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 22

Counsel for Respondents

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES:

UNITED STATES CIRCUIT COURT CASES:

STATE CASES:

STATUTES:

OTHER AUTHORITIES:

CONSTITUTIONAL PROVISIONS:

QUESTIONS PRESENTED

I. Whether *Kelo v. City of New London* should be upheld under the Fifth Amendment, given that economic development is a well-established role of the government.

II. Whether the Taking's Clause is self-executing even though constitutional rights rarely form stand-alone causes of action, and the separation of powers embedded in the Constitution suggests that Congress is the proper party to create federal causes of action.

STATEMENT OF THE CASE

This case is about the Fifth Amendment's Takings Clause and the role of the judiciary in policing a sovereign state's eminent domain procedures.

A. Factual Background

The Pinecrest Project. In March of 2023, the State of New Louisiana contracted with Pinecrest, Inc. to build a ski resort near the capital to draw in tourists and boost the economy. R. at 2. Governor Anne Chase executed this contract under the New Louisiana Economic Development Act, which gives the governor "the power and funds to contract with businesses to revitalize the economy." R. at 1. The State legislature passed this act to expand tourism and create new jobs. R. at 2.

The project is expected to provide thousands of jobs, dramatically increase tax revenue, and attract wealthy tourists to the area. R. at 2. The project will also benefit the economy in three ways. First, business owners will see an influx of wealthy tourists. R. at 2. Second, new workers are expected to move to the area as demand for labor increases. R. at 2. Third, the ski resort will increase property values. R. at 2. On top of this, fifteen percent of the ski resort's tax revenue will be used to "revitalize and support the surrounding community." R. at 2. This support will ensure long-lasting benefits to the area. R. at 2.

The Holdouts. To complete this project, the State requires one thousand acres of land owned by one hundred different owners. R. at 2. Ninety of the landowners have sold their land to assist with the project. R. at 2. Ten holdout property owners refuse to sell their land. R. at 2.

The ten holdouts have similar backgrounds. R. at 2. Most of their properties are small and ancestral, with homes that have been passed down for multiple generations. R. at 2. The holdouts raise complaints about losing their ancestral homes, as well as finding comparable homes they can

afford. R. at 2-3. Some of the holdout's homes have become worn down over time and are in poor condition. R. at 2. Many of the farms have struggled to produce marketable crops. R. at 2. This is because of poor soil conditions, which depletes the value of the farmland. R. at 2.

The main holdout is Karl Fischer, whose family has owned their farm for 150 years. R. at 3. Fischer and the other nine holdouts refuse to sell their land due to sentimental attachment to the property. R. at 3. In March of 2023, the State allowed Pinecrest to begin construction on the ninety properties that were already sold and initiated eminent domain proceedings against the ten holdouts. R. at 3. New Louisiana law provides that a statutory or executive waiver of sovereign immunity is required for a property owner to obtain just compensation for a taking. *See* NL Code § 13:5109. R. at 2. The State initiated eminent domain proceedings and notified the holdouts that New Louisiana law guarantees no right to compensation outside of working with the State. R. at 3. The holdouts filed suit days later. R. at 3.

B. Procedural History

The District Court. The holdouts sued the State of New Louisiana on two grounds. R. at 3. First, they sought a temporary and permanent injunction against the State under the Fifth and Fourteenth Amendment. R. at 3. The holdouts argued that the project violated the Takings Clause because takings for economic development are inconsistent with the meaning of "public use." R. at 3-4. Second, the holdouts sued for just compensation under the Fifth Amendment for any takings that might occur. R. at 3-4. To support this alternative claim, the property owners theorized that the Fifth Amendment Takings Clause is self-executing because just compensation is a constitutionally mandated remedy. R. 4.

The State of New Louisiana filed a motion to dismiss these claims under Rule 12(b)(6) on two grounds. R. at 3. First, the State asserted that the project qualifies as public use under the

Takings Clause because *Kelo v. City of London*, allows for economic development takings. R. at 3. Second, the State argued that the property owners failed to bring a cause of action upon which relief could be granted because the Fifth Amendment is not self-executing. R. at 3. Rather it is statutes that provide the cause of action for just compensation in takings cases, and no such statute applies here. R. at 3-4.

The district court granted the motion to dismiss, agreeing with the State that economic development is a valid public use and that the Fifth Amendment is not self-executing. R. at 4.

