No. 24-386

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2024

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 Respondent

Team 20
Counsel for Respondent

Questions Presented

1. Under the Fifth Amendment Takings Clause, should this Court overturn *Kelo v. City of New London*, redefining what qualifies as a legitimate "public use" taking, when the *Kelo* decision aligns with and follows logically from previous decisions, establishes a workable rule, and has been relied on for nearly two decades?
2. Should this Court create a cause of action against the states by interpreting the Takings Clause as self-executing when it has historically limited judicially created claims, deferring to legislatures, and Congress has treated treated constitutional rights as not implying causes of action?

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Statement of the Case

In an effort to revitalize the economy, the New Louisiana legislature enacted the Economic Development Act, enabling Governor Anne Chase to contract with businesses to expand tourism and create jobs within the state. R. at 1–2. With this mission in mind, Governor Chase partnered with Pinecrest Inc. "to dramatically increase tax revenue for the area, attract wealthy tourists, and provide 3,470 new jobs" by building a ski resort near the edge of the state capital. R at 2. This project is projected to "benefit business owners due to new employees moving to the area, new tourists visiting the resort, and property values increasing in the surrounding areas." *Id.* Additionally, "[f]ifteen percent of the tax revenue from the ski resort will be used to revitalize and support the surrounding community to ensure long-lasting benefits." *Id.*

To encourage economic development, New Louisiana state law allows takings. *Id.* Further, in accordance with NL Code § 13:5109, "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 sovereign immunity has not been waived, generally, or specifically, property owners are not entitled to compensation. *Id.* To complete this project, the State needs 1,000 acres in 3 counties owned by 100 property owners. *Id.* Despite having no legal obligation to buy the land, the State has purchased land from ninety of the one hundred property owners. *Id.*

I. Ten property owners refused to sell their land, suspending New Louisiana's economic development plan.

The remaining ten property owners initiated the suit. These ten properties are "small, family-owned farms and single-family homes in a poor, predominantly minority neighborhood." *Id.* Because of poor soil conditions and overgrown plots, the value of the farmland has been depleted. The farmers struggle to produce profitable goods. *Id.* Although none of the properties

threaten public safety, "some of the homes are in relatively poor condition." R. at 3. Because many of the homes "require substantial improvements," they are "depressing local market value." *Id.* The owners in the neighborhood have an average income of $50,000. R. at 2. Despite the poor conditions of the farmland in the area, the lead plaintiff, Karl Fischer, does not want to sell his small farm, because his family has owned the land for 150 years. R. at 3. The other nine plaintiffs rejected the State's offer to buy the land for similar reasons. *Id.*

On March 13, 2023, in response, and to avoid delay of the economic development project, New Louisiana began eminent domain proceedings and notified the ten owners that state law does not provide a right to compensation. *Id.* Pinecrest was similarly authorized to begin construction on the purchased properties. *Id.*

II. The District Court for the District of New Louisiana dismissed the ten property owners' claims that the State had violated their Fifth and Fourteenth Amendment rights.

The property owners sued New Louisiana "under the Fifth and Fourteenth Amendment, seeking temporary and permanent injunctive relief for violating the Takings Clause because the taking is not for public use, or, in the alternative, just compensation for any taking that occurs." *Id.* In response, the State made a 12(b)(6) motion to dismiss. *Id.* The State argued that (1) "Kelo v. City of New London allows for takings for economic development, and therefore this project satisfies the public use prong," and (2) "it argues that the property owners cannot bring a claim for just compensation because the Fifth Amendment is not self-executing and thus does not provide such a cause of action." *Id.* The State further clarified their argument that "statutes, not the Fifth Amendment, provide the cause of action for just compensation in takings cases." R. at 4. The plaintiffs argue that building a private ski resort does not qualify as "public use" and that

"the Fifth Amendment's takings clause is self-executing and creates a cause of action." *Id.* They also argue that "the Tucker Act and § 1983 waive sovereign immunity." *Id.*

The District Court analogized to *Kelo v. City of New London* and found that "'public use' extended to takings where the public conferred an economic benefit, and the properties were not taken to abate a public harm." R. at 5. The court also found "the taking clause is valid, and the plaintiffs have no claim for just compensation because the Fifth Amendment is not self-executing." R. at 4. Thus, the court granted the State's motion to dismiss.

