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 PETITIONERS

Team 17

Counsel for Petitioners

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QUESTIONS PRESENTED

I. Under the Fifth Amendment's Takings Clause, the government can exercise its eminent domain power and take private property if it is for a public use. The property taken in *Kelo v. City of New London*, 545 U.S. 469 (2005) was not put toward a public use. Should this Court reverse *Kelo* and implement a standard that ensures property is only taken if it is for a public use?

II. Whether the Takings Clause is self-executing, thereby protecting a plaintiff from bearing all the burdens of a public good by creating a cause of action against a state for just compensation when no other federal or state remedy is available to compensate a plaintiff for a taking.

STATEMENT OF THE CASE

I. Factual Background.

The legislature of the State of New Louisiana, Respondent, passed the Economic Development Act, giving the governor the ability to contract with businesses to revitalize the economy. R. at 1. Relying on this Act, the governor contracted with Pinecrest, Inc. ("Pinecrest") to build a luxury ski resort on the outskirts of New Louisiana's capital. *Id.* at 2. The goal of this project is to increase tax revenue, attract wealthy tourists, and provide new jobs. *Id.* To ensure long-lasting benefits from the project, fifteen percent of the tax revenue from the ski resort will be used to support the surrounding community. *Id.*

To complete this project, New Louisiana needs 1,000 acres of land, currently owned by 100 different owners. *Id.* Under New Louisiana state law, takings purely for economic development are permissible. Additionally, a statutory or executive waiver of sovereign immunity is required for a property owner to obtain just compensation from the State for a taking. *Id.* Because New Louisiana has not waived immunity generally or specifically for this project, it was able to get ninety of the owners to sell their land for well below market value. *Id.* The remaining ten, including Karl Fischer, are Petitioners in this suit. *Id.*

The Petitioners' properties are comprised of small, family-owned farms and single-family homes. *Id.* The value of the farms as farmland has depleted as a result of the soil condition and overgrowth, and some of the homes are in relatively poor condition, requiring substantial improvements. *Id.* at 2-3. However, none of the properties are dilapidated or pose any risk or threat to the public. *Id.* at 3. Additionally, many of the homes have been passed down for multiple generations, creating a tight-knit community and sentimental attachment to the land. *Id.* at 2. Fischer, the lead Petitioner, owns a small farm that has been in his family for 150 years. *Id.*

at 3. Because of the sentimental value and the below market value offers, Fischer and the other Petitioners do not want to sell their land. *Id.* However, on March 13, 2023, New Louisiana authorized Pinecrest to begin construction on the ninety purchased properties, and the State initiated eminent domain proceedings against the ten holdout properties, notifying the owners that state law provides no right to compensation. *Id.*

II. Procedural History.

On March 15, 2023, Fisher and the other nine holdout property owners sued New Louisiana in the United States District Court for the District of New Louisiana. *Id.* at 1, 3. Petitioners brought this suit under the Fifth and Fourteenth Amendments, seeking temporary and permanent injunctive relief, for the State's violation of the Takings Clause or, in the alternative, just compensation for any taking that occurs. *Id.* at 3. Petitioners argue that taking property to build a luxury ski resort is not consistent with the meaning of "public use," and thus the State violated the Takings Clause. *Id.* Additionally, Petitioners argue that the Fifth Amendment's Takings Clause is self-executing and creates a cause of action because "just compensation" is a constitutionally mandated remedy. *Id.*

In response, New Louisiana moved to dismiss both claims under Rule 12(b)(6), based on two arguments. *Id.* First, the State argued that *Kelo v. City of New London*, 545 U.S. 469 (2005) allows for takings for economic development, and it therefore did not violate the Takings Clause. *Id.* Second, it argued that the property owners cannot bring a claim for just compensation because the Fifth Amendment is not self-executing and thus does not provide a cause of action. *Id.* Rather, the Tucker Act and § 1983 provide the cause of action for just compensation in takings cases. *Id.* at 3-4.

The United States District Court for the District of New Louisiana granted New Louisiana's motion to dismiss and, on appeal, the United States Court of Appeals for the Thirteenth Circuit affirmed. *Id.* at 5, 11. Petitioners have appealed to this Court.

SUMMARY OF THE ARGUMENT

The Takings Clause in the Fifth Amendment of the United States Constitution prohibits any taking of private property that is not both for a public use and accompanied by just compensation. The Takings Clause serves to protect individuals and their property rights by restricting the government's takings power. As such, it serves as an important limit to ensure the protection of constitutional rights. However, the decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), allowing takings for purely economic development, expands the interpretation of public use so much that it no longer serves as a limit to the government's takings power. Rather, this standard allows for any taking that has mere indirect, incidental public benefits. Because of this expansion and nonadherence to the public use requirement, *Kelo* should be overruled. Additionally, *Kelo* should be overruled because the stare decisis factors, including the quality of the precedent's reasoning, the workability of the rule, and the reliance on the decision, favor overruling *Kelo*. Lastly, while courts respect the decisions of state legislatures, given that they are most familiar with their circumstances, legislatures are not entitled to complete deference, and a judicial check is necessary to protect constitutional rights.

Instead, public use is best interpreted as creating a standard where properties are selected because of facts of independent significance, rather than the interests of the entity to which the property is eventually transferred. Because this standard ensures the removal of a public concern to advance public health and safety, it is best supported by policy and best aligns with the history and purpose of eminent domain.

