No. 24-386

SUPREME COURT OF THE UNITED STATES

KARL FISCHER, ET. AL.,
Petitioner,

v.

THE STATE OF NEW LOUISIANA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT

Brief for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitutional Provisions:

Other Authorities

QUESTIONS PRESENTED

I. Under the Fifth Amendment to the United Sates Constitution, which requires government takings of property be for public use, should *Kelo v. City of New London* be overruled when its precedent is not grounded in text or history, precludes full access to the fundamental right of property ownership, is inconsistent with prior Supreme Court decisions, and is not followed by the majority of states?

II. If *Kelo* is overruled, under the Fifth Amendment to the United States Constitution, which requires government takings of property be for public use, should a new rule be used that allows for government takings of property for public use when (1) the transfer to a private entity involves public necessity of the extreme sort otherwise impracticable; (2) the private entity remains accountable to the public in its use of that property; or (3) the selection of the land to be condemned is itself based on public concern, when the new rule is grounded in history and text, workable, and consistent with prior Supreme Court decisions?

III. Is the Fifth Amendment's Takings clause self-executing, creating a cause of action against a state for just compensation when federal and state remedies such as the Tucker Act and 42 U.S.C § 1983 are unavailable, the Framers intended the Fifth Amendment to be self-executing, and Fifth Amendment not being self-executing would open the door to abuse of property rights by state governments?

STATEMENT OF THE CASE

This case stems from the State of New Louisiana attempting to seize 1,000 acres of land from 100 different property owners across three counties. R. at 2. New Louisiana's state legislature passed the Economic Development Act, giving the governor the power and funds to expand the State's tourism attractions and create new jobs in an attempt to revitalize the economy. R. at 1. In turn, New Louisiana Governor Anne Chase contracted with Pinecrest, Inc. to build a new luxury ski resort. R. at 2. In theory, the project is projected to increase tax revenue, attract wealthy tourists, provide new jobs, and increase property values in the area. *Id.* Additionally, fifteen percent of the tax revenue will be used to revitalize and support the surrounding community. *Id.*

New Louisiana state law allows takings purely for economic development and provides that a statutory or executive waiver of sovereign immunity is required for a property owner to receive just compensation from the State for a taking. *Id.* New Louisiana had not waived immunity for this project. *Id*. As a result, the State got ninety out of the 100 targeted property owners to sell their land for well below market value because they were left with no right to just compensations under state law. *Id.*

The ten holdout property owners possess small family farms and single-family homes in a poor, predominantly minority neighborhood. *Id.* Many of the homes were passed down through multiple generations, and there exists a tight-knit community and sentimental attachment to the land, R. at 2, despite some of the homes being in relatively poor condition and farms struggling to produce marketable crops and becoming overgrown due to soil conditions. R. at 2-3. None of the homes are dilapidated or pose any risk or threat to the public, and it is difficult for the

families to find comparable housing because the average income of the neighborhood is $50,000. *Id.*

The primary holdout owner and lead plaintiff is Karl Fischer, the owner of a small farm which has been in his family for 150 years. R. at 3. The State has initiated proceedings to take his land, but he, along with nine other plaintiffs, refuse to sell, especially below market price. *Id.* Yet, on March 13, 2023, New Louisiana initiated eminent domain proceedings against the ten holdout properties while offering no just compensation. *Id.* The State also authorize Pinecrest to begin construction on the purchased properties. *Id.*

On March 15, 2023, the ten property owners filed suit against New Louisiana under the Fifth and Fourteenth Amendments, seeking temporary and permanent injunctive life for violating the Takings Clause. *Id.* They claim the takings are not for public use, or in the alternative, are entitled to just compensation for any taking. *Id.* First, they argue that taking property to create a ski resort is not consistent with the plain meaning and historical understanding of "public use." R. at 4. Furthermore, they argue that the Fifth Amendment's taking clause is self-executing and creates a cause of action because just compensation is a constitutionally mandated remedy, and 28. U.S.C. § 1491 (the Tucker Act) and 42 U.S.C. 1983 were not the source of the cause of action for a remedy for a taking because the Fifth Amendment itself provides the cause of action. *Id.* Finally, they assert that claims for injunctive relief predated the passage of those statutes. *Id.*

Without filing an answer, New Louisiana moved to dismiss both claims under Rule 12(b)(6), arguing that the project is for public use under *Kelo v. City of New London* because the takings are for economic development. R. at 3. It also argues that the property owners cannot bring a claim for just compensation because the Fifth Amendment is not self-executing and does not provide such a cause of action. *Id.* It argues that that under the Tucker Act and 42 U.S.C. §

1983, statutes provide the cause of action for just compensation in takings cases, rather than the Fifth Amendment. R. at 3-4.

The District Court of New Louisiana granted Defendant's Motion to Dismiss for both claims on June 28, 2023, and Plaintiffs appealed. R. at 8-9. On March 13, 2024, R. at 19, The Thirteenth Circuit Court of Appeals affirmed the district court's decision. R. at 10. Plaintiffs appealed, and the Supreme Court of the United States granted writ of certiorari on August 17, 2024. R. at 20.