III. The Court of Appeals for the Thirteenth Circuit affirmed the District Court's dismissal of the property owners' claims.

The Court of Appeals acknowledged that the Kelo is binding precedent, and "'public use' extends to takings for economic development even when no harm is being remediated, and the property is given to another private party." R. at 10. The Court of Appeals affirmed that "the Fifth Amendment is not self-executing and thus does not create a right to bring a claim for relief." *Id.* The Court of Appeals noted the absence of a statute requiring just compensation or evidence of the State waiving immunity and affirmed the District Court's holding dismissing the plaintiffs' claims. R. at 11.

In a concurring opinion, Justice J. Hayes advised the Supreme Court to uphold the public use precedent created in Kelo, noting the "quality of the reasoning," "workability of the rule," "consistency with other related decisions," and the "reliance on the decision." R. at 11–13.

In a concurring in part and dissenting in part opinion, Justice J. Wills encouraged the Supreme Court to overrule Kelo, also noting the "quality of the reasoning, "workability of the rule," "consistency with other related doctrines," and the "reliance on the decision." Justice J.

Wills advises the Supreme Court to change its precedent in regard to "public use", but regardless believes a remand is required to determine just compensation. R. at 14–18.

Summary of Argument

In accordance with the Fifth Amendment's Takings Clause, New Louisiana's taking for their economic development plan was constitutional, because (1) it adheres with current Supreme Court precedent in *Kelo v. City of New London* as a legitimate "public use" taking, and (2) the Takings Clause is not self-executing.

This Court should continue to adhere to its precedent established in *Kelo v. City of New London* as supported by principles of stare decisis. *545 U.S. 469 (2005).* First, the *Kelo* doctrine aligns with previous "public use" precedent, allowing takings for a public purpose, including revitalizing the economy. Second, the *Kelo* reasoning follows logically from previous Supreme Court takings cases, noting the community benefits that arise from economic development. Third, the *Kelo* rule has been applied and interpreted consistently. Fourth, because the Court has continued to rely on the *Kelo* precedent for almost twenty years, many parties made extensive plans and strategic actions. Overturning *Kelo* will be costly for individuals, communities, and officials alike. *Kelo* should not be overturned, because not only does it align with previous Supreme Court holdings regarding takings, but it is consistent with related decisions, the quality of reasoning is logical, the rule is workable, and parties have relied on this decision.

Still, should the Court decide to overturn *Kelo,* the New Louisiana taking is still consistent with previous Supreme Court precedent. The Supreme Court has a history of deferring to the discretion of the legislature in determining the constitutionality of takings. More specifically, the Supreme Court has continued to define public use broadly using terms such as public end and public welfare. Thus, while *Kelo* articulates an important clarification in public

use precedent, because the New Louisiana taking is still supported by earlier precedent, *Kelo* is not indispensable in this case.

The Plaintiff lacks a cause of action because the Fifth Amendment Takings Clause is not self-executing. First, constitutional rights do not independently create causes of actions. Second, damages remedies, not the judiciary. Third, in previous Supreme Court takings cases, this Court has never awarded just compensation without a claim brought by another source of law. Fourth, Congress has never interpreted the Takings Clause as including an implied cause of action as shown by the statutory creation of other causes of action to support constitutional rights. Thus, the Fifth Amendment Takings Clause is not self-executing, and legislature action is required to create a cause of action.

Because the New Louisiana taking follows *Kelo* and other earlier precedent about "public use," the Fifth Amendment is not self-executing, and there is no cause of action supported by law, the plaintiffs have no claim for compensation and the complaint should be dismissed.

Argument

I. *Kelo* should not be overturned.

This Court should continue to rely on its decision in *Kelo v. City of New London*. 545 U.S. 469 (2005). This Court considers four factors when considering whether stare decisis allows it to overturn existing precedent: (1) consistency with related decisions, (2) quality of the reasoning, (3) workability of the rule, and (4) reliance on the decision. *Janus v. AFSCME, Council 31*, 585 U.S. 878, 917 (2018). There is a strong presumption in favor of adhering to precedent because it "promotes the evenhanded, predictable, and consistent development of legal principles . . . and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Stare decisis dictates that the *Kelo* decision be upheld

because it (1) adheres to this Court's long standing public use precedent, (2) follows logically from this Court's reasoning in its prior takings cases, (3) outlines a clear rule allowing the government to address public needs, and (4) has been relied on for nearly two decades.

