No. 24-386

In the Supreme Court of the United States

KARL FISCHER, ET AL.,

Petitioners,

v.

THE STATE OF NEW LOUISIANA,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Thirteenth Circuit

BRIEF FOR THE RESPONDENT

Team Sixteen
Counsel of Record

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QUESTIONS PRESENTED

I. Under the Fifth Amendment's Takings Clause, (1) should *Kelo v. City of New London, Conn.* be overruled, and, if so, (2) what constitutes a permissible taking for "public use"?

II. Is the Takings Clause self-executing, thereby creating a cause of action against a state for just compensation when no other federal or state remedy is available?

STATEMENT OF THE CASE

I. Factual Background

In the interest of revitalizing New Louisiana's economy and breathing life into depressed communities, the state's legislature passed the Economic Development Act to provide its Governor with the power and funding to seek out development contracts. R. at 1–2. Acting pursuant to this authority, the Governor entered into contracts with Pinecrest, Inc. ("Pinecrest") to develop a recreational winter sport facility near the state capital. R. at 2. The facility is expected to provide nearly four thousand new jobs, promote tourism, boost local business, and increase tax revenues–fifteen percent of which will be reinvested into the local community. *Id.* Under NL Code § 13:5109, New Louisiana requires a general or specific waiver of sovereign immunity to allow suit for compensation. *Id.* However, out of preference for bargaining with property owners rather than authorizing costly litigation, the state declined to waive its immunity generally or specifically for the Pinecrest revitalization project. *See id.*

With this economic development contract in hand, New Louisiana set out acquiring the one thousand acres of land necessary for the project. *Id.* Because the land identified for the Pinecrest project is generally low quality farmland with structures in poor repair, ninety percent of landowners accepted the state's offers and entered into purchase agreements. *Id*. The state continued its negotiation with the ten remaining holdout landowners. *Id*. However, these landowners consistently refused the state's offers. *See id.* at 3. In the interest of ensuring the development could proceed expeditiously and the area could enjoy its economic benefits, on March 13, 2023, the state greenlit construction. *Id*. To that end, the state initiated eminent domain proceedings for the ten remaining plots under NL Code § 13:4911 to compensate the holdouts for land taken for public benefit. *Id.*

II. Procedural History

On March 15, 2023, the holdout property owners lodged their complaint against New Louisiana in the District Court, seeking both temporary and permanent injunctive relief. R. at 3. The holdouts alleged that the economic development project would not serve the public. *Id.* Alternatively, they sought just compensation for any taking that occurs. *Id.* New Louisiana moved to dismiss both claims under Rule 12(b)(6), without filing an answer. *Id.* Siding with New Louisiana, the District Court correctly held that the project satisfies the public use prong of the Takings Clause, as Supreme Court precedent allows takings for economic development of this very kind. *Id.* Further, the District Court held that petitioners failed to state a claim for compensation because New Louisiana had not provided a statutory vehicle for this claim, and there is no cause of action arising directly out of the Fifth Amendment Takings Clause. *Id.* Accordingly, the District Court granted New Louisiana's motion to dismiss both claims. R. at 5, 8.

Subsequently, the property owners appealed to the Thirteenth Circuit, which was argued and submitted on December 8, 2023. R. at 9. The Thirteenth Circuit plainly stated *Kelo* is binding. *Id.* The Thirteenth Circuit affirmed the District Court's dismissal of the just compensation claim, and concurred that the Fifth Amendment cannot provide an independent vehicle for claims. R. at 10-11. The panel unanimously held that New Louisiana's economic development plan satisfies the current definition of public use. R. at 14. The holdout owners petitioned to the Supreme Court of the United States for a Writ of Certiorari and it was granted on August 17, 2024. R. at 20.

SUMMARY OF ARGUMENT

This Court should affirm the Court of Appeals and District Court's holdings that New Louisiana's taking was valid under *Kelo* and that Petitioners cannot state a claim under the Takings Clause alone. The Court should uphold *Kelo* because the rule is workable and has been relied on

continuously. Additionally, *Kelo*'s quality of reasoning is strong and consistent with this Court's past decisions.

Even if the Court were to overturn *Kelo*, New Louisiana's taking falls within the definition of public use. This definition is broad and inclusive. *Berman v. Parker*, 348 U.S. 26, 33 (1954). The taking is justified because it serves to benefit broader public interest, preserving the fundamental concept of public use that this Court has continuously applied.

The Court should also decline to imply a cause of action arising directly out of the Takings Clause. While the Takings Clause has been described as self-executing, the Court has held that neither precedent nor historical practice definitively establish that it supplies a cause of action absent statutory authorization. As the Takings Clause does not directly establish a cause of action, the Court would need to imply one arising out of the clause. Because the Court has consistently cautioned against judicial creation of rights of action wherever special factors counseling hesitation exist, the Court should not imply a cause of action for just compensation.

Here, creating a cause of action would disturb sovereign immunity precedents by subjecting states to damages suits in federal court, upset the separation of powers between branches by exercising power given to Congress to abrogate state sovereign immunity, and create instability in takings jurisprudence.

ARGUMENT

I. Under the Fifth Amendment's Takings Clause, *Kelo v. City of New London, Conn.* should not be overruled, and even if it is, New Louisiana's economic development plan constitutes a public use.

The Fifth Amendment's Takings Clause states "Nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. In *Kelo v. City of New London, Conn.,* the city exercised their power of eminent domain to condemn land that was to be used for

their redevelopment project. *Kelo v. City of New London, Conn.,* 545 U.S. 469, 475 (2005). This redevelopment plan would draw new businesses to the distressed area, which would in turn serve to rejuvenate the city. *Id.* at 473. This Court held that the city's redevelopment plan satisfied the Fifth Amendment's public use requirement. This decision was consistent with previous cases where the Court deferred to legislative judgments on what constitutes a legitimate public use. Overturning *Kelo* would ignore this well-established precedent and undermine the flexibility granted to legislatures in addressing economic and community development needs.

A. Under the Fifth Amendment's Takings Clause, *Kelo v. City of New London* should not be overruled because the rule is workable, well-reasoned, and has been significantly relied on.