SUMMARY OF THE ARGUMENT

Kelo v. City of New London should be overruled, and a new rule should be established to determine what constitutes a permissible taking for a "public use" because the precedent set in *Kelo* is not grounded in text or history, is unworkable, inconsistent with precedent, and not relied on amongst the majority of states. Regarding text and history, the word "use" as written in the United States Constitution carries a narrow meaning, while the decision in *Kelo* construes it to encompass all potential economic benefits, an almost limitless definition. Also, at the time the Fifth Amendment was written, owning property was an invaluable right which could not be violated at the whim of the government, and eminent domain was used in very limited circumstances.

Furthermore, the rule set in *Kelo* is unworkable because it precludes individuals from fully utilizing the fundamental right of property ownership without unjust infringement on behalf of the government. Specifically, construing "public use" in such a broad manner, as done in *Kelo*, essentially erases the important and enumerated limitation of government power while reducing the power and meaning of the Fifth Amendment's Takings Clause. The rule is also inconsistent with prior precedent because the decisions relied upon in *Kelo* narrowed their

holdings to allow takings for public use when the takings were used to eliminate current, affirmative harms, and *Kelo* does not consider these essential limitations. Finally, the majority of states have acted, both legislatively and judicially, to ensure they do not have to follow *Kelo*, and there should not be such significant inconsistency across state lines regarding the protection of a fundamental right.

Instead, a new rule be used that allows for government takings of property for public use when (1) the transfer to a private entity involves public necessity of the extreme sort otherwise impracticable; (2) the private entity remains accountable to the public in its use of that property; or (3) the selection of the land to be condemned is itself based on public concern because this rule is grounded in text and history, workable, and consistent with precedent. The rule, outlined by the Supreme Court of Michigan, is consistent with text with history because it uses a much narrower definition of the word "use," has classifications similar to those used for eminent domain early in this nation's history, and includes a category that encompasses decisions that have expanded the scope of public use while respecting the importance of the enumerated limitation. Furthermore, it is workable because it places a clear limit on government takings, providing individuals the full protection guaranteed by the Fifth Amendment. The rule is also consistent with precedent because it allows for takings used to eliminate a current, affirmative public harm. Thus, *Kelo* should be overruled, and the rule outlined by the State of Michigan should be established.

Additionally, Plaintiffs have a cause of action under the Fifth Amendment because the Fifth Amendment is self-executing. This means that when the state or federal government takes property from private citizens, the Constitution–without the need for any additional source of law–gives the citizen the right to sue the government for just compensation if the government

fails to appropriately compensate for the taking. English common law, political philosophy, and the Framers' intent in crafting the Fifth Amendment make it clear that the Amendment was intended to be self-executing. To hold that the Fifth Amendment is not self-executing would allow states to take the property of their citizens with impunity and no accountability and defeat the entire purpose for which the Amendment was intended. Finally, 42 U.S.C. § 1983 does not create a cause of action for a just compensation claim against a state because it was not intended to do so, and this Court has consistently held that 42 U.S.C. § 1983 does not overcome a state's sovereign immunity. For these reasons, Petitioners ask the Court to find that the Fifth Amendment is self-executing, and it gives petitioners the right to pursue a legal remedy against the state of New Louisiana in federal court for just compensation. In turn, the circuit's and district court's decisions should be reversed, and the case should be remanded for further proceedings.

ARGUMENT

The Fifth Amendment of the United States Constitution ensures that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. The Fifth Amendment was made applicable to the states by the Fourteenth Amendment. *Kelo* v. *City of New London*, 545 U.S. 469, 496 (2005) (O'Connor, J., dissenting). This clause of the Fifth Amendment, known as the Takings Clause, imposes two conditions when governments seek to take private property. *Id.* at 496 (O'Connor, J., dissenting). Specifically, "the Taking must be for a 'public use' and 'just compensation' must be paid to the owner." *Id.* (citing *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 231-32 (2003)).

The determination of what exactly constitutes public use has changed over time. 2A Nichols on Eminent Domain § 7.02 (2024). While the Court has generally not interpreted public

use to literally require the condemned property be put into use for the public, the Court significantly widened the scope of the Takings Clause in two cases in the twentieth century. *Id.* Specifically, in *Berman v Parker*, 348 U.S. 26, 33-36 (1954), the Court allowed for the taking of a department store within a blighted community, filled with slums and overcrowded dwellings, so that a private party could redevelop the entire community into a more "well-balanced" community. Then, in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241-45 (1984), the Court determined the seizing of private land for redistribution to other private persons for the public purpose of breaking up a land oligopoly was a constitutional public use. In both cases, the Court allowed for the transfer of condemned properties from one private party to another private party, while simultaneously broadening the definition of public use to include more general benefits conferred to the public as a whole. *See* 2A Nichols on Eminent Domain § 7.09.

The Court further extended the scope of public use in *Kelo v. City of New London*, 545 U.S. 469 (2005). In *Kelo*, the Court decided that takings by the government for economic development purposes in accordance with a comprehensive plan satisfy the public use requirement in accordance with the Fifth Amendment. 545 U.S. at 484. Thus, after *Kelo*, the public use requirement only forbids the government taking of private property for the sole purpose of conferring a private benefit on a particular private party. *See id.* at 478. While states are able to place further restrictions on their exercises of the taking power, the question for the Court is whether *Kelo* should be overruled, and if so, what rule should be established to determine what constitutes a permissible taking for a public use.