A. Kelo *aligns with previously established public use precedent.*

The Fifth Amendment of the United States Constitution provides that no person's "private property be taken for public use, without just compensation." U.S. Const. amend. V., § 1. The Court's only responsibility is to determine whether there is a public use, and once that is determined, then it is within the legislature's discretion to determine whether the taking is reasonable. *Berman v. Parker*, 348 U.S. 26, 35–36 (1954).

The Supreme Court has found takings to be permissible for public use in many different circumstances, including those that involve transfer of property to private parties. In *Strickley v. Highland Boy Gold Min. Co,* the Court noted that the plaintiffs erred in concluding that because the taking was "solely for private use" the taking was unconstitutional. 200 U.S. 527, 530 (1906). Deferring to the state and its knowledge of a "local affair," the Court held that transferring the land to the mining company was permissible as a public use taking. *Id.* at 531. It also highlighted the inadequacy of "use by the general public as a universal test." *Id.* In *Berman v. Parker*, the Court held that taking real property "for redevelopment pursuant to a project area redevelopment plan" constituted a public use. 348 U.S. at 29. There, the District of Columbia's urban-renewal plan resulted in transferring title from property owners to private developers. *Id.* at 34–35. As to the public use requirement, the Court also explained that "the concept of the public welfare is broad and inclusive." *Id.* at 33. In *Hawaii Housing Authority v. Midkiff*, the Court stated that in determining the legitimacy of a taking for public use, "judicial deference is required because . . . legislatures are better able to assess what public purposes should be advanced . . . ." 467 U.S.

229, 244 (1984). The Court concluded that a "legitimate public purpose" was achieved by breaking up "concentrated property ownership," despite the fact that the property was transferred to private owners. *Id.* at 245.

In line with previous decisions, in *Kelo*, the Court similarly found economic development to not be outside the scope of public use. As in *Strickley*, property was transferred to private developers for the furtherance of a project that would benefit the public, even if not directly. In *Kelo*, the Court noted the creation of new jobs and increase in tax revenue that would occur because of the city's economic development plan in determining that the taking was for public use. *Kelo*, 545 U.S. at 472. More specifically, as in *Berman*, the Court in *Kelo* clarified that "there is no basis for exempting economic development from our traditionally broad understanding of public purpose." *Id.* at 485. The Court similarly deferred to the local government to assess appropriate public purposes.

In this case, the purpose of New Louisiana's development plan is "to contract with businesses to revitalize the economy by expanding the State's tourism attractions and creating new jobs." R. at 2–3. As in *Strickley*, the plan involves transferring property to a private party, Pinecrest, Inc., for the creation of a ski resort. R. at 2. However, here the public purpose is even clearer and more direct; unlike *Strickley*, where the permissible taking was allowed for the betterment of the mining company whose industry impacted the public, this project was created intentionally with citizens of the State in mind. This project will increase the area's tax revenue, increase property values, attract wealthy tourists, create 3,470 new jobs, and draw a larger work force. R. at 2. New Louisiana will also use fifteen percent of the tax revenue generated by the ski resort to "revitalize and support the surrounding community to ensure long-lasting benefits." *Id.* Similar to the redevelopment plan in *Berman*, this project involves transferring land to private

developers to advance public welfare in a way that the local government independently could not. The New Louisiana legislature created the development plan after assessing how to advance public purposes and revitalize its economy. R. at 1–2. Deference to their judgment is required. *Midkiff*, 467 U.S. at 244.

Not only is this taking permissible under prior Supreme Court precedent, but New Louisiana's development plan also adheres to *Kelo*. This Court has a "longstanding policy of deference to legislative judgments in this field" *Kelo*, 545 U.S. at 480. While New Louisiana's plan uses a private entity to provide a public benefit to its State's residents, as in *Kelo*, the primary purposes of this project include creating new jobs and increasing tax revenue through economic development. R. 1–2. New Louisiana's economic development plan aligns with Supreme Court precedent, including *Kelo*, permitting takings for public use as determined to be appropriate by state or local governments.