The Takings Clause requires the payment of just compensation upon the taking of property. The just compensation provision serves to protect those whose property is taken from bearing the entirety of the cost of a public good by awarding them compensation for the property taken. However, the Thirteenth Circuit held that, in the absence of an explicit federal or state remedy, the Takings Clause is not self-executing and, thus, provides an implied cause of action to pursue the just compensation remedy.

The Thirteenth Circuit's holding is wrong for three reasons. First, for centuries courts have treated the Takings Clause as self-executing. From the courts of the antebellum period to as recently as 2019, both this Court and state courts have treated the Takings Clause as providing a right to just compensation that contains all the necessary elements and is founded on the Constitution itself. Second, this Court has held that constitutional rights should be read liberally to prevent any erosion of their efficacy. Construing the Takings Clause as self-executing is the only way to prevent an erosion of the constitutional right as adopting the Thirteenth Circuit's construction would result in reliance on state and federal legislatures to allow the right detailed in the Takings Clause to be exercised. Finally, affirming the decision of the Thirteenth Circuit would result in states unconstitutionally taking property and would prevent constitutionally mandated redress for owners whose property is taken. Requiring that the Takings Clause have an explicit statutory-created cause of action would allow states to simply never pass a law affording such a cause of action and take property to possess and change till an owner claws their changed property back with an injunction. Since owners could not obtain monetary damages for permanent or temporary takings, or the damages resulting from such takings, they would have no means of recovering the just compensation mandated by the constitution. Such an outcome would be a degradation of the Fifth Amendment.

ARGUMENT

I. The Court should overrule *Kelo v. City of New London*, 545 U.S. 469 (2005) and implement a standard for public use requiring a fact of independent significance before the government can take private property.

The Takings Clause in the Fifth Amendment of the United States Constitution prohibits any taking of private property that is not for a public use. *See* U.S. CONST. amend. V. The Takings Clause functions to protect individuals and their property rights by limiting the government's power to take private property to those situations in which the property is to be used for a public use. *Id*. If the property is not to be used for a public use, then it is unconstitutional, and the government cannot exercise its takings authority. *Id.*

While the lower courts correctly granted New Louisiana's motion to dismiss under current law, *Kelo v. City of New London*, 545. U.S. 469 (2005) should be overruled. *Kelo* should be overruled because it improperly expanded public use, the stare decisis factors support overruling it, and the legislature is not entitled to complete deference. As such, the Court should implement a standard for public use requiring a fact of independent significance before the government can take private property.

A. *Kelo* should be overruled because it improperly expanded "public use."

It is well established that the Court will not overturn a past decision unless there are strong grounds for doing so. *Janus v. AFSCME, Council 31*, 585 U.S. 878, 917 (2018). Stare decisis is strongly presumed because it promotes predictability and consistency among the development of legal principles, fosters reliance on judicial decisions, and contributes to the integrity of the judicial process. *Id*. However, stare decisis is a principle of policy and not "a mechanical formula of adherence to the latest decision." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). If there are strong grounds for overturning a past decision, the Court may do so. *United*

States v. IBM, 517 U.S. 843, 855-56 (1996). Additionally, the doctrine "is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." *Janus*, 585 U.S. at 917. Despite the high bar in place for overruling a past decision, *Kelo* should be overruled because it improperly expanded the interpretation of public use.

1. *Kelo* does not align with the Fifth Amendment.

When interpreting the Constitution, the primary objective is to determine the text's original meaning to the ratifiers at the time of ratification. *Cnty. of Wayne v. Hathcock*, 684 N.W.2d 765, 779 (Mich. 2004). To do so, every word must be given its due force and appropriate meaning at the time the Constitution was ratified. *Holmes v. Jennison*, 39 U.S. 540, 570 (1840). If a legal term of art is used, those words are to be construed in their legal, technical sense. *Id*.

a. Under the current interpretation of public use, *Kelo* is too expansive.

At the time of founding, "use" was primarily defined as "[t]he act of employing any thing to any purpose." 2 S. Johnson, A Dictionary of the English Language 2194 (4th ed. 1773). However, the Court has stated that it has long rejected any literal requirement that condemned property be put into use for the general public. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984). Neither the entire community, nor a considerable portion of the community, need to directly participate in an improvement for the improvement to constitute a public use. *Id*. Instead, the Court has shifted its interpretation of public use to mean "public purpose." *See, e.g., Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 163 (1896). "If [the taking's purpose] be essential or material for the prosperity of the community,… and the improvement cannot be accomplished without the concurrence of all or nearly all of such owners…, then such reclamation may be made, and the land rendered useful to all." *Id.*

Under the current interpretation of "public use," even those takings where property is taken from one private party and given to another private party are constitutional. *See, e.g., Midkiff*, 467 U.S. at 244. Though this may seem to wholly contradict the limit in place by the public use requirement, the Court in *Midkiff* stated that "it is only the taking's purpose, and not its mechanics, that must pass scrutiny." *Id*. The purpose of the taking in *Midkiff* was to address oligopoly. *Id*. Oligopoly resulted in the State and Federal Governments owning almost forty-nine percent of the State's land and seventy-two private landowners owning another forty-seven percent. *Id*. at 232. Because of the concentration of land ownership, the State's land market could not function normally, and thousands of individual homeowners were forced to lease, rather than buy, the land underneath their homes. *Id.* at 242. As a result, Hawaiian leaders, dating back to the early 1800s, had repeatedly attempted to divide the lands, though to no avail. *Id*. By taking the land and distributing it to more citizens, the "social and economic evils of a land oligopoly traceable to [the Hawaiian] monarchs" was addressed and corrected. *Id*. Thus, although the property was transferred to other private parties, the Court held that the taking was not unconstitutional because it served a public purpose, attacking oligopoly, a longstanding Hawaiian "evil." *Id*.