Kelo v. City of New London is an unconstitutional precedent and as such, should be overruled. Its precedent has essentially eradicated the important limitation set in the Fifth Amendment's Taking Clause while ignoring the reason it exists in the first place. *Id.* at 506

(O'Connor, J., dissenting). In its place, what constitutes a public use should fall under one of three classifications: (1) the transfer to a private entity involves public necessity of the extreme sort otherwise impracticable; (2) the private entity remains accountable to the public in its use of that property; or (3) the selection of the land to be condemned is itself based on public concern. *County of Wayne v. Hathcock*, 471 Mich. 445, 472-75 (2004).

I. *Kelo* should be overruled because the quality of case's reasoning, workability of the rule, inconsistency with other related decisions, developments since the decision, and reliance on it all weigh in favor of overturning the precedent.

While stare decisis is the "preferred course," it is "not an exorable command" and is "at its weakest when we interpret the Constitution." *Janus v. AFSCME, Council 31*, 585 U.S. 878, 916-17 (2018) (citing *Agostini v. Felton*, 521 U.S. 203, 235 (1997)). According to the Court, "[W]hen it comes to the interpretation of the Constitution—the 'great charter of our liberties,' which was meant 'to endure through a long lapse of ages'—we place a high value on having the matter "settled right."" *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 264 (2022) (citing *Martin v. Hunter's Lessee*, 14 U.S. 304, 326 (1816)).

To determine whether precedent should be overturned, the Court examines and weighs a variety of factors. *Janus*, 585 U.S. at 917. Five of the most important factors include: (1) the quality of [the case's] reasoning, (2) the workability of the rule it established, (3) its consistency with other related decisions, (4) developments since the decisions was handed down, and (5) reliance on the decision. *Id.* Upon weighing these factors, stare decisis should not be followed and *Kelo* should be overruled.

A. *Kelo*'s quality of reasoning supports its overruling because the reasoning is not grounded in text and history.

When the Court fails to ground its decision in text and history, the quality of the reasoning factor weighs in favor of overturning precedent. *See Dobbs,* 597 U.S. at 269-70.

Regarding the text, the Takings Clause demands that private property only be taken for "public use." U.S. Const. amend. V. Every word in the Constitution is understood to have independent meaning and "'that no word was unnecessarily used, or needlessly added.'" *Kelo v. City of New London*, 545 U.S, 469, 496 (2005) (O'Connor, J., dissenting). If the government were free to take private land for any use, the term public use would be meaningless surplusage, which cannot be the case. *Id.* at 508 (Thomas, J., dissenting) Thus, these words should be read as an express limit on the power of eminent domain. *Id.*

The definition of the phrase public use must next be understood to determine the extent of that limit. The narrow definition of the word "use" at the time of the Constitution meant "to use, make use of, avail one's self of, employ, apply, enjoy, etc." *Id.* (citing J. Lewis, Law of Eminent Domain § 165 (1888)). While the word use could be construed in either a broad or narrow way, the narrow definition was used in several other places within the Constitution and contrasts with the expansive term "general Welfare" also written throughout the Constitution. *Id.* Therefore, the narrower definition should also be used to understand the limitation set by "public use" because if it was meant to be construed broadly, such as meaning any public purpose, the phrase "for the general Welfare" would have been used instead. *Id.*

With this understanding, it can hardly be said that the public is "employing" or "applying" the taken private property when the sole purpose of taking it is for any incidental economic advantages that may or may not come to be in the future. *See id.* At best, the public may "enjoy" these benefits, but any potential economic effects that may arise are too far removed and indirect to be said as being enjoyed by the public. Thus, the reasoning in *Kelo* lacks any substantial grounds in Constitutional text.

Furthermore, the reasoning in *Kelo* fails to consider history. The limitations set forth in the Takings Clause "serve to protect 'the security of Property,'" described by Alexander Hamilton "'as one of the 'great objects of Government.'" *Id.* at 496 (O'Connor, J., dissenting) (citing 1 Records of the Federal Convention of 1787, 302 (1911)). They are meant to "ensure stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government's eminent domain power." *Id.* at 496. The Framers understood that property ownership is a natural, fundamental right and should not be unjustly transferred from one private person to another, which is reflected in the early eminent domain practice. *Id.* at 510 (Thomas, J., dissenting). While some states construed this power more broadly than others, the majority used it to provide public goods, such as public roads, railroads, and public parks, or quasi-public goods that the public would benefit from equally. *Id.* at 512-13.

However, the Court in *Kelo* essentially erases the line between private and public property use. *Id.* at 498 (O'Conner, J., dissenting). By holding that the government "may take private property currently put to ordinary private use, and give it over to new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public," the Court essentially turns the limitations of the Takings Clause into "hortatory fluff." *Id.* at 497, 512. As "nearly any lawful use of real private property can be said to generate some incidental benefit to the public," then, "the words 'for public use' do not realistically exclude *any* takings." *Id.* at 512 (Thomas, J., dissenting). Therefore, the Court in *Kelo* ignores the purposeful, significant constraint on eminent domain, and in doing so, its reasoning ignores important history.

Overall, the quality of *Kelo*'s reasoning weighs in favor of the case being overturned because it lacks a basis in textual and historical reasoning.

B. *Kelo* is unworkable because it precludes individuals' full access to the right of property ownership granted by the Fifth Amendment.