The Court of Appeals. The United States Court of Appeals for the Thirteenth Circuit affirmed the district court's judgment. R. at 9. The appellate court held that the taking was valid under *Kelo v. City of New London*, and that the Fifth Amendment is not self-executing. R. at 11. Judge Hayes agreed with the majority's holding on both issues but wrote separately in a concurrence to explain why the Court should maintain *Kelo v. City of New London's* public use precedent. R. at 11. Judge Willis wrote a concurrence in part, stating that the Court should overrule *Kelo*, and a dissent in part, stating that the district court's holding that the Takings Clause is not self-executing should be reversed. R. at 14.

SUMMARY OF THE ARGUMENT

I

The lower courts properly granted New Louisiana's motion to dismiss, as the Pinecrest Project is a valid public use of the Takings Clause under *Kelo v. City of New London*. When this Court ruled in New London's favor in *Kelo*, this Court combined a century of precedent into one simple standard—that takings for economic development are a valid public use under the Fifth Amendment. The Petitioners argue that *Kelo* is unconstitutional and that the Pinecrest Project

cannot go forward as a result. This brief will show why *Kelo* is good constitutional law per the *Dobbs* factors, and therefore the Pinecrest Project should proceed.

First, *Kelo* has quality reasoning because it strikes the proper balance of power federalism demands. Economic development is a political issue, not a judicial one, and *Kelo* holds that issues of economic development are best left to the legislature. ***Second***, *Kelo* is workable because it is consistent, predictable, and allows legislatures to properly exercise their police powers. *Kelo* was born from a notoriously unworkable standard, and this Court has no reason to impose the previous flawed standard again. ***Third***, *Kelo* is the natural culmination of a century of jurisprudence. The precedent will show the Court deferring to the legislature and expanding the previous "use by the public" test into a public purpose. The Court cannot overturn *Kelo* without threatening this vital precedent. ***Fourth***, hundreds of courts have relied on *Kelo* to resolve eminent domain disputes and millions of dollars of economic development have been generated because of *Kelo*. Stare decisis and federalism demand that *Kelo* be upheld.

New Louisiana will show that the Pinecrest Project meets the *Kelo* standard. The project is comparable to that in *Kelo*—and because the Court should uphold *Kelo*, the Court should allow the project to go forward. While the *Kelo* decision has been met with public disagreement, the legislature is the proper party to deal with public outcry—not the Courts.

II

The lower courts properly granted New Louisiana's motion to dismiss the Petitioners' alternative claim, as the Fifth Amendment Takings Clause is *not* self-executing, and thereby does *not* create an implicit cause of action for just compensation. Instead, constitutional text, legislative history, and judicial precedent all point to who holds the authority to create such causes of action:

Congress. This brief will show why the Takings Clause is not self-executing and why interpreting otherwise would needlessly interfere with legislative authority.

First, the Takings Clause is not self-executing because no modality of constitutional interpretation indicates that the Clause creates a cause of action. In fact, the first chance that the Court had to definitively make this interpretation, it avoided to do so. Rather, separate sources of law, like the Tucker Act, 28 U.S.C. § 1491, or 42 U.S.C. § 1983, are necessary for the right to sue for just compensation. Yet, Congress has not enacted a federal statute that permits private takings claims against the states in federal court.

Second, holding that the Takings Clause is self-executing needlessly interferes with legislative authority to create a federal cause of action. The Court rightfully refuses to create constitutional damages remedies. If there is *any* reason (even one) to think that Congress is in a better position to create such remedies, the Court must resist the urge to usurp Congress' power to create one. There are two reasons why Congress is more equipped than the Court to create constitutional damage remedies. One reason is because there is an alternative remedial structure through § 1983. Secondly, courts would have to navigate a flood of systemwide consequences without legislative direction. Petitioners needlessly place this Court in a position that threatens federalism and the separation of powers, as there are other avenues of recourse available.

This Court should affirm the judgment of the United States Court of Appeals for the Thirteenth Circuit.

ARGUMENT

Standard of Review. The respondents in this case do not dispute the facts. This case involves a question of law in a 12(b)(6) motion. The standard of review for questions of law is de novo. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

I. THE COURT SHOULD UPHOLD *KELO* BECAUSE ECONOMIC DEVELOPMENT IS VALID UNDER THE TAKINGS CLAUSE AND THE COURT SHOULD DEFER TO THE LEIGSLATURE IN ECONOMIC DECISIONS.

This case involves a political issue, not a judicial one. Balancing the interests of the property owners and the public is a highly charged political issue that is rightfully left to the legislature—not the courts. The Court has recognized this throughout the last century and has no reason to break precedent now.

