoted analogy to *Bivens* does nothing to confront one of the most profound truths in all of constitutional law and federal courts: "The constitutional text refers to only two remedies: (1) a right to just compensation for takings and (2) the privilege of the writ of habeas corpus." HART & WECHSLER, *supra*, at 330. That sets these two constitutional rights apart from others and at least suggests these two rights—even if not all others in the Constitution—have special protections against congressional abrogation or dereliction. *Cf. Battaglia v. Gen. Motors Corp.*, 169 F.2d 254 (2d Cir. 1948) (analyzing congressional effort to deny any forum, state or federal, to raise a constitutional claim). Indeed, the Court has held that the Constitution's protection for habeas corpus rendered invalid a congressional restriction on federal jurisdiction for habeas claims. *See Boumediene v. Bush*, 553 U.S. 723, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008); HART & WECHSLER, *supra*, at 338 ("*Boumediene* is the only Supreme Court decision clearly holding that a congressional enactment restricting jurisdiction—in that case, of both federal and state courts—is unconstitutional."). Yet the panel's decision in this case denies any forum—state or federal—to the only other constitutionally guaranteed remedy of just compensation. So the monumental questions of constitutional law and federal courts posed by this case cannot be avoided by analogizing to *Bivens*.

And even if the cause of action is "implied," *Bivens* still is the wrong framework. *See ante*, at 421 n.1 (Higginson, J., concurring). The cause of action for takings claims pre-dated *Bivens* by over a hundred years and traces its lineage all the way to the Founding. It therefore cannot be dismissed as "judicial genesis" of the same sort that begat *Bivens*. *Ibid.*

D.

Fourth, JUDGE HIGGINSON's reliance on *Maine Community Health Options v. United States*, — U.S. —, 140 S. Ct. 1308, 206 L.Ed.2d 764 (2020), is misplaced. That case involved a statutory right of action under the Tucker Act for takings claims against the federal government. *See id.* at 1331. But it said nothing about situations like this one where Congress does not enact a statutory cause of action. In fact, the Court *expressly declined* to decide whether plaintiffs could bring their claims under the Takings Clause because the Tucker Act provided them with just compensation: "Having found that the Risk Corridors statute is a money-mandating provision for which a Tucker Act suit lies, we need not resolve petitioners' alternative arguments for recovery based on an implied-in-fact contract theory or under the Takings Clause." *Id.* at 1331 n.15. And faced with no statutory cause of action in *First English*, the Court *did* decide that the Takings Clause provided an independent cause of action. *See* 482 U.S. at 315–16, 107 S.Ct. 2378; *see* Part III.B, *supra.*

E.

Fifth and finally, JUDGE HIGGINBOTHAM suggests the panel referenced the Texas Supreme Court because it thinks federal takings claims are cognizable in Texas's courts but not ours. *Ante*, at 417–18 (Higginbotham, J., concurring). There are at least three problems with that.

First, as explained in Part II, *supra*, plaintiffs cannot relitigate their claims in state court. They have been adjudicated on the merits here. So the case is now over. And by exerting § 1441 jurisdiction, the panel has allowed States to remove federal takings claims from state court—thus empowering defendants to deprive plaintiffs of the state forum that JUDGE HIGGINBOTHAM says would otherwise exist.

Second, the Supreme Court has repeatedly said that the Takings Clause guarantees plaintiffs just compensation regardless of whether States provide 100% relief in state court or under state law. *See, e.g., Knick*, 139 S. Ct. at 2170–71; *First English*, 482 U.S. at 315, 316 n.9, 107 S.Ct. 2378; *Jacobs*, 290 U.S. at 16, 54 S.Ct. 26; *Seaboard*, 261 U.S. at 304, 43 S.Ct. 354; *Chicago*, 166 U.S. at 233–41, 17 S.Ct. 581; *see also Palazzolo*, 533 U.S. at 615–17, 121 S.Ct. 2448 (Supreme Court entertaining takings claim against a State based on the federal Constitution, not state statute); Woolhandler & Mahoney, *supra*, at 681 (indicating that between Reconstruction and the New Deal, federal courts commonly exercised federal question jurisdiction to hear takings claims). Moreover, even if the State of Texas would otherwise provide a remedy to

Texans who sue in state court and somehow manage to avoid removal of their claims to federal court, the State of Louisiana does not. *See Ariyan*, 29 F.4th at 228. JUDGE HIGGINBOTHAM does not dispute that.[3]

And third, just because federal rights *can* be vindicated in state court, it does not follow that these rights *cannot* be vindicated in federal court. Under JUDGE HIGGINBOTHAM's contrary logic, we would be obligated to dismiss every single § 1983 claim we see because, after all, state courts must *always* be open to them. *See Haywood v. Drown*, 556 U.S. 729, 739–40, 129 S.Ct. 2108, 173 L.Ed.2d 920 (2009) (holding that once a State creates a court of general jurisdiction, as all three of our States have, the State *must* hear and adjudicate § 1983 claims).

* * *

Much more could be said about the evolution of the federal cause-of-action requirement from the Process Acts to *Ex parte Young* to § 1983 and the Takings Clause. Much more could be said about sovereign immunity and jurisdiction. And much more could be said about the principles of federalism—including, the need to balance federal protection for federal rights against the State's eminent domain powers, the State's power over property law, and the State's dignity as a sovereign in our federal system. It's a shame we're unwilling to consider these

3. JUDGE HIGGINSON does dispute it, albeit in a footnote. *See ante*, at 424 n.5. But he does so only to dispute that *Ariyan* held what it held.

important issues en banc. And it's a shame that property owners in our circuit can no longer litigate Takings Clause claims in any forum, state or federal. I respectfully dissent.