Although simple to understand and follow, the rule set forth in *Kelo* is still unworkable. A rule is unworkable if it precludes full access to a constitutional right. *See Knick v. Twp. of Scott*, 588 U.S. 180, 189 (2019). As a result of *Kelo*, "under the banner of economic development, all private property is now vulnerable to being taken away and transferred to another private owner, so long as it might be upgraded." *Kelo*, 545 U.S. at 494 (O'Connor dissenting). This rule "effectively wash[es] out any distinction between private and public use of property" which in turn acts "effectively to delete the words 'for public use' from the Takings Clause of the Fifth Amendment." *Id.* By eliminating a key limitation to a government power, *Kelo* precludes individuals from having full access to their constitutional right of property ownership.

The majority in *Kelo* attempted to set forth limitations, likely in an effort to justify crossing the line of unconstitutionality. *See id.* at 501. For example, it still leaves courts the power to determine and forbid takings whose "sole purpose is to bestow a benefit on the private transferee." *Id.* However, the Court fails to provide any guidance in conducting such an inquiry. *Id.* Furthermore, there are likely to incidental benefits from any transfer of property, and there is no clear determination of how much or how little a private party can benefit. *See id.* It is difficult to imagine a realistic scenario in which the government would condemn a property and transfer it to another person that would have no incidental benefits, and therefore the limits to the government's taking power seems limitless.

The majority also indicates that the transfer of private property can only be used to upgrade property, not downgrade it. *Id.* However, there is once again no guidance on who decides what the most productive possible use of the property is. *Id.* Furthermore, unjust

government intrusion is most likely to affect the poor communities. The rule "'encourages those citizens with disproportionate influence and power in the political process, including large corporations and development firms' to victimize the weak." *Id.* at 522 (Thomas, J., dissenting). Thus, not only does the governmental eminent domain power seem limitless, but it also encourages the government to infringe on the fundamental right property ownership.

Furthermore, while the Court emphasizes the comprehensive plan set forth for economic development in this particular case, there is once again no standard of what would constitute a plan meeting enough requirements to satisfy this rule. *Id.* at 503-04 (O'Connor, J., dissenting). As such, it is not a real protection on the fundamental right. *See id.* Finally, the Court leaves the states to limit economic development takings if they wish, but this does not protect the right given to individuals under the Federal Constitution. *Id.*

Overall, *Kelo* grants the government the ability to infringe upon individuals' fundamental right of property ownership with essentially no limitations, and as such, the workability factor weighs in favor of overturning *Kelo*.

C. *Kelo* should be overturned because it is inconsistent with the precedent it basis its decision on and fails to accurately apply their rules.

While *Kelo* basis its reasoning on precedent, such as *Berman* and *Midkiff*, these cases are distinguishable. In both cases, the properties in question were "inflict[ing] affirmative harm on society—in *Berman* through blight resulting in poverty and in *Midkiff* through oligopoly resulting from extreme wealth." *Kelo*, 545 U.S. at 500 (O'Connor, J., dissenting). It is true that in both cases the Court granted deference to the legislature to determine public purpose; however, "in both cases, the relevant body had found that eliminating the existing property was necessary to remedy the harm." *Id.*

The same cannot be said for *Kelo*. *Id.* The well-maintained, condemned homes were not the source of any social harms. *Id.* Yet, they were still taken, and a dangerous implication was made that any property may be transferred to another private party if that private party has the means to upgrade it and provide some incidental public benefit. *See id.* at 500-03. The Court improperly used *Berman* and *Midkiff* to extend the definition of "public use," rather than understanding and applying the specific and narrow holdings provided in each case. Therefore, the reasoning lacks a sufficient basis in precedent, and the inconsistency factor weighs in favor of overruling *Kelo*.

D. *Kelo* should be overturned because since the decision was handed down, the majority of states have passed laws or amendments to avoid following its precedent.

Although federal courts have largely followed the precedent set in *Kelo*, the majority of states quickly acted in the opposite direction. *See* 2A Nichols on Eminent Domain § 7.12 (2024). Specifically, "Public reaction against the majority opinion in *Kelo* was swift, intense, and unprecedented. State lawmakers in every region of the nation took up the cause of making clear that 'public use' was not elastic enough to include private economic development projects." 1 Nichols on Eminent Domain Special Alert § SA.01 (2024). Specifically, since *Kelo*, "forty-four states changed their laws: Eleven changed their constitutions, while forty enacted a broad range of statutory changed." Diana Berliner, *Looking Back Ten Years After Kelo,* 125 Yale L. J. 82, 84 (2015).

A major problem arises because now individuals are relying on their state legislatures to protect an enumerated, federal constitutional right. *See id.* at 89. However, no two states enacted the same changes, leading to national inconsistenty. *Id.* at 90. This dangerously sets a precedent that allows states to limit or expand a constitutional right as they wish, depending on how big of

an inconvenience they deem it to be for government planning. *See id.* As Berliner correctly asks, "Do we want the right to free speech, or the right to be free from unreasonable searches and seizures, to vary by state, with some states providing strong protection and others virtually none?" *Id.* Rights expressed in the Federal Constitution are meant to protect all citizens, and having such variability in the treatment of a fundamental right defeats the purpose of having a federal constitution. *Id.*

This is evident especially in states which have not taken any reforms and are still subject to the precedent set in *Kelo*, in which eminent domain has been used seemingly for any private purpose. *Id.* at 89. For example, in New York, private taking of property has been allowed for "private development around a sports stadium, the expansion of Columbia University, the replacement of a CVS with a Walgreens, and the enhancement of a golf course." *Id.* These takings would not be permitted in numerous states, this inconsistency is a significant problem, and the first step in solving it is to overrule *Kelo* and set a constitutional floor which prohibits governmental takings for potential, incidental economic benefits. *Id.* at 90.