The petitioners present a deeply sympathetic case that all can empathize with. They make compelling arguments that the Pinecrest Project is unfair. But petitioners fail to note that it is unfair for ten holdouts to prevent thousands of their neighbors from a thriving economy. Both sides can argue that why ruling against them is "unfair." But there are no winners in the game of fairness. Fairness is too nebulous a concept for courts to apply consistently and predictably. The Court knows this, and instead of judging fairness, the Court judges constitutionality. The Pinecrest Project is constitutional under *Kelo*, and complaints about the efficacy of economic policy or the inconvenience to the landowners should be made via political processes—not judicial ones.

This argument is divided into two parts: A) why *Kelo* was decided correctly and B) why the Pinecrest Project meets the *Kelo* standard.

A. *Kelo* Should not be Overturned Because None of the Requisite Factors to Overturn Supreme Court Precedent are Satisfied.

The appellate court referred to the *Dobbs* factors to determine if *Kelo* should be overturned. R. at 11. The *Dobbs* decision outlined several considerations on overturning precedent: 1) quality of the reasoning, 2) workability of the rule, 3) consistency with other related decisions, and 4) reliance on the decision. *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 220 (2022). These factors aim to balance conflicting interests and rights when resolving constitutional issues. After analyzing these factors, this Court will see that *Kelo* should be upheld.

1. *Kelo* has quality reasoning because it logically follows precedent and the Framer's intended scope of state sovereignty.

The history of the Takings Clause shows a common theme: deference to the legislature. This consistency reflects the correct balance of power that federalism demands. The separation of powers was carefully crafted to ensure that no branch of government became too powerful and overtook another branch—or the will of the people. *See generally* The Federalist No. 51 (James Madison). One example of the separation of powers is the legislature's police powers: those that promote the public health, safety, morals, and welfare. *Lochner v. New York*, 198 U.S. 45, 53 (1905).

States have broad discretion in the exercise of their police powers based on the needs of the people. The police powers are not stagnant but adapt with society. Regarding the police powers, courts have noted that

> What was at one time regarded as an improper exercise of the police power may now, because of changed living conditions, be recognized as a legitimate exercise of that power. This is so because: "What was a reasonable exercise of this power, in the days of our fathers may to-day seem so utterly unreasonable as to make it difficult for us to comprehend the existence of conditions that would justify same; what would by our fathers have been rejected as unthinkable is to-day accepted as a most proper and reasonable exercise thereof."

Miller v. Bd. of Pub. Works, 234 P. 381, 383 (Cal. 1925) (citing *Streich* v. *Bd. of Edu.*, 34 S. D. 169, 175 (S.D. 1914)).

One vital way that states pursue these police powers is through the economy. In *Berman v. Parker,* the Court held that economic development falls within the State's police powers. *Berman v. Parker*, 348 U.S. 26, 32 (1954). Further, "the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established." *Id.* at 33. If the Court imposed a limitation against economic development, the Court would handicap state governments from pursuing their constitutionally designed police powers.

Kelo's deference to the legislature is also proper because it recognizes the tension between elected and unelected power. Federal courts consist of unelected judges that have the power to overturn decisions and rules of elected officials. This creates a strain between the will of the people and the law. Courts must respect this balance by refraining from overturning legislative decision unless the Constitution calls for it. This need for balance applies to the public use doctrine, as a court should be unwilling to "substitute its judgment for a legislature's judgment as to what constitutes a public use." *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (referring to *United States v. Gettysburg Electric R. Co.*, 160 U.S. 668, 680 (1896)).

When an elected official makes a poor policy decision, the public has the power to vote that official out of office. *See Printz v. United States,* 521 U.S. 898, 957 n. 18 (1997) (Stevens, J., dissenting) ("to the extent that a particular action proves politically unpopular, we may be confident that elected officials charged with implementing will be quite clear to their constituents where the source of the misfortune lies"). Not so with the judiciary. The unelected judiciary retains power even if the decision wreaks havoc on the people. Therefore, one of the tenets of being in the judiciary is to defer to the legislature for policy decisions, especially economic decisions that are felt by all. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) ("the responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones").

Courts do not need to police the legislature from abusing their eminent domain power because elected officials naturally police themselves. If the government repeatedly used eminent domain unnecessarily, that government would quickly grow unpopular with the constituents. This unpopularity would be detrimental to any political candidate. This reality leads legislatures to either 1) refrain from abusing eminent domain power or 2) be voted out of office when they use

eminent domain improperly. This is a natural check on the legislature from abusing their power, and the Court does not need to artificially check the legislature's power by reviewing public policy.