Past cases have identified factors that should be taken into account when deciding whether to overrule a past decision: the quality of reasoning, the workability of the rule established, its consistency with related decisions, and reliance on that decision. *Janus v. Am. Fed'n of State, Cnty., & Mun. Employees, Council 31*, 585 U.S. 878, 917 (2018). The Court has repeatedly emphasized "overruling a precedent is a serious matter." *Dobbs v Jackson Women's Health Organization,* 597 U.S. 215, 266–67 (2022). "*Stare decisis* …promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

Applying the *Janus* factors, *Kelo* should not be overruled. The reasoning in *Kelo* is firmly grounded and aligned with the Court's established precedents. The rule it established is workable and has been integrated into the judicial framework without creating inconsistency. *Kelo* has maintained consistency across related decisions. Additionally, the reliance on *Kelo* has been substantial, and its stability contributes to the predictability of law.

1. *Kelo's* quality of reasoning is strong because it is based on precedent.

The quality of reasoning has an important bearing on whether a prior case should be reconsidered. *Dobbs*, 597 U.S. at 269. A rule has a strong quality of reasoning if it is based on text, history, or precedent. *Dobbs,* 597 U.S. at 270. In *Dobbs*, an abortion clinic challenged Mississippi's Gestational Act, alleging it violated the Court's precedents that recognize a constitutional right to abortion. *Roe* was assessed according to the *Janus* factors. *Roe v. Wade*, 410 U.S. 113 (1973). The Court held that *Roe's* reasoning was exceedingly weak because there was little effort made to explain how its rule was derived from sources relied upon in constitutional decision-making. *Dobbs,* 597 U.S. at 271. The Court specifically highlighted how *Roe* failed to note the consensus of state laws then in effect. *Dobbs,* 597 U.S. at 272. Further, the Court reasoned that the *Roe* court undertook the sort of fact-finding that legislative committees typically conduct. *Id.* Finally, the Court found that *Roe* relied on precedent that did not involve the specific issue at hand or justify the arbitrary lines drawn out by the rules. *Dobbs*, 597 U.S. at 273–74.

Kelo's reasoning is strong. First, it was founded on precedent. *Kelo's* interpretation of public use follows a trend set since the late nineteenth century. *See Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158–164 (1896). The Court in *Kelo* explicitly affirmed that the narrow test used in the past to define public use has been "repeatedly and consistently" rejected since Justice Holmes' opinion in *Strickley v. Highland Boy Gold Mining Co*., 200 U.S. 527, 531 (1906).[1] *Kelo* appropriately reflects the broader, well-established interpretation of public use, upholding more than a century of jurisprudence. *Kelo*, 545 U.S. at 480. In *Dobbs,* the Court found that *Roe's* reasoning was weak because it did not rely on past decisions that involved the specific issue that

[1] Justice Holmes emphasized that "use by the general public" was inadequate as a universal test. *Strickley,* 200 U.S. at 531.

was dispositive in that case. However, *Kelo* adhered to past precedent. It specifically addressed public use in the context of the Fifth Amendment when deciding that the takings in that case satisfied the public use requirement. Moreover, *Kelo* continued the trend established in *Berman* of resolving challenges in light of the entire plan, rather than a piecemeal analysis. The *Kelo* court went as far as rejecting the petitioner's rule because it would represent a great departure from precedent.[2] *Kelo,* 545 U.S. at 487–88. Further, in *Dobbs,* the Court stated that *Roe's* framework resembled fact-finding that was better suited for a legislature. *Kelo* refrains from doing exactly that. The *Kelo* court makes it clear–to question the mechanics of the legislature's plan runs afoul of their constitutional power. Instead, the Constitution simply tasks the Court with deciding what public purpose is. *See id.* at 489. In conclusion, this Court should preserve *Kelo*. Its reasoning is sound because it grounds the interpretation of public use on a consistent line of precedent.

2. *Kelo's* rule is workable because it has been understood and applied in a consistent and predictable manner.

The workability of a rule depends on whether it can be understood and applied in a consistent, predictable manner. *See Dobbs v. Jackson Women's Health Org*., 597 U.S. 215, 220 (2022); *see also Loper Bright Enterprises v. Raimondo,* 144 S. Ct. 2244, 2270 (2024) (finding *Chevron* unworkable because it lacked clear definitions of key terms, was difficult to uniformly apply in disparate situations, and led to threshold questions that complicated its application).

Kelo is workable. *Kelo* establishes an explicit rule that allows the government flexibility to promote the public good. In *Loper Bright,* the Court found *Chevron* to be unworkable because the phrase "statutory ambiguity" was inherently ambiguous, which rendered the entire framework to be arbitrary in practice. In *Loper Bright*, this very Court was correct in determining that *Chevron*

[2] Petitioners in *Kelo* urged the Court to recognize a new bright-line rule in which economic development would not constitute public use. *Kelo*, 545 U.S. at 484.

could not stand as an easily-applicable test that allocated authority between courts and agencies. The Court also found the dissent's interpretation unworkable because it created judicial uncertainty.

Kelo is thoroughly distinguishable. Its test remedied the difficult-to-administer test previously used to define public use. *Kelo*, 545 U.S. at 479–480. In *Loper Bright*, the Court highlighted the ongoing need to clarify the doctrine, ultimately revealing its inherent unworkability. By contrast, *Kelo* establishes a clear and lasting rule for defining public use, a definition that has been consistently applied by this Court since the early 1900s, providing both clarity and versatility in serving the public interest. *Kelo* at 483. *Kelo* provides a practical and enduring framework that balances government authority with the public good, avoiding the confusion and instability evident in *Loper Bright*.[3] Its clear definition of "public use" guarantees a versatile application, establishing it as a workable standard, no matter the circumstances. The slightest deviation from this interpretation would disrupt the clarity of the Fifth Amendment jurisprudence, and this Court can avoid that by continuing to uphold the current rule.

3. Reliance interests require upholding *Kelo*.

Stare decisis has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision. *Hilton v. S.C. Pub. Railways Comm'n*, 502 U.S. 197, 202 (1991). While they do not outweigh the inherent problems with a flawed precedent, reliance interests are important for the Court to consider. *See Ramos v. Louisiana,* 590 U.S. 83, 107 (2020) (finding reliance interests in *Apodaca* weak where overruling a case would

[3] The *Loper Bright* court highlights how other courts have declined to engage with *Chevron* because it "makes no difference." Further, courts have avoided *Chevron* deference since 2016, even in cases where it may be applicable. *Loper Bright,* 144 S. Ct. at 2271.

affect relatively few pending cases nationwide, and the need for a correct rule outweighed the burden on states to retry a portion of prior cases).