Altogether, *Kelo* should be overruled because it lacks textual and historical reasoning, is unworkable, inconsistent with precedent, and the majority of states have chosen to circumvent its rule.

II. The three classifications used by the State of Michigan should constitute a taking for public use under federal precedent because the rule is grounded in text and history, workable, and consistent with precedent.

Similar to the Federal Constitution, the Michigan Constitution permits governmental takings of private land for "public use." *County of Wayne v. Hathcock*, 471 Mich. 445, 472 (2004). In *Hathcock*, the Michigan Supreme Court determined that the requirement does not bar transfer of private property to another private party, just to private entities for private use. *Id.* It

then outlined three classifications which constitute a public use: (1) when the transfer to a private entity involvs public necessity of the extreme sort otherwise impracticable; (2) when the private entity remains accountable to the public in its use of that property; or (3) when the selection of the land to be condemned is itself based on public concern. *See id.* at 472-75.

The first classification includes property use that would generate public benefits from instrumentalities of commerce such as highways, railroads, and canals. *Id.* at 473. The second category includes private use that is devoted to the use of the public, independent of the will of the private party using it, and subject to public oversight, such as a petroleum pipeline. *Id.* at 474. The third classification allows for takings based on the underlying purpose of the condemnation, rather than the subsequent purpose, and includes the taking of properties in a blighted community. *Id.* at 475. These classifications should be used instead of the rule set forth in *Kelo* because they are rooted in text and history, workable, and consistent with federal precedent.

First, these three classifications are consistent with text and history. Public use under these categories requires a much closer and more direct connection between the use of the property and the public. As such, they use a narrower definition of public "use" as the Framers intended, rather than the broader definition of public use as construed in *Kelo* that is more comparable to "general welfare." *See Kelo*, 545 U.S. at 508 (Thomas, J., dissenting). Furthermore, the first and second classifications are similar to what the states used eminent domain for early in the nation's history by providing a direct benefit to each individual member of the public. *See id.* at 512. Furthermore, the third classification accounts for the increasing expansion of what constitutes public use throughout history, such as in *Berman* and *Midkiff*, while respecting the intended limitation set in the Constitution to protect property rights. *See* 2A Nichols on Eminent Domain § 7.02 (2024).

Second, the classifications are workable because they do not preclude an individual from fully accessing their fundamental right provided by the Fifth Amendment. *See Knick v. Twp. of Scott*, 588 U.S. 180, 189 (2019). It is clear what each distinction would be used for, and there is a significant limitation on governmental power. *Hathcock*, 471 Mich. at 475. Therefore, unlike the precedent set in *Kelo*, the important limitations set in the Takings Clause would still be acting in full force, preventing the government from unjustly infringing on the fundamental right of property ownership. *Kelo*, 545 U.S. at 505-06 (O'Connor, J., dissenting). Notably, the rule is also clear and simple to understand, which maintain provide judicial clarity.

Finally, the third classification is consistent with precedent. Specifically, it allows for taking properties currently causing an affirmative harm, which would permit the takings done in *Berman* and *Midkiff*. *See Hathcock,* 471 Mich. at 475. Specifically, the redevelopment of a blighted area, such as in *Berman*, 348 U.S. at 32-33, and the taking of land to eliminate the negative effects of an oligopoly, such as in *Midkiff*, 467 U.S. at 242, would both be of the public concern described in the third category. *See Hathcock*, 471 Mich. at 475. Thus, the cases *Kelo* uses to base its decision off of would still be constitutional, and this new rule would be consistent with precedent. *See Kelo,* 545 U.S. at 500 (O'Connor, J., dissenting).

Overall, *Kelo* should overruled, and a new rule following the classifications outlined in *Hathcock* should be used to determine what constitutes a permissible taking for a public use.

III. This Court should permit petitioner's just compensation claim to proceed because the 5th amendment's just compensation clause is self-executing and does not require federal or state legislation to provide a cause of action.

English common law and political philosophy were the sources and inspiration of much of the Constitution and early American jurisprudence. They are therefore educative in determining the meaning of the Fifth Amendment. Even more influential are the views of the

Framers who authored the Fifth Amendment; their purpose in including the Amendment is highly informative to determining its true purpose. English common law and the Framers' intent clearly demonstrate that the just compensation clause was meant to be self-executing so that it could guard against governmental abuses of power. Additionally, the historical context and legislative history of 42 U.S.C. § 1983 demonstrates that while it waived some sovereign immunity, it is not the origin of a cause of action under the Fifth Amendment.

A. English common law, early American jurisprudence, and the original intent of the Fifth Amendment all demonstrate that the Fifth Amendment was meant to be self-executing. Finding otherwise defeats the purpose for which the Fifth Amendment was intended.