If the judiciary strikes down *Kelo* based on their interpretation of economic development or public policy, the Court runs the risk of Lochnerizing the matter. *See* William M. Wiecek, Liberty Under Law: The Supreme Court in American Life 125 (1988). If the Court overturns a legislative decision based on an intuitive sense on what is good or bad public policy, the Court becomes unstable to whatever political matter comes before the Court—or whatever political minds sit on the bench.

Under the principle of stare decisis, the Court should conform to prior decisions unless the prior decisions are blatantly false or unjust. *See* William Blackstone, Commentaries *47 (describing precedent as a "permanent rule," which judges should not deviate from due to personal opinion). There is nothing false or unjust about *Kelo*. Economic development is well within the police powers of the State, and states may legislate how they see fit to reach those ends.

2. *Kelo* is workable because it is properly applied in a consistent manner.

Workability requires that the decision be easily understood and applied in a consistent and predictable manner. *Dobbs*, 597 U.S. at 220. *Kelo* is workable because it created a straightforward and constitutionally sound standard that courts have applied for nearly two decades.

Kelo once again shows the level of deference the judiciary should grant the legislature in policy decisions. This deference has limits, which *Kelo* properly recognizes. *Kelo* provides that takings cannot occur for a purely private purpose. *See Kelo v. City of New London*, 545 U.S. 469, 477 (2005). It is well known that eminent domain cannot be used to confer a purely private benefit on a private party. *See Midkiff,* 467 U.S at 245. But just because property is given to a private party

does not mean that the property will only serve a private purpose. The Court has wisely noted that this reading of the public use doctrine would be too narrow. *Id*. Governments understand that sometimes the most efficient way to convey a public benefit is through private parties.[1] Because of this, *Kelo* allowed for a "broader and more *natural* interpretation of public use as 'public purpose.'" *Kelo*, 545 U.S. at 480 (citing *Fallbrook Irrigation Dist*. v. *Bradley*, 164 U.S. 112, 158-164 (1896), 41 L. Ed. 369, 17 S. Ct. 56 (1896)) (emphasis added).

Kelo has been met with opposition—arguing that while *Kelo* is workable, the decision's workability only arises because the decision is wrong. They will argue that the previous "use by the public" test was the correct measure of whether eminent domain is appropriate.[2] The opposition also states that because the decision was so unsound, many state courts have circumvented or abandoned *Kelo* via legislation or amendments to their constitutions, stating that economic development is not a valid reason for a taking. These arguments fails for several reasons.

First, the original meaning of the Takings Clause is more expansive than the opposition proposes. The proponents of the "use by the public" test often give conclusory arguments that the Framer's originally intended the Takings Clause to be narrow. This proposition has been met with a robust scholarly response, with historian Buckner Melton stating that "the original American concept, which appeared in colonial, revolutionary, and early national days [was] that… 'public

[1] During the COVID-19 pandemic, the Mayor of Mount Pleasant, South Carolina, asked the local Chick Fil A manager to assist in speeding up traffic lines to get COVID-19 vaccinations after seeing delays. Mayor Haynie wrote in a tweet regarding the matter "When you need help, call the pros." Talia Kaplan, *SC mayor calls on Chick-Fil-A to help with COVID vaccine traffic backup: 'Call the Pros,'* (Jan. 27, 2021, 9:03 AM), https://www.foxnews.com/lifestyle/chick-fil-a-manager-helped-his-community-when-it-mattered-most-sc-mayor.

[2] The use by the public test holds takings under the Fifth Amendment are only valid if they are for literal use by the public; for example, condemnation of land for a railroad with common-carrier duties would be a proper use by the public. *Kelo,* 545 U.S. at 472.

use' actually meant public benefit—of almost any conceivable kind." Buckner F. Melton, Jr., *Eminent Domain, "Public Use," and the Conundrum of Original Intent*, 36 Nat. Resources J. 59, 85 (1996). Buckner is not alone. Professor of property law William Stoebuck writes, "It is doubtful that the draftsmen [of the Fifth Amendment] thought condemnation could only be for the literal use of the public." William Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 589 (1972). The history of the Takings Clause is not black and white, but shades of grey.