Likewise, in *Berman v. Parker*, 348 U.S. 26, 38 (1954), the Court upheld a taking where a blighted area, which was injuring the public health, safety, and morals of its community, was taken to be redeveloped. The properties were then either transferred to public agencies for use as streets, utilities, recreational facilities, and schools, or leased to private enterprises, provided that the private enterprises carry out the redevelopment plan. *Id.* The goal of the redevelopment plan was to prevent, reduce, and eliminate the blighting factors. *Id.* at 30. Though some of the properties were given to private parties, the Court upheld the taking because the community,

which was referred to as the "slums," was so injurious that condemnation of it was necessary to prevent the "cycle of decay." *Id.* at 35.

Despite the interpretation of public use expanding, the above two cases still adhered to the limit because the takings either remedied a longstanding "evil" of the land or addressed a community's blight. *See Midkiff*, 467 U.S. at 244; *Berman*, 348 U.S. at 38. The property taken in each was the source of the social harm, and each taking directly achieved a public benefit. *Id.* In fact, the Court in *Berman* made a distinction between those takings which serve a public purpose and those that do not. *Berman*, 348 U.S. at 31. It stated that "to take for the purpose of ridding the area of slums is one thing; it is quite another…to take a man's property merely to develop a better balanced, more attractive community." *Id.*

Though the *Kelo* opinion is clothed in language similar to that of *Midkiff* and *Berman*, the taking was solely to develop a better balanced, more attractive community. *Kelo*, 545 U.S. at 483. The City did not allege that the properties were in poor condition, and there was no "evil" or blighting that needed remediation. *Id.* Thus, the property was not the source of any social harm and was instead taken for mere economic development. The holding in *Kelo*, allowing for takings for mere economic development, leaves the government's power unrestricted and opens the door for dangerous results. *Id.* at 494 (O'Connor, J., dissenting). If the *Kelo* standard is continued, the ownership of all private property is at the stake of the government. This allows for takings like that of the present case where private property, passed down from generation to generation, is condemned to build a ski resort in the hopes of increasing tax revenue, attracting wealthy tourists, and providing new jobs. R. at 2.

b. The public use clause is surplusage if it does not limit the government's power.

It is well-established that no clause in the Constitution is intended to be without effect. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803). Because no word was unnecessarily used or needlessly added, every word must have its due force. *Holmes*, 39 U.S. at 571. The Court may only interfere and substitute its judgment for a legislature's when the use would be "palpably without reasonable foundation." *United States v. Gettysburg Elec. R. Co.*, 160 U.S. 668, 680 (1896). However, as Justice O'Connor noted in her dissenting opinion in *Kelo*, "nearly any lawful use of real private property can be said to generate some incidental benefit to the public." *Kelo*, 545 U.S. at 501 (O'Connor, J., dissenting). By permitting such secondary takings, the public use requirement does not actually serve as a limit on the government's power. *Id.* at 511 (Thomas, J., dissenting). Instead, it duplicates the inquiry required by the Necessary and Proper Clause, which expressly grants the federal government its powers. *Id.* (Thomas, J., dissenting). As a duplicate inquiry that does not serve to limit the government in any way, the Takings Clause becomes mere surplusage, which violates a longstanding rule of constitutional construction.

2. The stare decisis factors support overruling *Kelo*.

In determining whether stare decisis requires adherence to precedent, the Court considers several factors. *Janus,* 585 U.S. at 917. Among the factors considered, the most prominent to the present case are the quality of reasoning, the workability of the rule, and reliance on the decision. *Id.* When taken as a whole, these factors support overruling *Kelo*.

Two factors the Court considers when determining whether precedent should be overruled are the quality of the reasoning and the workability of the precedent in question. *Id.* The Court in *Kelo* stated that because there is no principled way of distinguishing economic development

from other legitimate public purposes, it would be incongruous to hold that economic development is not a public purpose. *Kelo*, 545 U.S. at 484-85. However, economic development can be distinguished from other legitimate public purposes. As explained above, before *Kelo*, public purpose applied to those takings that were "essential or material for the prosperity of the community." *Fallbrook Irrigation Dist.*, 164 U.S. at 163. *Kelo* is a grave expansion of that requirement. Though *Kelo* can be understood and applied in a consistent and predictable manner, solely due to its expansion of "public use," it is poorly reasoned and unworkable because it is detrimental to a constitutional right. Garreth Cooksey, *Takings Care of Business: Using Eminent Domain for Solely Economic Development Purposes*, 79 Mo. L. Rev. 715, 729 (2013).