English Common Law and English judicial commentary on just compensation show that there was a widely accept pre-Revolution understanding that government had an obligation to compensate for taken property. One of the earliest cases dealing with the just compensation was the *Case of the King's Prerogative on Salt-peter,* where in 1606, the English king desired to dig for saltpeter on a citizen's private land to make gunpowder. Mary Catherine Jenkins and Juliette Turner-Jones, Note**,** *Original Understanding Of "Background Principles" In Cedar Point Nursery v. Hassid***,** 47 Harv. J.L. & Pub. Pol'y 507, 519-20 (2024). The justices ruled that the king could take "'according to the Limitations following for the necessary Defence of the Kingdom . . . In addition, the King must leave the land 'in so good Plight as [he] found it,' This requirement mirrors the Takings Clause's "just compensation" requirement." *Id.*

English political philosophers of the pre-Revolution era outlined their own vigorous defenses of the centrality of property rights to a safe and flourishing society and argued just as vigorously that preserving such a society required that government respect and defend the property of its citizens. John Locke, one of the leading political philosophers pre-American Revolution, stated in his *Second Treatise of Government*, "The great and chief end . . . [of men

forming governments] is the preservation of their property . . . [A] man's property is not at all secure . . . if he who commands those subjects [has the] power to take from any private man, what part he pleases." *Id*. at 521. The great English legal philosopher William Blackstone also expounded on this in his *Commentaries*, "[which] often further explicated English common law on property, emphasizing that takings must not be performed 'in an arbitrary matter.' . . . Blackstone added that the legislature must give the property owner 'a full indemnification,' resembling the just compensation requirement in the Takings Clause." *Id*.

This overwhelming preference for protecting property rights for the people and from the government led the Framers and the early states to adopt protection for property rights and just compensation in both the state and national Constitutions. Before the national Constitution had even been ratified, Vermont (1777) and Massachusetts (1780) had written just compensation clauses into their state constitutions. *Id* at 522**.** And when the Constitution was written, the Framers crafted just compensation as one of only two remedies explicitly referenced in the Constitution. *See* RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 796–97 (5th ed. 2003) (stating that the second mention of a remedy is that of habeas corpus which is protected from interference by Congress).

James Madison was the architect of the Fifth Amendment among the Framers. Madison believed the Constitution required a just compensation clause to protect individual property rights because he did not trust the political process to do so. *Manning v. N.M. Energy, Mins. & Nat. Res. Dep't*, 144 P.3d 87, 90 (N.M. 2006). He believed that such an explicit reference to government's obligation to respect property – a "paper barrier" – was necessary to make it crystally clear that government could not and should not violate the property rights of citizens

without compensation. William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment.*, 94 Yale L.J. 694, 710 (1985). [P]aper barriers," he declared, "have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community." *Id*. In his essay *Property*, Madison explained that the Fifth Amendment would be self-executing in that it would ensure that "no land or merchandize . . . shall be taken directly even for public use without indemnification to the owner." *Id*. at 712.

Written into the Constitution and backed by the Framers, the right to just compensation as a self-executing remedy for government takings was quickly adopted by state legislatures and judiciaries. "By the 1820's, the principle of just compensation had won general acceptance." *Id* at 714-15. Courts around the country regularly interpreted the clause as self-executing, requiring that the government provide a remedy immediately upon the taking of private property. In *Gardner v. Trs. Of Newburgh,* the New York court of chancery found that the village of Newburgh could not divert plaintiff's stream for the benefit of the city without just compensation, saying:

> But, what is of higher authority, and is absolutely decisive of the sense of the people of this country, it is made a part of the Constitution of the United States "that private property shall not be taken for public use without just compensation." I feel myself, therefore, not only authorized but bound to conclude that a provision for compensation is an indispensable attendant on the due and constitutional exercise of the power of depriving an individual of his property.

Gardner v. Trs. of Newburgh, 2 Johns. Ch. 162, 167-68 (N.Y. 1816). *See also People v. Platt*, 17 Johns. Ch. 195, 209 (N.Y. 1819) (holding that the "Legislature cannot take away private property without . . . a just compensation."); *Bonaparte v. Camden & A. R. Co.,* 3 F. Cas. 821 (C.C.D. N.J. 1830) (No. 1,617) (holding that "[T]he right of the owner to receive, and the duty of the

legislature to provide for compensation is absolute, and the rights of property cannot be taken without an equivalent.").

This Court recognized as early as 1933 that governmental taking of property creates an automatic right to just compensation. In *Jacobs v. United States*, this Court explained that government takings create an automatic right for compensation:

> That right [to just compensation] was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the amendment. The suits were thus founded upon the Constitution of the United States.

Jacobs v. United States, 290 U.S. 13, 16 (1933). Similarly, In *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty*., this Court stated that the just compensation clause demonstrated the "the self-executing character of the constitutional provision with respect to compensation...." 482 U.S. 304, 315 (1987). In *United States v. Clarke*, the Court again noted that "A landowner is entitled to bring such an action [for just compensation] as a result of 'the self-executing character' of the Fifth Amendment's just compensation clause." *United States v. Clarke*, 445 U.S. 253, 257 (1980).

English common law, the Framers of the Constitution, and the American courts all support the conclusion that the Fifth Amendment is self-executing. The Court should continue this tradition and declare the Fifth Amendment to be self-executing.

B. This Court should find that the Fifth Amendment is self-executing and does not require legislative action to initiate a cause of action because to find otherwise would undermine the property rights the Fifth Amendment is meant to protect by opening the door to egregious violations of property rights by state governments.