The reliance interests require maintaining *Kelo*. As noted, not only has *Kelo* been relied on for nearly two decades but its rule is a continuation of precedent of nearly a century. In *Ramos,* the Court argued that overturning *Apodaca* would only impact two states and would likely not trigger an onslaught of litigation. The same cannot be said for *Kelo* as overturning this decision would have widespread, damaging effects halting redevelopment and community projects nationwide. The detriments would go far beyond two just states, destabilizing the legal framework that countless communities rely on currently. The Court in *Ramos* highlighted the preservation of constitutional liberties outweighed the inconvenience of retrying a few cases in just two states. *Kelo* preserves constitutional liberties by ensuring that property cannot be taken for the purpose of conferring a benefit on a particular private party. *Kelo,* 545 U.S. at 477. Furthermore, the fact that this Court has refused to review cases that seek to overturn *Kelo* highlights its critical role and widespread reliance. R. 13. In conclusion, the reliance interests in favor of *Kelo* are compelling, reflecting its long standing dependence.

4. *Kelo* is consistent with other related decisions.

The last factor in determining if a decision should be overruled is its consistency with other related decisions. If a particular decision is an outlier amongst other decisions, then it is not consistent. *See Janus*, 585 U.S. at 929 (finding that *Abood* was decided against a different legal and economic background and that overruling it brought greater "coherence" among First Amendment law).

Kelo is consistent with other related decisions. *Kelo's* holding reflects the Court's long-established deference to legislatures to determine the public needs that justify the exercise of the

Takings Clause. *Kelo*, 545 U.S. at 483. The key distinction is that *Kelo* extended the already broad definition of public use to now include economic developments. This still stands apart from *Janus.* There, the Court found *Abood* to be inconsistent because its decision went against a long tradition[4]. *Kelo's* holding was not one that was decided alone, rather it was decided in light of other decisions that expanded the definition of public use. The *Janus* court found that *Abood* was decided when the issue was a relatively new phenomenon. However, *Kelo* differs in this respect. The issue of public use and its definition is not a new one, rather it has appeared on the Court's docket since last century. *Kelo* is consistent because it aligns with the Court's historical approach of deferring to legislatures on public needs that invoke the Takings Clause, extending the broad definition of public use to encompass economic development projects.

B. *Kelo v. City of New London, Conn.* should not be overturned and even if it were, the proposed taking would still constitute a permissible taking for public use.

Even if *Kelo* was overruled, the proposed taking in this case would still satisfy the public use requirement of the Takings Clause. The Takings Clause does not provide a definition of public use nor does it mandate the Court to interpret it in a narrow way, as the petitioners would suggest. Instead, the Takings Clause allows for Courts to define public use as they see fit, as long as the government is not using its eminent domain power to take property of one private party for the sole purpose of transferring it to another private party. *See Berman*, 348 U.S. at 33 (finding that it is not the Court's role to determine whether a project is desirable or not because it is within the legislature's power to decide what their communities need). The Court has repeatedly declined to

[4] The *Janus* court found *Abood's* holding to "stick out" when viewed against other precedent that held that "public employees may not be required to support a political party" because *Abood* forced non-union members to pay union fees, and this was viewed as compelled speech. *Janus,* 585 U.S. at 925–26.

weigh in on the mechanics of a specific plan, rather its only concern is whether a taking actually is a public use. *Kelo,* 545 U.S. at 482. Even in making that determination, the Court's review of a legislature's judgment of what constitutes public use is an extremely narrow one. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984).

The Court has consistently acknowledged that public use encompasses projects aimed at serving a public purpose, such as economic growth and urban renewal, even if the entire public may not get to use it. *See Berman*, 348 U.S. at 28 (holding the plan to combat urban blight constituted public use because the community redevelopment project aimed to address public health, safety, and welfare); *Midkiff*, 467 U.S. 240 (holding that the Land Reform Act was within the definition of public use to reduce the oligopoly of land ownership because it would attack certain "perceived evils" of concentrated property ownership that were detrimental to state citizens); *Strickley v. Highland Boy Gold Min. Co*., 200 U.S. 527, 531 (1906) (holding the aërial bucket line used for a mine as public use because the legislature demanded it for the state's public welfare, and the test for public use no longer demanded use by the general public as a stringent requirement).

New Louisiana's development plan provides public benefits that justify the taking, even if *Kelo* were to be overturned. To begin, the Court's role is not to judge the specifics of the plan. This is similar to *Strickley,* where the Court refrained from reviewing the details of the mining corporation's plan. *Ergo*, the Court here should refrain from reviewing the details of New Louisiana's economic development plan. The Court stated in both *Strickely* and *Berman* that it is the legislature's job to determine what their communities need and what will promote the public welfare of their communities. Simply put, the Court's duty is to determine if that taking aligns with the Fifth Amendment. New Louisiana's legislature has determined that this project will

benefit their community by revitalizing the economy. R. at 2.

The State's plan does not depend on *Kelo's* holding to constitute a public use. In *Midkiff*, this Court upheld the taking because it aimed to attack certain "economic evils" that were a detriment to the community. *Midkiff*, 467 U.S. 241. Here, the Court should uphold the taking because it too aims to reverse the economic downturn plaguing the State, and this is achieved by creating new jobs, benefiting business owners, and increasing property values. R. at 2. In *Berman*, the Court upheld the taking because the project focused on addressing public health and safety. Although New Louisiana's plan does not address public health and safety in the same way the plan in *Berman* did, it still aims to strengthen these ends. By ensuring long-lasting benefits to the community, the New Louisiana legislature is indirectly striving to increase the public health and safety of their communities. R. at 2. Even though the ski resort itself may not be for the entire public to use, the benefits that will accrue from it will be. For example, New Louisiana will reinvest fifteen percent of the tax revenue to revitalize and support the surrounding communities. R. at. 2. It is well known that new and attractive businesses increase the standard of living in communities, and there is no indication that it would be different here. In conclusion, the State's taking constitutes a public use under the Takings Clause, regardless of *Kelo's* standing.