B. The Kelo *decision follows logically from earlier takings cases.*

In *Kelo*, the Court found that revitalizing the economy and promoting economic growth through private development served a legitimate government function and could be considered "public use," and that decision was not unprecedented. *Kelo*, 545 U.S. at 472.

Even before *Kelo*, earlier cases found that "public use" included traditional government functions that serve diverse legitimate public purposes. *See*, *e.g.*, *Strickley*, 200 U.S. at 531 (establishing or managing mining and railways); *Clark v. Nash*, 198 U.S. 361, 368–69 (1905) (facilitating agricultural irrigation); *Berman*, 348 U.S. at 33 (transforming a blighted area into a productive community through redevelopment); *Midkiff*, 467 U.S. at 245 (breaking up concentrated property ownership); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1015 (1984) (removing significant barriers to market entry).

Earlier takings cases did not limit use of eminent domain to actions that do not involve private parties. "[W]hat in its immediate aspect [is] only a private transaction may [] be raised by its class or character to a public affair." *Block v. Hirsh*, 256 U.S. 135, 155 (1921). This Court has held that "[i]t is not essential that the entire community, nor even any considerable portion . . . directly enjoy or participate in any improvement in order [for it] to constitute a public use." *Rindge Co. v. Los Angeles*, 262 U.S. 700, 707 (1923). It has recognized varied public purposes and goals that a taking may serve. The Court in *Berman* explicitly stated that it could not hold that "public ownership is the sole method of promoting the public purposes of community redevelopment projects." *Berman*, 348 U.S. at 33-34. Public uses "are not limited, in the modern view, to matters of mere business necessity and ordinary convenience, but may extend to matters of public health, recreation and enjoyment." *Id.*

To draw the line in defining public use to exclude economic development and revitalization would be inconsistent with this Court's previous decisions and its deference to legislative action. "Promoting economic development is a traditional and long-accepted function of government" and "[t]here is . . . no principled way of distinguishing economic development from the other public purposes that [the Court has] recognized." *Kelo*, 454 U.S. at 484. The *Kelo* decision follows logically from the takings cases before it.

As in *Kelo* and *Berman*, the properties in New Louisiana are being taken for redevelopment and to economically benefit the community and the State. R. at 1. The State contracted privately with Pinecrest, Inc. to build the resort, but the project's impact raises the private contract to a public affair. R. at 2. The Pinecrest resort is expected to increase the area's tax revenue, raise property values, attract wealthy tourists, create thousands of new jobs, and draw a larger work force to the community. *Id.* The project's long-lasting benefits are anticipated

to revitalize the area. *Id.* Precedent does not require that even a considerable portion of the population enjoy or participate in an improvement for it to be a public use, but, here, most, if not all, of the public will benefit from the resort's creation. Because economic development is a traditional function of the government, New Louisiana's development plan qualifies as a public use.

C. Kelo *establishes a clear rule that allows governments appropriate flexibility in interpreting "public use" to address public needs.*

Kelo set a clear rule that aligns with this Court's precedent and allows governments appropriate deference in addressing public needs. It established that use of eminent domain to transfer property to a private party for economic development was a valid "public use" if it is "rationally related to a conceivable public purpose." *Kelo*, 545 U.S. at 490 (Brennan, J., concurring) (citing *Midkiff*, 467 U.S. at 241).

Recognizing that societal needs vary between regions of the country and may evolve in response to changing circumstances, this Court has emphasized the "great respect" owed "to legislatures and state courts in discerning local public needs." *Kelo*, 454 U.S. at 482. *See also Old Dominion Land Co. v. United States*, 269 U.S. 55, 66 (1925) ("We shall not inquire whether this purpose was or was not so reasonably incidental . . . as to warrant the taking."). When they determine that "there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use." *Midkiff*, 467 U.S. at 244.