Even in the face of this overwhelming consensus that the Fifth Amendment is self-executing so that it may protect people from the abuse of government power, New Louisiana would urge the Court to reject that consensus and leave the petitioners with no avenue to protect their rights – the exact conclusion that the Framers strenuously sought to avert. An analysis of this case reveals the consequences of this concerning route that New Louisiana asks the Court to take.

Petitioners in this case are in a uniquely difficult situation. Under the Eleventh Amendment to the Constitution, states are immune from lawsuits barring certain exceptions under the doctrine of sovereign immunity. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 63 (1989). While the state of New Louisiana refers to 42 U.S.C. § 1983 as a means for citizens to vindicate their civil rights, the State is also fully aware that this Court has declared that a state is immune to a lawsuit under 42 U.S.C. § 1983 because it does not qualify as a person under the definition of the statute, and the statute is therefore inapplicable here. *Id* at 66; 42 U.S.C. § 1983.

The state has stripped petitioners of their treasured and historic homes with no compensation. If the Court rules that the Fifth Amendment is not self-executing, petitioners must simply quietly yield to the power of the state with no recourse to protect their property rights. Siding with New Louisiana would create a sobering new landscape not just for petitioners but all Americans, who would now live in a nation where all fifty state governments would have the power to seize the property of their citizens with little to no accountability. The district court in *Devilliers* artfully illustrated the dangers of such a conclusion:

> Take an example. Person A owns a 20-acre vacant parcel. While Person A is on a five-year trip around the world, the State commandeers the property, constructs a state office building on the property, and utilizes the building on the property—all without the permission of the property owner. When Person A returns home, the State tears down the building and returns the property to its original vacant state. This is a classic taking for which Person A is clearly entitled to be compensated. . .

> . But not so fast. Amazingly, the State maintains that Person A would have no federal constitutional remedy against the State because a Fifth Amendment Takings Claim can never be brought against a State under § 1983. This thinking eviscerates hundreds of years of Constitutional law in one fell swoop, and flies in the face of commonsense. It is pretzel logic.

Devillier v. Texas, No. 3:20-CV-00223, 2021 WL 1200893, at *3 (S.D. Tex. Feb. 22, 2021)

To whom may Person A turn when his or her rights have been taken by the state? The state of New Louisiana answers chillingly – no one. To rule that the Takings Clause is not self-executing would lead to a "Wild West" of state government power where states could take the land of private citizens at will with no obligation to compensate them. Such a decision would make the Fifth Amendment a shadow of what it was intended to be by leaving property rights at the whim of the power of state government, "expos[ing] more citizens to takings without adequate compensation, contrary to the protections our Constitution provides." *Manning v. N.M. Energy, Mins. & Nat. Res. Dep't*, 144 P.3d 87, 92 (N.M. 2006).

For this reason, courts have increasingly relied on their understanding of the original intent of the Fifth Amendment and this Court's language regarding the self-executing nature of the Fifth Amendment to find that the Fifth Amendment is self-executing and does not require additional legislative action to grant a cause of action. In *Manning v. N.M. Energy, Mins & Nat. Res. Dep't*, the New Mexico government passed a new law that increased mining regulations and effectively banned the Mannings from running their mine. *Id* at 529. New Mexico claimed sovereign immunity for the taking, saying that the Fifth Amendment was not self-executing and plaintiffs had no cause of action because §1983 did not apply to a state. *Id*. The New Mexico Supreme Court rejected this argument, reasoning that this line of reasoning "expos[es] more citizens to takings without adequate compensation, contrary to the protections our Constitution provides . . . Requiring further governmental action when it is the government that has effected

the taking is contrary to the very reason for the Fifth Amendment: a check against abusive governmental power." *Id*. at 92.

In *SDDS v. State*, the South Dakota state legislature granted South Dakota Disposal Systems (SDDS) a permit to run a waste disposal facility. *SDDS, Inc. v. State*, 650 N.W.2d 1, 4 (S.D. 2002). However, a popular vote by South Dakota citizens rejected the legislature's recognition of the facility and forced the site to stop working. *Id*. SDDS sued claiming that this was an unlawful taking, and the state claimed sovereign immunity under the Eleventh Amendment. *Id*. at 5, 8. The South Dakota supreme court rejected that line of reasoning. *Id* at 9. Basing its decision in part on the language in *First English*, the court determined that because the Fifth Amendment is "self-executing, the remedy does not depend on statutory facilitation. Because it is a constitutional provision, it is a right of the strongest character." *Id.* at 9. Therefore the state was not protected from a lawsuit by sovereign immunity and SDDS could sue the state. *Id*.

In *Boise Cascade Corp. v. State ex rel. Oregon State Bd. of Forestry*, the state of Oregon's Board of Forestry forbade the Boise Cascade Corporation from logging on its private property. *Boise Cascade Corp. v. State ex rel. Oregon State Bd. of Forestry*, P.2d 563, 565 (Or. Ct. App. 1999). When Boise Cascade sued claiming this was a taking under the Fifth and Fourteenth amendments, the state claimed sovereign immunity under the Eleventh Amendment and claimed that the plaintiffs should have filed under 42 U.S.C. § 1983. *Id*. at 117-18. The Oregon court of appeals rejected this argument. It first noted that § 1983 provided no remedy because the state is not a person under that statute. *Id*. at 567. Relying on language from the Supreme Court in *Jacobs* and *First English*, the court then stated, "We conclude that, because of the 'self-executing' nature of the Fifth Amendment, as applied to the states through the Fourteenth

Amendment, a state may be sued . . . for takings in violation of the federal constitution." *Id*. at 569.