II. The Thirteenth Circuit properly dismissed Petitioners' just compensation claim because the Takings Clause does not provide a cause of action against states.

During the pendency of this action, this Court held in *Devillier v. Texas* that neither precedent nor historical practice definitively establish that the Takings Clause, by its own force, provides a vehicle for damages claims. *Devillier v. Texas*, 601 U.S. 285, 292 (2024). Because New Louisiana has neither authorized compensation claims nor waived immunity, and no Federal law supplies a vehicle for suit against states, allowing Petitioners' suit to proceed requires this Court to imply a cause of action within the Takings Clause. The Court should honor *Egbert v. Boule* and

refrain from recognizing a new constitutional right of action where there are "special factors" counseling hesitation, or any reason to believe that Congress is better situated to create a cause of action. *Egbert v. Boule*, 596 U.S. 482, 492 (2022).

A. The Thirteenth Circuit properly held that no precedent establishes or affirms the existence of a cause of action under the Takings Clause.

To determine whether a constitutional provision provides a cause of action by its own force, the Court looks to its text, historical understanding and practice, and Court precedent. *See Armstrong v. Exceptional Child Ctr.*, 575 U.S. 320, 324–27 (2015) (Supremacy Clause did not bestow a right of action where its text did not describe the means by which private parties could enforce it in court, the pre-ratification historical record contained no mention that it provided "such significant private rights against the States," and the Court had never applied it as a vehicle for claims). By these criteria, the Takings Clause does not provide a cause of action because its text does not clearly state the means by which a party may sue, the record indicates no belief that it would function as a vehicle, and the Court has never indicated that it provides a cause of action.

1. The text of the Takings Clause alone does not create any private right of action because it is silent as to how a party may sue.

This Court has never before identified any constitutional provisions that provide a cause of action by their text alone. The Court has, however, articulated that if a provision does not include any detail concerning how a private party may sue in court, the provision likely does not provide a cause of action. *See Armstrong*, 575 U.S. at 324. In *Armstrong*, the Court held that the Supremacy Clause's text did not provide a cause of action under which a private party could sue a state. *Id.* at 327. Analyzing the Clause's structure, operative language, and context within the Constitution itself, the Court concluded that it was intended to serve as a rule of decision, not to provide a private right of action. *Id.* at 325–26. The particular fact that the clause was "silen[t] regarding

who may enforce federal laws in court, and in what circumstances they may do so[]" showed that there was no intent to create a cause of action. *Id.* at 325.

Applying the same analysis used in *Armstrong*, the Takings Clause's text does not provide a cause of action. The most this Court has ever said is that "its language indicates…[it] does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A.*, 482 U.S. 304, 314 (1987).[5] Just as the Supremacy Clause provided no explicit indication that a private party may enforce its provisions in court, nor any detail about how it may do so, the Takings Clause does not explicitly express that it may be privately enforced. Thus, the Takings Clause's text does not, by its own force, clearly provide a vehicle for claims.

2. Historical practices did not establish that the Takings Clause was viewed as conveying any private rights of action.

Under *Armstrong*'s application, the Court has looked to historical application to determine if a constitutional provision was viewed as providing a private right of action. *Armstrong*, 575 U.S. at 325–27. This is because if a provision had "been understood to provide such significant private rights against the States, one would expect to find that mentioned in the . . . historical record[.]" *Id.* at 325. Where a survey of record and practice reflects no understanding that a provision served as a vehicle, this "conspicuous absence militates strongly against [the] position[]" that a claim exists. *Id.*

Unlike many other provisions of the Constitution, discussion of the Takings Clause is largely absent from legislative history and other contemporary commentaries at the founding. *See*

[5] Because New Louisiana has initiated eminent domain proceedings for Petitioners' holdings, they will ultimately be compensated by this process. In any event, New Louisiana has not yet taken Petitioners' land.

John Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NWULR 1099, 1132–33 (2000) (noting "sparse legislative record" and "larger silence on [the] topic"). For nearly a century following ratification, individuals seeking redress for uncompensated takings by the federal government resorted not to suit but to private bills of Congress. *Lib. of Cong. v. Shaw,* 478 U.S. 310, 316 n.3 (1986). Although the Tucker Act waived federal sovereign immunity for claims of constitutional violations and effectively shifted this process to the Article I Court of Federal Claims, the act neither applied to states nor "creat[ed] substantive rights." 28 U.S.C. §§ 1346(a), 1491; *Me. Cmty. Health Options v. United States*, 590 U.S. 296, 322 (2020) (internal quotation marks and citation omitted). While 42 U.S.C. § 1983 created a private right of action against natural persons for deprivation of constitutional rights upon its enactment in 1871, it did not apply to the states. *See Will v. Mich. Dept. of State Police*, 491 U.S. 58, 66 (1989). Thus, although the Takings Clause was definitively incorporated to the states in 1897, there was no federally provided vehicle to assert a claim for just compensation. *See Chi., Burlington & Quincy Railroad Co. v. City of Chi.*, 166 U.S. 226, 234–35 (1897).

In the antebellum era, the primary avenues for landowners to seek redress for an uncompensated taking by a state were either trespass claims against the state officials responsible, or equitable relief in the form of injunction or return of the land. *See Knick v. Twp. of Scott*, 588 U.S. 180, 199–200 (2019). The prevailing understanding of state constitution Just Compensation clauses was that they barred the legislature from effecting takings without compensation, not that they created a remedial duty or right of action. *See* Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 Vand. L. Rev. 57, 59 (1999). After the Civil War, some state supreme courts began exercising their common-law powers to recognize implied causes of action for just compensation within their state constitutions.

See Knick, 588 U.S. at 200. However, this Court's unequivocal disavowal of federal common law, and its recognition that creating causes of action is a fundamentally legislative activity, leaves this approach inapposite to the Court's role as a federal tribunal. *See Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *Hernandez v. Mesa*, 589 U.S. 93, 100–01 (2020). Thus, the only relief this Court has authorized for uncompensated takings by states is prospective injunctive relief against state officials where their violations of federal law are ongoing. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997); *Ex parte Young*, 209 U.S. 123 (1908).

When compared against the Supremacy Clause in *Armstrong*, there is a similar dearth of historical evidence that the Takings Clause provided a private right of action, or any sign that it was meant to offer one. As in *Armstrong*, the absence of any reference or mention to "such significant private rights against States" similarly "militates against" the suggestion it provides a cause of action.