Another factor the Court considers is reliance on the decision. *Janus*, 585 U.S. at 917. As the Court has previously stated, reliance interests are important considerations in property cases, where parties may have acted in conformance with existing laws in order to conduct transactions. *Payne v. Tennnessee*, 501 U.S. 808, 828 (1991). After the *Kelo* decision, however, forty-four states changed their laws to provide increased protection. Diana Berliner, *Looking Back Ten Years After Kelo*, 125 Yale L. J. 82, 84 (2015). Among those states, thirty-three made changes to restrict the definition of "public use." *Id.* Additionally, on November 30, 2005, a mere five months after the *Kelo* decision, President George Bush signed House Resolution 3058 into law, which approved funding for a number of agencies for fiscal year 2006. Elisabeth Sperow, *The Kelo Legacy: Political Accountability, Not Legislation, Is the Cure*, 38 McGeorge L. Rev. 405, 416 (2007). The funding provision stated that none of the money appropriated to those agencies "may be used to support any Federal, State, or local projects that seek to use the power of eminent domain, unless eminent domain is employed only for a public use." *Id.* The Act continued by explicitly stating that public use "shall not be construed to include economic

development that primarily benefits private entities," thus clearly refuting the *Kelo* decision. *Id.* While overruling *Kelo* may impact those who have relied on the decision, given the number of states that have changed their laws to circumvent the ruling and the Federal legislative response, this element weighs in favor of overruling *Kelo*.

3. The legislature is not entitled to complete deference.

Another justification for the taking in *Kelo* was the broad latitude courts give to legislatures to determine what public needs justify the use of the takings power. *Kelo*, 545 U.S. at 483. The Court has repeatedly held that it will not second-guess legislatures' determinations of what is needed to effectuate their projects. *Id.* at 488. The Court explains that because each state may have its own special exigencies, state legislatures are most familiar with the circumstances, and thus their judgments are entitled to the highest respect. *O'Neill v. Leamer*, 239 U.S. 244, 253 (1915). Additionally, once the question of public purpose has been decided, the amount and character of land to be taken is left to the legislature's discretion. *Berman*, 348 U.S. at 36. As a result, the courts' roles are extremely narrow. *Id.* at 32.

However, to protect the Takings Clause's principle that no property be taken without a public use, courts still play crucial roles in reviewing a legislature's judgment. *Midkiff*, 467 U.S. at 240. In its duty of enforcing the Constitution, the question of defining public use is a judicial one. *Cincinnati v. Vester*, 281 U.S. 439, 446 (1930). If the use is "palpably without reasonable foundation," the court will interfere and substitute its judgment for a legislature's. *Gettysburg Elec. R. Co.*, 160 U.S. at 680. Because of this, "when deciding if a taking's purpose is constitutional, the police power and "public use" cannot always be equated." *Kelo*, 545 U.S. at 502 (O'Connor, J., dissenting).

Although the legislature has policing power to determine when a public purpose supports condemning land, and by extension the amount and character of the land to serve that public purpose, complete deference to the legislature is unsupported and dangerous. *Id.* at 518 (Thomas, J., dissenting). In his dissenting opinion in *Kelo*, Justice Thomas maintains that there is no justification for affording almost insurmountable deference to legislative conclusions, especially considering that the deference afforded in the context of takings is unique among all the express provisions of the Bill of Rights. *Id.* (Thomas, J., dissenting). Justice Thomas goes on to explain that that same level of deference is not given to legislatures to determine when a search of a home would be reasonable. *Id.* (Thomas, J., dissenting). He maintains that "something has gone seriously awry" when the Court's interpretation of the Constitution leads to citizens being safe from the government in their homes, but the homes themselves not being safe. *Id.* (Thomas, J., dissenting). Given the judicial check throughout other provisions of the Bill of Rights, and the Court's need to enforce the Constitution, the judiciary plays an important role in ensuring that a condemnation is not unconstitutional.

While the New Louisiana legislature undoubtedly knows more about its exigencies and circumstances than do the courts, it is not entitled to absolute deference. Because this taking would not be for a public use, it violates the Takings Clause and thus encroaches on the property owners' constitutional rights. The present case warrants the Court's action to substitute its judgment for the legislature's and protect the property owners' constitutional rights.

B. This Court should implement a standard for public use requiring a fact of independent significance before the government can take private property.

In *County of Wayne v. Hathcock*, the Supreme Court of Michigan redefined the definition of "public use" in its Constitution. 684 N.W.2d at 779. The court held that the taking of property, even for a private party, is permissible in three contexts. *Id.* One of these contexts, and the one

that the Court should adopt, is "where the property is selected because of facts of independent significance, rather than the interests of the private entity to which the property is eventually transferred." *Id.* at 771. As in *Midkiff*, the court emphasized that the fact that the property is transferred to a private party does not necessarily make the taking unconstitutional. *Id.* Rather, the focus is the controlling purpose of the transfer. *Id.* So long as the purpose of the condemnation is to remove a public concern and advance public health and safety, it is a public use, regardless of the party the property is transferred to. *Id.* Because this approach is best supported by policy and best aligns with the history and purpose of eminent domain, it constitutes a permissible taking for a public use.