These courts protected the right to just compensation even when claims were brought solely under the Fifth Amendment because they recognized that the self-executing nature of the Fifth Amendment's just compensation clause is critical to the defense of property. To refuse to defend citizens' rights to just compensation via the Constitution would run directly contrary to the Framers' objective that the Fifth Amendment be a buttress against government abuse of authority. To side with New Louisiana creates an effective loophole in the Constitution through which future state governments may easily step whenever they decide to take property with impunity. Petitioners ask this Court to refuse to set a precedent that hollows out property rights at the expense of unchecked government power.

C. 42 U.S.C. §1983 did not create a Fifth Amendment cause of action for just compensation against the states because it was written originally to stem the civil rights abuses of post-Confederacy southern states and was not intended to create a Fifth Amendment cause of action.

Respondents have claimed that 42 U.S.C. § 1983 is the origin of a cause of action under the Fifth Amendment because it provides a federal mechanism for private citizens to sue those who state authority figures who violate civil. R. at 3-4. However, a review of the legislative history and intent of the act shows that the purpose of the Act was to secure existing Constitutional rights, not create new causes of action or new rights. Furthermore, referring plaintiffs to § 1983 is a disingenuous catch-22 because plaintiffs cannot sue the state under §1983.

After the Civil War, it is well-known that post-Confederate states engaged in a policy of widespread discrimination and hostility against African Americans. 42 U.S.C. § 1983 grew out

of a congressional reaction to protect civil rights. In his treatise, "*Civil Rights & Civil Liberties Litigation: The Law of § 1983*', Sheldon Nahmod explains the history of § 1983:

> § 1983 is modeled on § 2 of the Civil Rights Act of 1866, which made criminal certain acts committed by persons "under color of any law, statute, ordinance, regulation, or custom." § 1983 and its jurisdictional counterpart, 28 U.S.C.A. § 1343(a)(3), specifically began as § 1 of the Ku Klux Klan Act of April 20, 1871, which was enacted by Congress pursuant to § 5 of the Fourteenth Amendment in order to enforce that amendment. . . and to address the breakdown of law and order in the southern states.

SHELDON H. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION: THE LAW OF § 1983 § 1:3, § 9:5 (2024).

42 U.S.C. § 1983 was meant to enforce the Fourteenth Amendment and its incorporated Constitutional rights; nothing in its text, intent, or legislative history demonstrate that it was the source of the cause of action for just compensation. "Thus, with respect to federalism, one might observe that § 1983 is a statute the purpose of which is to enforce the Fourteenth Amendment. . . . Indeed, it may even be suggested that the Forty-second Congress took these very positions when it enacted § 1983 in 1871." *Id.* § 1:9**.** If one follows New Louisiana's reasoning that 42 U.S.C. § 1983 created the cause of action for the Fifth Amendment, does that mean that § 1983 created the cause of action for every other Constitutional right enforceable against the states via the Fourteenth Amendment? The state does not elaborate on or clarify this. Such a position would mean that before 1871, almost 100 years after the Constitution had been ratified, Americans had no remedy to defend their Constitutional rights against state abuse. That, at best, seems to stretch the imagination when considering that states long before then were already reading the Fifth Amendment as the basis and source of just compensation claims, as noted earlier.

Additionally, 42 U.S.C. § 1983 does not provide a cause of action against the state itself, but only against certain individuals who violate the rights of private citizens when acting under the authority of the state. *Id.* § 2:4. As noted earlier, a person cannot sue a state for violating their civil rights under § 1983 because a state does not qualify as a person under the definition of that statute. *Id*. § 6:5**.** The fact that the 42 U.S.C. § 1983 provides a cause of action against state officials means nothing for petitioners in this case. Petitioners seek a cause of action against the state itself, not against individual state officials who overstepped their authority. 42 U.S.C § 1983 does not provide such a remedy.

Claiming that 42 U.S.C. § 1983 presents a remedy for the petitioners is the state's cloak and dagger method of killing this suit before it gets off the ground. As the district court noted in *Devillier*,

> As applied to this case, the net effect of requiring Plaintiffs to bring their federal constitutional takings claim under § 1983 against the State would be to end the claim before it even began . . . It is a classic Catch-22: plaintiffs must bring their federal takings claim against the State under § 1983, but such claims are dead on arrival because plaintiffs cannot bring their federal constitutional claims against the State under § 1983.

Devillier, 2021 WL 1200893, at *3 (S.D. Tex. Feb. 22, 2021). 42 U.S.C. § 1983 does not create a cause of action against the state. For the state to claim so, and to direct plaintiffs to use this as a remedy for their rights is disingenuous and leaves the plaintiffs without a means to defend their rights.

New Louisiana asks the Court to take the states and their citizens into the dangerous and uncharted territory of unbridled state government power over individual property. Such a step would strike a blow to the central purpose of the Takings Clause of protecting citizens' property rights from government overreach. For these reasons and those mentioned above, the Court should find that the Fifth Amendment's Takings Clause is self-executing.

CONCLUSION

For the reasons stated herein, petitioners respectfully request that the Court reverse the circuit court's decision and remand the case for further proceedings.

This the 21st day of October, 2024.