3. This Court has never held that the Takings Clause provides any right of action by its own force.

As its final step in *Armstrong*, this Court assessed whether any of its precedents had shown that an implied right of action arose out of the Supremacy Clause. *Armstrong*, 575 U.S. at 326–27. Surveying cases, the Court noted that the Supremacy Clause had served as a rule of decision, and courts had previously granted equitable relief where federal and state law conflicted. *Id.* However, the Court emphasized that it had "never held or even suggested that…[these rested] upon an implied right of action contained in the Supremacy Clause." *Id.*

While this Court has established that the Bill of Rights and the Thirteenth and Fourteenth Amendments are each self-executing, it has only ever stated this to mean that they required no further legislative action to be made effective as law. *See Civil Rights Cases*, 109 U.S. 3, 20 (1883) (Thirteenth and Fourteenth Amendments were "self-executing without any ancillary legislation"

and became operative "[b]y [their] own unaided force and effect"); *City of Boerne v. Flores*, 521 U.S. 507, 523–24 (1997), (describing self-executing nature of amendments as immediately taking legal effect, and suggesting this was intended to bar Congressional alteration of their meaning). While the Court has never held that the Fifth Amendment stands apart from the other self-executing Amendments by uniquely establishing a vehicle for damages claims, its *dicta* and footnoting in *First English* prompted a debate as to whether the Just Compensation Clause created a cause of action. *See First English*, 482 U.S. at 314–316, 316 n.9 (1987); *see also Azul-Pacifico, Inc. v. City of L.A.*, 973 F.2d 704, 705 (9th Cir. 1992) ("Plaintiff has no cause of action directly under the United States Constitution."); *contra Mann v. Haigh*, 120 F.3d 34, 37 (4th Cir. 1997) (just compensation clause created a "situation in which the Constitution itself authorizes suit[.]"); *DLX, Inc. v. Kentucky*, 381 F.3d 511, 527 (6th Cir. 2004), *rev'd on other grounds*.

More recently, the Court noted that its prior references to the Takings Clause's self-executing character referred to the right to bring a § 1983 claim when an uncompensated taking occurs without needing to exhaust state remedies. *See Knick v. Twp. of Scott*, 588 U.S. 180, 194 (2019). Elsewhere, the Court suggested that the Takings Clause could not, in fact, serve on its own as a vehicle for claims. *Me. Cmty. Health Options*, 590 U.S. at 323 n.12. Despite this recent law, the Petitioners and *amici* in *Devillier* strenuously advanced the argument for a sweeping reading of the Court's *dicta* in *First English* and elsewhere, urging that it did indeed establish that the Takings Clause granted a right of action.[6]

A unanimous Court disagreed with this lofty interpretation, noting that its precedents "do not cleanly answer the question whether a plaintiff has a cause of action arising directly under the

[6] *See* Reply Brief for Petitioners, *Devillier v. Texas*, 601 U.S. 285 (2024) (No. 22–913) 2024 WL 113232 *1, *8 ("Texas's argument was briefed in *First English*, dispatched in *First English*, and buried by the cases discussing *First English*.").

Takings Clause." *Devillier*, 601 U.S. at 292. The Court distinguished "the substantive right to just compensation" from the question of the procedural vehicles available to assert a claim, noting that "the mere fact that the Takings Clause provided the substantive rule of decision for [equitable] claims . . . does not establish that it creates a cause of action for damages . . . ." *Id.* at 291–92. While noting the absence of precedent "does not by itself prove there is no cause of action[,]" the Court clearly indicated that no previous case recognized a constitutional right of action arising out of the Takings Clause. *See id.* at 292.

Petitioners here, as in *Devillier*, nevertheless assert that the Takings Clause itself provides a cause of action for their claims. However, given the Court's clear indication that precedent does not support such a claim, providing this relief would require the Court to recognize a new implied cause of action.

B. The Court should not recognize a new implied cause of action arising out of the Takings Clause because under the court's *Bivens* special factors analysis, Congress is better positioned to weigh the factors involved in creating a cause of action.

As the Court recently affirmed, "[c]onstitutional rights do not typically come with a built-in cause of action to allow for private enforcement in courts." *Devillier,* 601 U.S. at 292. Because creating causes of action is a fundamentally legislative activity, the Court has "recognized the tension between this practice and the Constitution's separation of legislative and judicial power." *Hernandez* 589 U.S. at 100. With three exceptions,[7] "the theory that a right suggests a remedy" is one that the Court has declined to adopt for any constitutional provision or in any new context for

[7] *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (implied Fourth Amendment action against FBI agents for unreasonable search and seizure); *Davis v. Passman*, 442 U.S. 228 (1979) (Fifth Amendment due process action against Congressional employer for gender discrimination); *Carlson v. Green*, 446 U.S. 14 (1980) (Eighth Amendment cruel and unusual punishment action against federal prison officials for inadequate care).

over forty years. *See Ashcroft v. Iqbal,* 556 U.S. 662, 675 (2009). And, the Court has gone so far as to say that it would likely not reach the same decisions in *Bivens*, *Passman*, or *Carlson* were they decided today. *Ziglar v. Abbasi*, 582 U.S. 120, 134 (2017).

The thrust of the Court's approach is that if Congress has not clearly authorized private suits through § 1983 or other legislation, no such right exists. In the case of statutes, without clear congressional intent to create a private right to sue, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001). In the case of implied constitutional causes of action, too, "a federal court's authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress . . . ." *Hernandez*, 589 U.S. at 101. While the specific parameters have varied, the Court has used this general inquiry to resolve whether a cause of action had been authorized, whether in the Constitution or through legislation. *See id.*; *Jesner v. Arab Bank, PLC*, 584 U.S. 241, 264 (2018) (1791 Alien Tort Statute supplies no right of action against foreign corporations because it neither showed unambiguous intent to provide a vehicle against corporations nor showed a careful consideration of its parameters); *Will*, 491 U.S. at 66 (§ 1983 did not authorize suit against states).

As outlined in *Egbert*, the first step in this analysis is to ask whether the claim is "meaningfully different from the three cases in which the Court has implied a damages action." *Egbert*, 596 U.S. at 490-91. If the claim presents a new context, federal courts may not imply a cause of action where there are "'special factors' indicating that the Judiciary is at least arguably less equipped than Congress" to create a new right of action. *Id.* The special factors inquiry "must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Ziglar*, 582

U.S. at 136.