The concept of public welfare, or public use, is "broad and inclusive." *Berman*, 348 U.S. at 33. When a state court or legislature has determined that a public need exists, its plans "should not be made impossible by the refusal of a private owner to sell . . . and the Constitution of the United States does not require [the Court] to say that they are wrong." *Strickley*, 200 U.S. at 531. In determining what qualifies, legislatures make "determinations that take into account a wide

variety of values" that are not for the Court to reappraise. *Berman*, 348 U.S. at 33. Those values are not strictly limited and, for example, can be "spiritual as well as physical, aesthetic as well as monetary." *Id.* It is not for the Court to consider whether the taking is necessary. *Id.*

By not excluding economic development from its "traditionally broad understanding of public purpose," *Kelo* avoided contradicting past precedent and preserved the ability of state and local governments to use their discretion in applying the public use doctrine, so long as they do so in the pursuit of a public purpose. *Kelo*, 545 U.S. at 485. The rule in *Kelo* is clear and practical and should be upheld.

D. Kelo *has been consistently relied upon for almost two decades.*

States and federal courts across the country have relied on the Kelo decision for nearly two decades. It has been cited in this Court in cases pertaining to eminent domain and public use as well as other doctrines. *See*, *e.g.*, *Eychaner v. City of Chicago, Ill.*, 141 S. Ct. 2422 (2021) (Thomas, J., dissenting to denial of certiorari) (challenge to a city's use of eminent domain power to transfer property to a private company).

Federal appellate courts have also relied on and cited *Kelo* in their decisions interpreting public use and determining the proper amount of deference to legislative decisions. *See*, *e.g.*, *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008) (challenge to condemnation of property for sports arena and related development); *Fideicosmiso de la Tierra del Cano Martin Pena v. Fortuno*, 604 F.3d 7, 26 (1st Cir. 2010) (asserting takings claim against revocation of lands title in canal); *Brody v. Vill. of Port Chester*, 434 F.3d 121, 135 (2d Cir. 2005) (challenging property condemnation); *Whittaker v. Cnty. of Lawrence*, 437 F. App'x 105, 107 (3d Cir. 2011) (challenging redevelopment authorities' use of eminent domain); *Dahlen v. Shelter House*, 598 F.3d 1007, 1011 (8th Cir. 2010) (alleging a taking for construction of an adjacent homeless shelter); *Hillcrest Prop., LLP v. Pasco Cnty.*, 915 F.3d 1292, 1301 (11th Cir. 2019) (challenging

county ordinance requirements for development permits); *McCutchen v. United States*, 14 F.4th 1355, 1363 (Fed. Cir. 2021) (asserting takings claim for rule established by Firearms Owners' Protection Act); *W. Seafood Co. v. United States*, 202 F. App'x 670, 674 (5th Cir. 2006) (challenging condemnation of waterfront property for construction of private marina); *MHC Fin. Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118, 1129 (9th Cir. 2013) (challenging rent regulation ordinance as a taking).

States courts have also made decisions and established precedent based on the *Kelo* decision. *See*, *e.g.*, *Utah Dep't of Transp. v. Carlson*, 332 P.3d 900, 906 (Utah 2014) (challenging department of transport eminent domain use); *Carousel Farms Metro. Dist. v. Woodcrest Homes, Inc.* 442 P.3d 402, 412 (Colo. 2019) (challenging condemnation of a lot for subdivision); *State ex rel. Jackson v. Dolan*, 398 S.W.3d 472, 477 (Mo. 2013) (challenging port authority use of eminent domain).

Additionally, as the *Kelo* opinion made clear, "nothing precludes any State from placing further restrictions on its exercise of the takings power." *Kelo*, 545 U.S. at 489. In response to *Kelo*, many states have amended their Constitutions or passed additional legislation to regulate eminent domain within their jurisdictions. *Kelo* fits within the framework that it has helped to shape over the past nineteen years and should be upheld.

E. If this Court does overturn Kelo*, pre*-Kelo *precedent establishes that a taking for a "public use" is permissible when it serves a public purpose and promotes the public welfare.*

1. Pre-*Kelo* Meaning of Public Use

Should this Court overturn *Kelo*, the definition of a permissible taking for public use would remain largely consistent. *Kelo* denied adopting a universal test to determine the adequacy of property used by the public. *Kelo*, 545 U.S. at 480, 487. Before the *Kelo* decision, this Court

interpreted "public use" broadly, looking at the facts of each case with deference to the legislature. Permissibility of a taking for "public use" is determined by deciding whether the taking is a means to a public purpose or public welfare end. *See Berman*, 348 U.S. at 32–34; *Strickley*, 200 U.S. at 531; *Midkiff*, 467 U.S. at 244.