1. Policy best supports this approach.

As previously stated by the Court, the concepts of fairness and justice underlie the Takings Clause. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 336 (2002). The Takings Clause protects individuals from being treated unfairly by the government and requires that if the government takes someone's property, it does so through a fair adjudication. Edward Rubin, *The Illusion of Property as a Right and Its Reality as an Imperfect Alternative*, 2013 Wis. L. Rev. 573, 573 (2013). Additionally, the right to exclude others from property is one of the most essential "sticks in the bundle of rights." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982). The Fifth Amendment's limitations ensure stable property ownership by protecting against "excessive, unpredictable, or unfair use of the government's eminent domain power." *Kelo*, 545 U.S. at 496 (O'Connor, J., dissenting). Were this not the case, there would be no predictable standard to apply, and nothing would "prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory." *Id.* at 503 (O'Connor, J., dissenting). Similarly, nothing would prevent New

Louisiana from replacing the small, family-owned houses and farms, many of which have been passed down for multiple generations, with a luxury ski resort. R. at 2. As such, imposing the facts of independent significance standard ensures that property is not so susceptible to government interference and that all takings are fair and predictable.

Further, imposing this limit eliminates the need for property owners to turn to the States to have their constitutional rights enforced. *Kelo*, 545 U.S. at 504 (O'Connor, J., dissenting). While the States play an important function in the system of dual sovereignty, "compensating for [the Supreme Court's] refusal to enforce properly the Federal Constitution…is not among them." *Id.* (O'Connor, J., dissenting). Relying on the Court to protect constitutional rights, especially those rights that the States themselves are attempting to encroach on, ensures their protection.

2. The purpose and history of eminent domain best align with this approach.

Eminent domain in the United States began in colonial America. Cooksey, *supra*, at 719. It existed without restriction and, as early as 1639, formal statutes existed that allowed the government to take private property without compensation. Sperow, *supra*, at 407. However, as Alexander Hamilton described to the Philadelphia Convention, "the security of Property" is one of the "greatest obj[ects] of Gov[ernment]." 1 Recs. of the Fed. Convention of 1787, pg. 302 (M. Farrand ed.1911). As such, the Founders balanced the goals of eminent domain and the protection of private property in the Fifth Amendment. Cooksey, *supra*, at 715. Realizing both the importance of eminent domain and of private property, the Fifth Amendment codified the government's authority to take property, but only under the limited circumstance of when the property is put to a public use and furnished with just compensation. *Id.* Were it otherwise, and the Fifth Amendment did not function to limit the government's power, there would be no security of property.

Given the weight placed on protecting property ownership throughout the history of the United States, the facts of independent significance standard better assures the protection of property ownership than the standard outlined in *Kelo*. As Justice O'Connor posed in her dissenting opinion in *Kelo*, "who among us can say she already makes the most productive or attractive possible use of her property?" *Kelo*, 545 U.S. at 503 (O'Connor, J., dissenting). Allowing takings for mere economic benefit, without addressing some underlying harm, opens the door for property to be taken for any reason, which is not what the Founders could have intended when drafting the Fifth Amendment.

II. Precedent, principles of constitutional construction, and policy considerations all show that the Takings Clause is self-executing and, thereby, creates a cause of action against a state for just compensation.

The Takings Clause of the Fifth Amendment requires that "private property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V. This Court has previously stated that it "is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *First Eng. Evangelical Lutheran Church v. Cnty. of L.A.*, 482 U.S. 304, 318-19 (1987) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Despite this self-evident principle, the Thirteenth Circuit forced the Plaintiffs in this case to bear public burdens when it incorrectly held that the "Fifth Amendment is not self-executing and thus does not create a right to bring a claim for relief." R. at 10. Centuries of this Court's precedent, principles of constitutional construction, and policy considerations all indicate that the Takings Clause is self-executing and has been treated as such since the time of the Framers.

A. Centuries of this Court's precedent has treated the Takings Clause as self-executing.

The Takings Clause has a long-standing history in both federal and state courts. While it has evolved throughout the centuries, the mandatory and, therefore necessary self-executing, nature of the clause has been a constant in the historical narrative. The courts of this country have always treated the just compensation provision as mandatory. As an exercise of this mandatory nature, courts have also viewed the just compensation provision as "comprehensive" and including "all elements." *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 306 (1923). This viewpoint is evident in the opinions of the Antebellum courts, the courts of the late 19th century, the courts of the early 20th century, this Court in *First English*, and this Court recently in *Knick*.

Since the time of the Framers, courts have treated the Takings Clause as mandating compensation and any attempt to prevent the payment of compensation is intolerable. Since most federal courts lacked jurisdiction to hear takings claims, antebellum state courts were the common venue for takings claims, primarily against the states under state constitution provisions similar to the Fifth Amendment. In 1816, Chancellor Kent in a New York court stated that "fair compensation must, in all cases, be previously made to the individuals affected." *Knick v. Twp. of Scott*, 588 U.S. 180, 200 (2019) (quoting *Gardner v. Newburgh*, 2 Johns. Ch. 162, 166 (N.Y. 1816)). Similarly, the New Jersey Supreme Court stated in 1839 that it is a "settled principle of universal law that the right to compensation is an incident" to the government exercising eminent domain power and that the government's power and the just compensation clause are "so inseparably connected with the other, that they may be said to exist not as separate and distinct principles, but as parts of one and the same principle." *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 178 (1971) (quoting *Sinnickson v. Johnson*, 17 N.L.J. 129, 145 (1839)). The Supreme Court of

Mississippi applied the mandatory nature of just compensation and articulated that the "right of the legislature of the State" to "constitute itself judge in its own case" and "to determine what is the 'just compensation' it ought to pay thereof" or to "extinguish any part of such 'compensation' by prospective conjectural advantage" cannot be "tolerated under our Constitution." *Isom v. Miss. Cent. R.R.*, 36 Mississippi 300, 315 (1858). The Mississippi Supreme Court articulated that it was not the place of the legislature to curtail the payment of compensation.