New Context

Under the Court's current *Bivens* framework, "[i]f the case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new." *Ziglar*, 582 U.S. at 139. Even such comparatively discrete issues as "the rank of the officers involved[]" or "the generality or specificity of the official action[]" makes a given case meaningfully different from previous *Bivens* cases. *Id.* at 139–40. Unless a case involves nearly identical facts to a previous *Bivens* case, it will present a new context. *See id.* at 140 (summarizing cases as "a claim against FBI agents for handcuffing a man in his own home without a warrant; a claim against a Congressman for firing his female secretary; and a claim against prison officials for failure to treat an inmate's asthma.")

There is no doubt that this case presents a new *Bivens* context. The right at issue here, the Fifth Amendment's Takings Clause, was not addressed by *Bivens*' Fourth Amendment claims, *Davis*'s Fifth Amendment Due Process claims, or *Carlson*'s Eighth Amendment claims, and none of these claims was brought against a state. As no *Bivens* cases control, the Court must identify whether any special factors bar identifying a new cause of action arising out of the Takings Clause.

Special Factors

Wherever there are "special factors counseling hesitation in the absence of affirmative action by Congress[,]" a court may not create a new damages action. *Ziglar*, 582 U.S. at 136 (quoting *Carlson*, 446 U.S. at 19). Whether creating a given cause of action would offend "separation-of-powers principles" forms its own category of special factors. *Id.* at 135. However, because creating causes of action is fundamentally legislative, doing so is manifestly a "significant step under separation-of-powers principles[,]" and a "disfavored judicial activity." *Id.* at 133, 135

(internal citation and quotation marks omitted). Ultimately, "*any* rational reason (even one)" that suggests that Congress is better positioned to fashion a damages action, or that there is even "*potential*" for judicial intervention to have an adverse impact, demands judicial restraint. *See id.* at 496 (internal quotations and citation omitted); *see also Canada v. United States*, 950 F.3d 299, 309 (5th Cir. 2020) ("The only relevant threshold—that a factor 'counsels hesitation'—is remarkably low.")

In engaging in this analysis, this Court's role is neither to weigh the costs and benefits of implying a private right of action, nor to ask whether it would be advantageous to do so in a specific case. *Egbert*, 596 U.S. at 496. Any indication of possible "systemwide consequences" or uncertainty resulting from a new cause of action "forecloses relief." *Id.* at 493 (internal citation omitted). While the existence of alternative remedial options weighs strongly against implying a cause of action, this analysis applies even absent any alternatives. *Id.* at 502; *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007).

Based upon this framework, the Court has refused to fashion damages actions for every other alleged constitutional violation that has come before it, or in any new context presented for existing *Bivens* claims. *See e.g. Bush v. Lucas*, 462 U.S. 367, 390 (1983) (action against employer for violation of employee's First Amendment rights); *Chappell v. Wallace*, 462 U.S. 296, 304 (1983) (action by black servicemen against commanding officers for Fifth Amendment due process violation of Fourteenth Amendment equal protection rights); *FDIC v. Meyer*, 510 U.S. 471, 473 (1994) (Fifth Amendment due process claim against Federal Agency). Lower courts which have applied the Court's current *Bivens* framework to claims brought under the Takings Clause have held that the framework weighs overwhelmingly against recognizing such claims. *See Devillier v. State*, 63 F.4th 416, 417, 420 (5th Cir. 2023) (Higginbotham & Higginson, JJ.

concurring separately in denial of rehearing *en banc*) (landowner's claim could not proceed absent a congressionally-created cause of action); *Gerlach v. Rokita* 95 F. 4th 493, 498 (7th Cir. 2024), *petition for cert. filed* (U.S. July 9, 2024) (No. 23-1742) (current *Bivens* framework would require property owner to show that the text of the clause directly authorized suit for claim to proceed).

Although only addressed indirectly by the Court, the Takings Clause context was presented within a *Bivens* claim in *Wilkie*. *See Wilkie*, 551 U.S. at 556 n.8.[8] There, the Court considered a landowner's *Bivens* claim alleging that federal agents engaged in a pattern of retaliation until the landowner granted an easement, thereby depriving him of his Fifth Amendment property rights. *Id.* at 548. Noting that the case presented a new *Bivens* context, the Court held that special factors precluded recognizing an implied cause of action. *Id.* at 561–62.

First, the Court found that state law and administrative complaint structures allowed the landowner some alternative means of relief, while noting their incomplete and piecemeal nature. *Id.* at 553–54. Second, allowing a cause of action would effectively weigh in on how public employees should bargain with property owners for procurement, and enter realms where Congress had already legislated. *Id.* at 562, 566–67. Practical concerns formed the final special factor– allowing the landowner's claim would "invite claims in every sphere of legitimate governmental action affecting property interests" and expose "any governmental authority affecting the value or enjoyment of property interests" to claims for damages. *Id.* at 557, 561. While two justices opined in a partial concurrence that the landowner's Fifth Amendment claim should be allowed to vindicate the right to just compensation, the remaining seven held that special factors precluded

[8] The Court noted here that the landowner framed the question presented as whether officials could "avoid the Fifth Amendment's prohibition against taking property without just compensation by using their regulatory powers to harass . . . a private citizen into giving the Government his property without payment?" *Wilkie*, 551 U.S. at 556 n.8.

doing so. *See Wilkie*, 551 U.S. at 583–584 (Ginsburg & Stevens, JJ., concurring in part).

As in *Wilkie*, implying a cause of action for just compensation against states would present numerous special factors that should counsel this Court's hesitation. First, because implying a cause of action here would subject states to damages suits, it would drastically alter settled sovereign immunity doctrine. Second, because Congress was expressly given the power to abrogate state sovereign immunity, authorizing this right of action would be an exercise of a power delegated to Congress. Finally, implying a Takings action would have many unknown practical implications: impacts to federalism and state autonomy, the possibility of new claims against the federal government, and the likelihood that this Court will need to answer further questions concerning the adjudication of claims.

1. Creating a damages action for takings against states would upend centuries of sovereign immunity precedent, which has barred suits for damages against states without their consent.