First, this Court has historically defined "public use" broadly. When determining the permissibility of a taking in Berman, the Court concluded that "the concept of the public welfare is broad and inclusive." *Berman*, 348 U.S. at 33. The *Berman* Court clarified that some examples of permissible public use are but are not limited to "public safety, public health, morality, peace and quiet, law and order," as well as renovating areas that are "an ugly sore" on a community's charm. *Id.* at 32. This extensive list illustrates the inclusiveness of judicial interpretation of the term "public use."

Additionally, after permitting a land transfer to private developers, the Court concluded that public ownership is not "the sole method of promoting the public purposes of community redevelopment projects." *Id.* at 34. Rather, "once the public purpose has been established" by Congress, the specifics of the eminent domain are "merely means to the end." *Id.* at 33.

The *Strickley* decision similarly highlights the importance of considering "public use" in terms of the end public purpose rather than the means of eminent domain. *See Strickley*, 200 U.S. at 531. The Court explained that "[i]n discussing what constitutes a public use, it recognized the inadequacy of use by the general public as a universal test." *Id.* Further, "the public welfare of the state . . . should not be made impossible by the refusal of a private owner . . . ." *Id.* In *Strickley*, the public welfare end resulted in transferring land to a mining company to build aërial lines between its railways and mines. *Id.* Additionally, the Court in *Midkiff* explained that a taking is permissible under the Fifth Amendment as for public use as long as "the eminent

domain is rationally related to a conceivable public purpose . . . .” *Midkiff*, 467 U.S. at 241. In this case, redistributing land to private individuals was permissible, because of the public purpose of “correct[ing] deficiencies in the market determined by the state legislature to be attributable to land oligopoly . . . .” *Id.* at 243.

Even prior to *Kelo*, this Court has repeatedly expressed the need for judicial deference when considering whether a taking is permissible for a “public use.” In *Berman*, the Court explained that the legislature has the power to determine “that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.” *Berman*, 348 U.S. at 102–103. The *Berman* Court advised that the Court has no business “reapprais[ing]” values the legislature has already determined. *Id.* at 103. In *Midkiff*, the Court concluded that “if a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use.” *Midkiff*, 467 U.S. at 244. There, the Court deferred to the legislature’s judgment on how to best improve market deficiencies. *Id.* at 243. In determining whether an exercise of eminent domain is a permissible public use taking, the Court has repeatedly exercised judicial deference.

2. Meeting the Pre-*Kelo* Standard

To meet this Court’s pre-*Kelo* standard for permissible application of the public use doctrine, New Louisiana’s economic development plan must have a public purpose and promote the public welfare. *See Berman* 348 U.S. at 32–34; *Strickley*, 200 U.S. at 531; *Midkiff*, 467 U.S. at 244. The New Louisiana legislature passed this act in order to “revitalize the economy” by creating new jobs and increasing the State’s tourism. R. at 1–2. Additionally, this plan is projected to “dramatically increase tax revenue,” fifteen percent of which will be “used to revitalize and support the surrounding community to ensure long-lasting benefits.” R. at 2.

Creating new jobs, increasing tax revenue, and funding the surrounding community likely qualify as being "rationally related to a conceivable public purpose." *Midkiff*, 467 U.S. at 241. Like the project in *Berman* where the goal was to redevelop and improve the area, here, the primary purpose of New Louisiana's plan is to revitalize the economy. R. at 1. Improving an area and revitalizing an economy are both legislative actions to promote the public interest because they provide benefits to the community.

The development plan's planned construction of a private ski resort does not disqualify it from being a public use. R. at 2. As this Court explained in *Strickley*, it would be an inadequate universal test to equate the constitutional public use requirement to use by the general public. The decision to construct the ski resort was merely a means to the economic end of revitalization and was planned with that goal in mind. R. at 2. The Pinecrest ski resort is similar to the mining company's aïrial lines in *Strickley*, because the general public will not have access, but is also a means to the end of promoting the public welfare.