During this time period, state courts often did not treat the state equivalent of the Takings Clause as providing a cause of action and instead saw it as a vehicle to declare statutes unconstitutional. Robert Brauneis, *First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 Vand. L. Rev. 57, 68 (January 1999). This construction was not, however, the result of an understanding that "property owners subject to uncompensated, state-authorized appropriations simply could not recover damages absent legislation establishing a procedure to do so." *Id.* at 61. Instead, it evolved since state courts were not allowed to treat takings claims as a suit for damages for two reasons. First, there was a common law rule that plaintiffs in takings claims could get "prospective relief only in the form of an injunction or judgment in ejectment." *Id.* at 63. Second, state courts in the antebellum period accepted the "common law principle that a state could not be sued in its own courts without its consent." *Id.* at 72. Thus, under common law principles, antebellum state courts "had no means of compensating a property owner for his loss" and "no way to redress the violation of an owner's Fifth Amendment rights other than ordering the government to give his property back." *Knick*, 588 U.S. at 200-201. With the incorporation of the Takings Clause against the states by the 14th Amendment, state courts in the 1870s began to allow recovery of actual damages under the just compensation clause, largely due to an increased emphasis on construing

statutes and constitutional provisions based on legislative or framer intent instead of common law principles. U.S. CONST. amend. XIV; Brauneis, *supra*, at 111. As a result, state courts began to treat the just compensation clause as "providing a right and remedy to property owners, rather than merely" operating as a "limitation on legislative power." *Id.* at 113. Furthermore, state courts recognized the just compensation clause as a "special case" "within the tradition of recognizing implied damages actions" as it "could be read as the express grant of a damages action." *Id*. Thus, from the 1870s onwards, state courts have relied on the intent of the Framers and viewed the just compensation clause as including an express grant of a damages action.

Federal court treatment of the just compensation clause evolved in a similar fashion to state court treatment. Antebellum federal courts did not discuss the self-executing nature of the just compensation clause as they simply did not have the jurisdiction to hear takings claims in the first place. Congress did not grant federal courts the ability to hear claims against the United States founded upon the Constitution till the passage of the Tucker Act in 1887. 28 U.S.C. § 1491. The passage of the Tucker Act waived "the Federal Government's sovereign immunity and grant[ed] the Court of the Federal Claims jurisdiction over suits seeking compensation for takings." *Knick*, 588 U.S. at 216-17. Federal courts, subsequently, "joined the state courts in holding that the compensation remedy is required by the Takings Clause itself." *Id.* at 201. Later federal courts continued the trend of treating the Takings Clause as self-executing.

The courts of the late nineteenth century reiterated the mandatory nature of the just compensation clause and continued to imply its self-executing nature. For example, in *Cherokee Nation*, this Court stated that an owner "is entitled to reasonable, certain and adequate provision for obtaining compensation before his occupancy is disturbed" and that "under the Constitution, he is entitled" to compensation. *Cherokee Nation v. S.K. Ry. Co.*, 135 U.S. 641, 659 (1890). In

order for a provision for just compensation to be reasonable, certain and adequate, it must not rely on statutory enactment, as respondent will argue. Instead, a provision for just compensation is only reasonable, certain and adequate if it is derived from the Takings Clause itself. This Court articulated this principle in the *Monongahela* case when it stated that "[i]t does not rest with the public, taking the property, through Congress or the legislature, its representative, to say" "what shall be the rule of compensation." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893). Instead, this Court stated that the "Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry." *Id*. Thus, it is necessary to declare the Takings Clause as self-executing, not only because precedent has continuously treated it as such, but because affirming the decision of the Thirteenth Circuit would create a reliance on the legislature to create a rule for compensation. That result has already been treated as intolerable by this Court. The courts of the early twentieth century also saw that result as intolerable.

In *Seaboard*, this Court stated that "[i]t is obvious that the owner's right to just compensation cannot be made to depend on state statutory provisions." *Seaboard Air Line R.. v. United States*, 261 U.S. 299, 306 (1923). This is because "[j]ust compensation is provided for by the Constitution and the right to its cannot be taken away by statute. Its ascertainment is a judicial function." *Id.* at 304. To support the assertion that interest for payment while the government held the property during litigation, this Court went on to describe the requirement of just compensation as "comprehensive and include[ing] all elements and no specific command to include interest is necessary when interest or its equivalent is part of such compensation." *Id.* at 306. If interest does not require a specific legislative command to obtain since it is part of just compensation, it is required that the Takings Clause contain a cause of action to obtain just

compensation so that a specific legislative cause of action is not necessary. Instead, a plaintiff has a cause of action under the Takings Clause, itself, since he "is entitled to damages inflicted by the taking." *Id.* at 304. As mentioned previously, courts have treated the Takings Clause as self-executing since at least the 1870s, when they gained the ability to do so. This Court simply explicitly articulated a long-standing precedent: that "[t]he requirement that 'just compensation' shall be paid is comprehensive and includes all elements." *Id.* at 306. This principle was only reinforced in later cases in the early twentieth century.