As a bedrock principle defining the relationship between the states and the federal government, state sovereign immunity is derived not only from the Eleventh Amendment, but also from "the Constitution's structure, its history, and the authoritative interpretations by this Court." *Alden v. Maine*, 527 U.S. 706, 713 (1999); *see also* U.S. Const. amend. XI. Sovereign immunity was a concept that the founding generation considered fundamental to the federal system, and which they quickly enshrined within the Eleventh Amendment when it was upended by *Chisholm v. Georgia* in 1793. *Id.* at 720–21; *see also Chisholm v. Georgia*, 2 U.S. 419, 420 (1793). While initially only shielding states from suit against citizens from another state, since 1890 sovereign immunity has been understood to generally bar suits against states without their consent. *See Hans v. Louisiana*, 134 U.S. 1, 16 (1890).

The "impetus" for the vindication of sovereign immunity was "the prevention of federal-

court judgments that must be paid out of a State's treasury." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994). The Court has described in stark terms how allowing damages suits to proceed against nonconsenting states presents "'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties . . . .'" *Alden*, 527 U.S. at 749 (quoting *Ex parte Ayers*, 123 U.S. 443, 505 (1887)). Further, doing so would not only force a state to "defend or default but also . . . face the prospect of being thrust, by federal fiat and against its will, into the disfavored status of a debtor . . . ." *Id.* Thus, the general rule is that the federal judiciary may not hear damages suits against states which have not waived their sovereign immunity.[9] *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996) (Congress cannot subject nonconsenting states to suit in federal court except by Fourteenth Amendment abrogation); *Alden*, 527 U.S. at 713 (analogous outcome in state court). The Court has recognized only two exceptions in which a state may be subject to damages suits by private parties: where the state waives sovereign immunity by consenting to suit, and by Congressional abrogation under its Fourteenth Amendment authority.[10] *See College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 669–70 (1999).

Although the Court has never addressed the relationship between the Fifth and Eleventh Amendments, all circuits which have confronted the issue have acknowledged that the overwhelming weight of precedent establishes that the Fifth Amendment does not abrogate state

[9] Although Judge Willis of the Thirteenth Circuit argues in his dissent that claims for compensation are not claims for damages, R. at 18, this Court has noted that actions to obtain compensation seek "not just compensation per se but rather damages for the unconstitutional denial of such compensation." *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687, 710 (1999). In general, "[d]amages for a constitutional violation are a legal remedy." *See id.*

[10] While the Court has held that states provided an implicit waiver of sovereign immunity to the federal government in the "plan of the Convention" which may allow abrogation "where the federal power . . . is complete in itself[,]" because takings are not such a power, this doctrine does not apply here. *See Torres v. Tex. Dep't of Public Safety*, 597 U.S. 580, 590 (2022).

sovereign immunity.[11] Even circuits which entertain that the Takings Clause may provide a cause of action have noted that it would be trumped by sovereign immunity.[12] *See Seven Up Pete*, 523 F.3d at 954 ("the constitutionally grounded self-executing nature of the Takings Clause does not alter the conventional application of the Eleventh Amendment."); *Gerlach*, 95 F.4th at 498 (sovereign immunity disposed of just compensation claim, even if it were allowed to proceed under Takings Clause alone).[13]

Several recent circuit court decisions affirm that the states' sovereign immunity would trump an implied Takings action. In *Gerlach v. Rokita*, an Indiana resident brought a damages action against state officials directly under the Takings Clause, asserting that a state practice of not paying interest on returned property violated the resident's right to just compensation. *Id.* at 496. Though decided while *Devillier* was pending, the Seventh Circuit held that even if this Court chose to imply a cause of action, the fact that Indiana had not waived sovereign immunity would bar the resident's suit in federal court. *Id.* at 499. Similarly, in *Skatemore, Inc. v. Whitmer*, Michigan small

[11] *Citadel Corp. v. P.R. Highway Auth.*, 695 F.2d 31, 33 n.4 (1st Cir. 1982); *74 Pinehurst LLC v. New York*, 59 F.4th 557, 570 (2nd Cir. 2023); *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 553 (4th Cir. 2014); *Washington Legal Found. v. Tex. Equal Access to Just. Found.*, 94 F.3d 996, 1005 (5th Cir. 1996); *DLX,* 381 F.3d at 526–28 (6th Cir. 2004); *Garrett v. Illinois*, 612 F.2d 1038, 1040 (7th Cir. 1980); *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 954 (9th Cir. 2008); *Williams v. Utah Dep't of Corr.,* 928 F.3d 1209, 1214 (10th Cir. 2019); *Robinson v. Ga. Dep't of Transp.*, 966 F.2d 637, 640 (11th Cir. 1992)

[12] Some circuits have analogized a tax refund case, *Reich v. Collins,* 513 U.S. 106 (1994), to hold that the Takings Clause does not abrogate Eleventh Amendment sovereign immunity so long as a state's courts hear takings claims. *See e.g. Hutto.*, 773 F.3d at 551–52. This position has never been endorsed by the Court, and runs counter to both the holding in *Alden*—where the Court explicitly declined to extend *Reich* beyond its tax refund context, or extend its holding beyond barring states from switching tax refund remedies mid-process—and the general proposition that federal courts may not themselves abrogate sovereign immunity. *See Alden*, 527 U.S. at 740.

[13] Additionally, all circuits which have confronted the issue again post-*Knick* hold that this principle is unchanged. *See Bay Point Props., Inc. v. Miss. Transp. Comm'n*, 937 F.3d 454, 456 (5th Cir. 2019); *Skatemore, Inc. v. Whitmer*, 40 F.4th 727, 734 (6th Cir. 2022) *cert. denied*, 143 S. Ct. 527 (2022); *Utah Dep't of Corr.,* 928 F.3d at 1214.

businesses sued state officials in federal court under § 1983, asserting that the officials had effectuated uncompensated regulatory takings by ordering closures during the COVID-19 pandemic. *Skatemore, Inc. v. Whitmer*, 40 F.4th 727, 729–30 (6th Cir. 2022), *cert. denied*, 143 S. Ct. 527 (2022). The Sixth Circuit rejected the small businesses' arguments that the Takings Clause abrogated Michigan's sovereign immunity regardless of its nonconsent, stating that nothing in this Court's recent or earlier decisions altered "bedrock principles of sovereign immunity law." *Id.* at 733–34 (quoting *Bay Point Props., Inc. v. Miss. Transp. Comm'n*, 937 F.3d 454, 456 (5th Cir. 2019)).