Lastly, the New Louisiana project resulted from the legislature trying to fix an economic need through eminent domain. The legislature in *Midkiff* also permissibly exercised eminent domain transferring land ownership to private parties to correct a deficiency in the market. Here, the deficiency in the market is the lack of marketable crops from the family-owned farms and the legislature similarly seeks to exercise eminent domain by allowing the construction of a tourism attraction to correct that deficiency in New Louisiana's economy. R. at 3.

Thus, because the New Louisiana economic development plan is rooted in the public purpose of economic revitalization and community growth, it follows this Court's pre-*Kelo* public use and takings precedent and should be upheld.

II. The Fifth Amendment Takings Clause is not self-executing and does not create an implied cause of action.

The Takings Clause is not self-executing because (1) constitutional rights are defenses that do not themselves create causes of action, (2) provision of remedies for rights violations is the responsibility of legislatures, (3) this Court has never awarded just compensation without a claim brought by another source of law, and (4) as reflected by the statutory creation of a cause of action in the 28 U.S. Code § 1491 ("Tucker Act") and 42 U.S.C. § 1983, Congress views the Takings Clause as not including an implied cause of action. If a taking did occur, then Petitioners are constitutionally entitled to just compensation, but the question at issue is who decides how the sovereign state meets this obligation. It is the responsibility of the legislature, not this Court, to provide for a damages remedy.

A. Constitutional rights are defenses that do not create implied causes of action.

Although this Court has not explicitly resolved whether the Fifth Amendment is self-executing, it has held that constitutional rights are defenses and do not themselves create causes of action. *See Devillier v. Texas*, 601 U.S. 285, 292 (2024); *Egbert v. Boule*, 596 U.S. 482, 490–91 (2022).

This Court has implied causes of action under the Constitution in only three cases, the "*Bivens* claims." *See Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (claim against federal officers who allegedly violated Const. rights under the Fourth Amendment); Davis v. *Passman*, 442 U.S. 228 (1979) (sex-discrimination claim under the Fifth Amendment); *Carlson v. Green*, 446 U.S. 14 (1980) (prisoner's inadequate-care claim under the Eighth Amendment). Recognition of causes of action under Bivens is "a disfavored judicial activity." *Ziglar v. Abbasi*, 582 U.S. 120, 135 (2017). Beyond the three currently existing Bivens claims, this Court has not "implied additional causes of action under the Constitution" because "creating a cause of action is a legislative endeavor." *Egbert,* 596 U.S. at 491. The Court has restricted *Bivens* claims only to cases that are factually like one of the three cases above. *Id.*

This Court has intentionally limited judicial creation of causes of action to Bivens claims, and a takings claim does not qualify under those criteria. Here, New Louisiana state law authorizes the State to condemn property for economic development and requires waiver of sovereign immunity to receive just compensation. R. at 2. However, the State did not waive immunity for this taking, and no other law provides the plaintiffs with a cause of action for compensation. R. at 2, 8.

B. Responsibility for providing damages remedies belongs to legislatures.

The Takings Clause is not self-executing and responsibility lies with the legislatures to determine the means and methods of fulfilling its constitutional obligations. Assertion of an implied cause of action under the Constitution itself necessarily implicates principles of separation-of-powers. *Ziglar*, 582 U.S. at 135–36. This Court has held that most often the legislature is better equipped than the courts to provide for a damages remedy. *Id.*

The Takings Clause establishes an immediate governmental responsibility to provide just compensation for a taking without requiring additional legislation, but it does not remove a legislature's authority to determine how the government will satisfy its obligation. *See First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 482 U.S. 304, 315–316 (1987).

The proper application of eminent domain is a subject of public debate. While, on the surface, it may seem troubling that, without an implied cause of action, the rights of an individual require legislative action to establish a means of restitution, this is unlikely to be the case. When this Court's decisions in the past clarified the meaning of constitutional language, revealing potentially negative results for property owners, many states properly exercised their authority and responded by adjusting their laws to reflect the preferred meaning or requirements

for exercise of eminent domain.[1] *See*, *e.g.*, Ala. Code § 11-47-170 (2005); Conn. Gen. Stat. § 8-193 (2007); Minn. Stat. § 117.025 (2006) (collecting examples). As the Court in *Kelo* highlighted, the "necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate." *Kelo*, 545 U.S. at 489. This question should be preserved for the legislatures and their constituents to discuss and address.