In 1933, this Court summarized the *Seaboard* case when it stated that "the Court held that the right to just compensation could not be taken away by statute or be qualified by the omission of a provision for interest where such an allowance was appropriate in order to make the compensation adequate." *Jacobs v. United States*, 290 U.S. 13, 17 (1933) (summarizing *Seaboard Air Line R. v. United States*, 261 U.S. 299, 306 (1923)). This Court went on to state that the suits giving rise to the case were "based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain" and, as such, "that right was guaranteed by the Constitution." *Id.* at 16. This Court went on to state that it was irrelevant that the owners had asserted their right directly with a suit utilizing the jurisdiction imparted by the Tucker Act as it did not change the essential nature of their claim since the "form of the remedy did not qualify the right" as it "rested upon the Fifth Amendment" and "[s]tatutory recognition was not necessary." *Id*. Furthermore, this Court stated that a "promise to pay" by the taker of the property "was not necessary" as such "a promise was implied because of the duty to pay imposed by the Amendment" since the "suits were thus founded upon the Constitution of the United States." *Id*. Thus, in *Jacobs*, this Court treated the Takings Clause as self-executing and any claim for just compensation and duty to pay such

compensation is founded upon the Constitution, itself. This is because "the act of the taking" is the "event which gives rise to the claim for compensation" and statutory recognition of a cause of action is irrelevant. *United States v. Dow*, 357 U.S. 17, 22 (1958). This Court only reinforced this principle in the latter half of the twentieth century, when it described the Takings Clause as having a "self-executing character." *First English*, 482 U.S. at 315.

In 1987, this Court reiterated the long-standing principle in the *First English* case. This Court stated that "[w]e have recognized that a landowner is entitled to bring an action in inverse condemnation as a result of the 'self-executing character of the constitutional provision with respect to compensation'" and that "it has been established at least since *Jacobs v. United States*, 290 U.S. 13 (1933), that claims for just compensation are grounded in the Constitution itself." *First English*, 482 U.S. at 315 (quoting *United States v. Clarke*, 445 U.S. 253, 257 (1980)). This Court went on to state that *Jacobs* was not alone in treating takings claims as self-executing as the "'suits were thus founded upon the Constitution of the United States'" and "the Court has frequently repeated the view that, in event of a taking, the compensation remedy is required by the Constitution." *Id.* at 315-16 (quoting *Jacobs v. United States*, 290 U.S. 13 (1933)). Furthermore, to dissuade any notion of the 'self-executing' nature of the Takings Clause merely being a limitation on the power of the Government to act, this Court stated in a footnote that the "cases cited in the text, we think, refute the argument of the United States that 'the Constitution does not, *of its own force*, furnish a basis for a court to award money damages against the government" and "[t]hough arising in various factual and jurisdictional settings, these cases make clear it is the Constitution that dictates the remedy for interference with property rights amounting to a taking." *Id.* at n.9 (emphasis added). Thus, overturning the Thirteenth Circuit in this case and explicitly stating the self-executing nature of the Takings Clause would not be a

novel idea; it would simply be a return to this Court's established precedent and the historical narrative.

Recently, this Court restated the aforementioned precedent and historical narrative in the *Knick* case when it stated that a "property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it." *Knick*, 588 U.S. at 185. While this Court referred to the Tucker Act as being the avenue for enforcing that actionable Fifth Amendment takings claim, this Court also stated that the statute is simply the "*standard procedure* for bringing such claims." *Id.* at 189 (emphasis added). While the Tucker Act may provide the standard procedure for takings claims, that does not mean the Takings clause itself is not self-executing, especially since the statute is simply a jurisdiction-granting statute and does not provide an explicit cause of action. *See Higbie v. United States*, 778 F.3d 990, 993 (2015) ("The Tucker Act, however, does not create a substantive cause of action, and, as such, 'a plaintiff must identify a separate source of substantive law that creates a right to monetary damages.'" (quoting *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005)). Instead, a plaintiff may only bring a claim under the Tucker Act when they have a cause of action under another body of substantive law; the self-executing nature of the Takings Clause provides that cause of action for takings claims brought under the Tucker Act. Thus, as this Court stated, the "'self-executing character' of the Takings Clause 'with respect to compensation'" gives a cause of action to a property owner "for just compensation at the time of the taking." *Knick*, 588 U.S. at 192 (quoting *First English Lutheran Church v. Cnty of L.A.*, 482 U.S. 304, 321 (1987)).

Respondent will try to argue that "[c]onstitutional rights provide defenses and generally do not create causes of action." R. at 6; *Egbert v. Boule*, 596 U.S. 482, 490-91 (2022). The Takings Clause, however, is distinct from other constitutional rights. It contains both an explicit

rights and remedy. Furthermore, as discussed previously, courts for centuries have treated the Takings Clause as having a built-in cause of action. This is because, without an implied cause of action, the Takings Clause would not be effective and would be regulated to the "'status of a poor relation' among the provisions of the Bill of Rights." *Knick*, 588 U.S. at 189. Also, if the Takings Clause was not self-executing, plaintiffs would not be able to bring claims under the Tucker Act, as they have done for centuries, because the Tucker Act requires a cause of action arising from a separate body of substantive law to pursue. *See Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005). Thus, the Takings Clause, unlike the other constitutional rights, is self-executing and has been treated as such since at least the 1870s.