As in *Gerlach*, Petitioners solely brought their action under the Takings Clause, and as in both *Gerlach* and *Skatemore*, Petitioners are seeking damages from the state in the form of just compensation. However, just as Indiana and Michigan had not waived their sovereign immunity, New Louisiana has not waived its immunity either generally or specifically for the Pinehurst project. To hold that New Louisiana—and all nonconsenting states—should nevertheless be subject to suits brought directly under the Takings Clause would be to rewrite centuries of doctrine, or to create an exception that would disturb previously settled questions of law. The Court should decline to take this drastic step.

2. Creating a cause of action under the Takings Clause would implicate separation-of-powers concerns by exercising the power to abrogate state sovereign immunity expressly given to Congress.

The Court has cautiously avoided intruding into realms occupied by other branches when analyzing whether special factors implicate separation-of-powers concerns. *See e.g. Hernandez*, 583 U.S. at 103–04 (declining to create a cause of action where it would infringe on executive and congressional sphere of foreign policy); *Ziglar*, 582 U.S. at 142–43 (analogous outcome in national security context); *FDIC*, 510 U.S. at 486 (analogous outcome where doing so would step into

Congress' role of determining federal fiscal policy). This applies even where the realm is not one delegated to Congress *per se*, but rather one where Congress has effectively taken up the field with legislation or remedial structures. *See Chappell*, 462 U.S. at 304 (military justice and discipline); *Schweiker v. Chilicky*, 487 U.S. 412, 425–426 (1988) (administration of welfare programs). The power to abrogate state sovereign immunity was expressly given to Congress in Section Five of the Fourteenth Amendment. *See* U.S. Const. Amend. XIV. And, this Court has been clear that without a valid Congressional abrogation or a state's consent, "federal courts may not step in and abrogate state sovereign immunity." *See Sossamon v. Texas*, 563 U.S. 277, 290–91 (2011).

If the Court were to create a cause of action under the Takings Clause against states, it would run headlong into a mass of separation-of-powers concerns. Unlike the control over military justice and welfare programs that were of concern in *Chappell* and *Schweiker* simply because Congress had legislated previously, abrogation by the Court would be an exercise of a power explicitly given to Congress under the Constitution. For the Court to give Petitioners what they seek would thus be far closer to an entry into foreign policy, national security, or fiscal policy as it cautioned against in *Hernandez*, *Ziglar*, and *FDIC*, and would similarly implicate separation-of-powers. The existence of this special factor should preclude creating this cause of action.

3. Recognizing a cause of action would have unknown impacts for states and the federal government.

The *Egbert* standard that "even one" rational reason to think that Congress is better suited to create a cause of action has reinforced the need for judicial restraint in numerous cases. The Court has thus declined to extend a cause of action based on special factors where any uncertainty existed as to its future impacts and workability. *See Wilkie*, 551 U.S. at 555, 561 ("difficulty in defining a workable cause of action" and likelihood it would "invite claims in every sphere of legitimate governmental action affecting property interests").

First, implying a cause of action here would implicate federalism by making nearly all state-level compensation structures suspect. This Court has emphasized that "[t]he essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." *Addington v. Texas*, 441 U.S. 418, 431 (1979) (civil commitment standards). However, since Petitioners' conception of the Takings Clause's self-executing nature would provide a vehicle for suit only where state or federal statutory remedies are insufficient, this construction necessarily questions state structures' sufficiency. This Court and circuits which have confronted the issue have suggested that any state provisions for compensation, no matter how indirect or delayed that compensation may be, satisfy the Fifth Amendment. *See Knick,* 588 U.S. at 186 n.1 (Ohio inverse condemnation framework, rather than authorizing suits for compensation, requires landowner to seek writ of mandamus to compel condemnation proceedings); *Ariyan, Inc. v. Sewerage & Water Bd. of New Orleans*, 29 F.4th 226, 228 (5th Cir. 2022), *cert. denied*, 143 S. Ct. 353 (2022) (Louisiana Constitution, rather than authorizing state courts to issue compensation judgments, requires subsequent approval and appropriation by legislature or local corporation). Allowing Petitioners' action to proceed on this reading of the Takings Clause would effectively impose a single, federally-determined structure on all states. Moreover, it would create the very issues the Court warned against in *Wilkie* by inviting actions whenever a legitimate state activity implicates property rights.

Second, if the Court adopts Petitioners' theory, it would implicate the sufficiency of *federal* remedies and contravene both congressional design and Court precedent. The Court has consistently held that because Congress's designs deserve deference, alternative remedies crafted by Congress preclude judicially created claims. *See Wilkie*, 551 U.S. at 550. In so holding, this Court has repeated that it is irrelevant whether those remedies provide complete relief. *See id.* If

nonconsenting states must be subject to suit for supposedly insufficient compensation, the federal government could be haled into court where a property owner claims they lack a complete remedy.

Finally, creating a cause of action would unleash new questions that this Court would be required to answer subsequently, creating confusion and inconsistency in lower courts. At least one state's recent experience cautions against this. *See Burnett v. Smith*, 990 N.W. 2d 289, 297 (Iowa 2023) (overturning a 2017 decision implying a *Bivens*-type claim arising from the state constitution, in part because the legal issues of limitations period, availability of punitive damages and attorney fee awards, and availability of judicial immunity defense all arose within six years). Taken together, these impacts provide ample reason for the Court to hesitate before implying a cause of action against the states for just compensation.

CONCLUSION

Under the Fifth Amendment's Takings Clause, *Kelo v. City of New London, Conn*. should not be overturned because the rule is workable, well-reasoned, and has been substantially relied on. Even if *Kelo* were to be overturned, the proposed taking would still constitute a permissible taking for public use. Further, the Takings Clause's text, the historical record, and this Court's precedents each demonstrate that the Clause has never been used as a vehicle for claims. A proper application of the Court's *Bivens* framework militates against recognizing a new cause of action for takings claims against states. For the foregoing reasons, this Court should affirm the judgment of the Thirteenth Circuit and District Court.

Respectfully Submitted.
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