C. *This Court has never awarded just compensation without a claim brought by another source of law.*

This Court has never awarded just compensation without a claim brought under another source of law. *DeVillier*, 601 U.S. at 288. Compensation has, however, been awarded under other federal or state statutes. *See Knick v. Twp. of Scott*, 588 U.S. 180, 192 (2019) (claim brought under § 1983); *First Eng. Evangelical Lutheran Church v. Cnty. of L.A.*, 482 U.S. 304, 308, 315 (1987) (claim brought under state inverse condemnation law); *DeVillier*, 601 U.S. at 288 (claim compensation brought solely under the Takings Clause, but state law did provide a remedy).

This Court has provided equitable relief in cases brought under claims not created by another source of law, but equitable relief and just compensation are not synonymous. See *Dohany v. Rogers*, 281 U.S. 362, 364 (1930); *Norwood v. Baker*, 172 U.S. 269, 276 (1898). A claim for just compensation seeks money (and requires fair market value), not equitable relief. *United States v. Miller*, 317 U.S. 369, 374 (1943). Additionally, equitable remedies are granted only in unique circumstances that make monetary compensation inadequate. *Ruckelshaus*, 467

[1] After this Court's decision in *Kelo*, many states took action to restrict the meaning of "public use" to prevent similar results by passing additional legislation or amending state constitutions. *See Eminent Domain: State Constitutional Amendments Post-Kelo*, Institute for Justice, https://ij.org/issues/private-property/eminent-domain/?option=com_content&task=view&id=2412&Itemid=129 (last visited Oct. 19, 2024).

U.S. at 1016. These differences justify the Court's treatment of equitable relief versus just compensation.

Here, the plaintiffs cannot be awarded just compensation without another legislative source for a cause of action. They seek just compensation under the Fifth Amendment without any other claim under another source of law. R. at 8. Unlike *Dohany* or *Norwood*, their claim is for monetary compensation, not equitable relief. R. at 3. Thus, this Court's history of awarding just compensation only when a claim is brought under another law requires that their claim be denied.

D. Congress has not interpreted the Takings Clause as including an implied cause of action.

As reflected by the statutory creation of causes of action in both the Tucker Act and 42 U.S.C. § 1983, Congress has not viewed the Takings Clause as including an implied cause of action against federal, state, or local governments.

The Tucker Act and § 1983 both waived sovereign immunity and created avenues to pursue legal remedies for civil rights violations, including under the Takings Clause, against both federal and state or local governments. *See United States v. Great Falls Mrg. Co.*, 112 U.S. 645, 657 (1884) (creating claim for property owners to obtain compensation); *Felder v. Casey*, 487 U.S. 131, 139 (1988) (creating a "species of liability in favor of persons deprived of their federal civil rights by those wielding state authority"); *Burnett v. Grattan*, 468 U.S. 42, 55 (1984) (state law establishing administrative process for resolving employment discrimination complaints). Before the Tucker Act, claims for compensation from the federal government could be made only via private requests and acts of Congress. *Lib. of Cong, v. Shaw*, 478 U.S. 310, 316 n.3 (1986).

The Tucker Act and § 1983 authorize claims against violations of federal constitutional rights. The Tucker Act created and granted the US Court of Federal Claims "jurisdiction to render judgment upon any claim against the United States founded . . . upon the Constitution . . . or upon any express or implied contract with the United States . . . ." 28 U.S. Code § 1491(1). Similarly, 42 U.S. Code § 1983 states that any person who causes the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." While the constitutional rights that these statutes seek to enforce existed before, the creation of these statutes demonstrates that Congress did not recognize an implied cause of action and found it necessary to create one.

The Fifth Amendment Takings Clause is not self-executing and only provides a right to sue for just compensation if a cause of action is provided by another source of law. To find otherwise would go beyond the judiciary's responsibility "to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

Conclusion

For the reasons above, the Court should uphold the lower court's decision, upholding *Kelo* and declining to judicially create a new cause of action.

Respectfully submitted,
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October 21, 2024