B. Constitutional rights should be construed in a way that preserves the true intent of the Constitution and does not diminish their efficacy.

This Court has continuously placed emphasis on reading constitutional rights, specifically, in a way that does not diminish their efficacy. Thus, this Court laid out the following standard for construing constitutional rights: "constitutional provisions for the security of person and property shall be liberally construed." *Monongahela*, 148 U.S. at 325 (quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886). This rule is necessary because a "close and literal construction deprives [constitutional rights] of their efficacy, and leads to the gradual depreciation of the right, as if it consisted more in sound than in substance." *Id*. Thus, this Court concluded that it "is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Id*. The court's motto "should be obsta principiis." *Id*.

The Thirteenth Circuit held that the Takings Clause is not self-executing and requires a legislature to create an explicit cause of action for a plaintiff to receive just compensation when their land is taken by a state. This construction severally degrades the efficacy of the

constitutional right to just compensation. Reading the Takings Clause as self-executing is the only way to protect the constitutional right in the Takings Clause from being subjected to the whims of the legislatures and rendering it meaningless until the legislatures deem it necessary to pass a statute explicitly setting forth a cause of action for a takings claim. This Court has previously construed the Takings Clause to ensure it is not relegated to "'the status of a poor relation' among the provisions of the Bill of Rights" when it overruled *Williamson County* and the state-litigation requirement in order to restore "takings claims to the full-fledged constitutional status the Framers envisioned when they included the Clause among the protections in the Bill of Rights" and keep the "authority over federal takings claims" out of the hands of state courts. *Knick*, 588 U.S. at 189. It should do so again in this case and side with centuries of precedent by interpreting the Takings Clause as implicitly self-executing.

C. Affirming the decision of the lower court would prevent constitutionally mandated redress for individuals whose property is taken and result in states taking property without providing compensation.

In *Knick*, when the government raised a concern that all eminent domain endeavors would be enjoined, this Court stated that "[s]o long as the property owner has some way to obtain compensation after the fact, governments need not fear the courts will enjoin their activities." *Knick*, 588 U.S. at 185. This is because, when state courts were prevented from awarding monetary damages for just compensation and the government would take property without paying just compensation, "a court would set aside the taking because it violated the Constitution" and would "order the property restored to its owner." *Id.* at 200. However, with the advent of awarding monetary damages to provide just compensation for takings, this Court began to see "invalidation of [an] ordinance" to convert "the taking into a 'temporary' one" as "not a sufficient remedy to meet the demands of the Just Compensation Clause." *First English*, 482

U.S. at 319. Affirming the holding of the Thirteenth Circuit below would prevent the plaintiffs from recovering monetary damages for the property taken as there is not currently an explicit statutory remedy in either federal or state court. Thus, under the Thirteenth Circuit's regime, the only remedy available to plaintiffs, and any subsequent victims of a taking by a state who does not provide a state remedy, would be an injunction for the return of property that has been in the possession of the government pending litigation. As this Court stated in *First English*, such a remedy is not a "sufficient remedy to meet the demands of the Just Compensation Clause." *Id*.

The Thirteenth Circuit held that the Takings Clause is not self-executing and, thus, denied the plaintiffs a remedy to pursue their constitutional right to just compensation as the New Louisiana legislature did not pass a statute to provide a remedy. R. at 11. Such a construction requires a state legislature to pass a statute that provides a right to sue the very same entity for taking property. The Thirteenth Circuit's holding gives the "legislature of the State" a right "by law, to apply the property of the citizen to public use, and then constitute itself judge to its own case, to determine what it ought to pay therefor, or how much benefit it has conferred upon the citizen by thus taking his property without his consent." *Isom*, 36 Mississippi at 315. Such an interpretation cannot "be admitted or tolerated under our Constitution." *Id*. Allowing such a construction would provide states the means of degrading a constitutional right by allowing the taking of private property, at least till the owner obtains an injunction for the return of the property. Prior to the owner acquiring an injunction, the state could do any number of things to the property, including destroying the owners home or otherwise damaging the property. Due to the inability for the owner to acquire monetary damages as just compensation, the owner would have no remedy for any degradation in the property returned to them. Such a construction cannot

be tolerated and blatantly disregards the principles of property ownership the Framers considered when writing the Fifth Amendment.

"[S]o long as compensation is available for those whose property is in fact taken, the governmental action is not unconstitutional." *Preseault v. ICC*, 494 U.S. 1, 4-5 (1990). As mentioned previously, declaring the government's action as unconstitutional and issuing an injunction that the property, in a likely changed state, be returned to the plaintiffs is unsatisfactory and does not compensate the plaintiffs for the time that the government unconstitutionally possessed their land. The more reasonable approach would be to treat the Takings Clause as courts have always implicitly treated it: as having a built-in cause of action that allows it to be enforced in a court of proper jurisdiction. A federal court has the jurisdiction to hear a takings claim against a state under federal question jurisdiction. The only barrier to compensation for these plaintiffs is the existence of a cause of action. This court has long recognized an implied cause of action for takings claims and this court should recognize one in this case. "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

CONCLUSION

For the foregoing reasons, the opinion of the United States Court of Appeals for the Thirteenth Circuit should be overturned.

Respectfully submitted,

/s/ Team 17

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