Second, the argument that the "use by the public" test is the proper measure of the Fifth Amendment's Takings clause hurts rather than helps the opposition's case. The previous "use by the public" test was notoriously unworkable, which led to the development of the current "public purpose" test. The "use by the public" test held that the only valid use of eminent domain was if the taking would result in public ownership. *See Midkiff*, 467 U.S. at 244. The Framers drafted the Takings Clause against a background of "a concept of property which permitted extensive regulation of the use of that property for the public *benefit*…" *Lucas v. South Carolina Costal Council,* 505 U.S. 1003, 1056 (1992) (emphasis added). Courts in the early 1900s found that the inadequacy of the use by the public test had been "well-established." *Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power. Co,* 240 U.S. 30, 32 (1916). The great jurist Oliver Wendell Holmes, stressed the "inadequacy of the use by the general public as a universal test." *Strickley v. Highland Boy Mining Co.,* 200 U.S. 527, 531 (1906). The current public purpose test was only developed in response to the shortcomings of the "use by the public" test. The test the opponents propose is the very reason that the current standard was developed.

Kelo is workable because it properly expanded the overly restrictive scope of the "use by the public" test to an accessible standard. States can now utilize eminent domain to pursue their police powers to the extent that the takings provide a public benefit.

3. *Kelo* is consistent with related decisions because it is the natural culmination of a century of prior jurisprudence.

Kelo was not a revolutionary decision. *Kelo* did not overhaul centuries of jurisprudence to drastically expand the public use doctrine. Instead, the *Kelo* standard developed naturally from a series of significant decisions over the previous century. *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112 (1896); *Berman*, 348 U.S. 26; *Midkiff*, 467 U.S. 229.

The first noteworthy time the Court interpreted "public use" to include "public purpose" was in 1896. *See Fallbrook Irrigation Dist.*, 164 U.S. 112. In *Fallbrook Irrigation Dist.,* California faced a dilemma: impose a property tax to allow for the development of irrigation systems that would privately benefit farmers, or not impose the tax and let the arid lands lay waste. *See Id.* at 160. The State imposed the tax. *Id*. Mrs. Bradley, a landowner within the irrigation district, believed the tax was unconstitutional because the tax would take money from private landowners and distribute it to other private landowners. *Id.* at 151. After Bradley refused to pay, the district enforced the collection by the sale of her land. *Id*. Seeing the dire need for water to arid lands, the Court held that while the irrigation system may not be used by everyone paying the tax, the overall need for economic development necessitated the tax. *Id.* at 160. Even though the irrigation system was for private individuals (farmers) and not the general public, the development of arid lands was a necessity. *Id.* at 161. The Court even stated that if a landowner received more water than he needed, that the landowner could sell the excess water for a profit, thereby privately benefiting from a public good. *Id.* at 162.

This development in the Takings Clause spurred a series of decisions fleshing out the boundaries of eminent domain. The case of *Berman v. Parker* developed that once a public purpose had been established, the method in which the public purpose would be pursued is for the legislature alone to decide. *Berman*, 348 U.S. at 33. In *Berman*, the District of Columbia passed

the District of Columbia Redevelopment Act to restore an area of D.C. that was worn down. *Id.* at 28. The municipality sought eminent domain proceedings against a storeowner within the boundaries of the area they planned to redevelop. *Id*. The store owner sued, stating that the development plan was a violation of the Fifth Amendment. *Id*. The store owner argued that his property was not blighted, and therefore the District of Columbia could not take his property. *Id*. The Court disagreed, holding that the taking was within the police powers of the municipality. *Id.* at 32. Even though his land was not blighted, the Court held the entirety of the land could be taken as opposed to the district having to parcel out every individual blighted property. *Id.* at 35.

The Court's ruling in *Midkiff* was the final decision that set up the natural progression towards *Kelo*. In the late 1960s, the Hawaiian legislature passed the Land Reform Act of 1967 to redistribute privately owned lands to their lessors after discovering that forty-seven percent of Hawaii's land was owned by only seventy-two private landowners. *Midkiff*, 467 U.S. at 232. The Court held that these takings were constitutional, even though the lands were taken from private parties and redistributed to other private parties. *Id.* at 229. This decision said the quiet part of *Berman* out loud—that "the 'public use' requirement is thus coterminous with the scope of a sovereign's police powers." *Id.* at 240. If a sovereign state seeks to take land to pursue its police powers, the judiciary should not exert personal opinions and bias on that decision.

The developments prior to *Kelo* show a trend of expansion of the once narrowly tailored "use by the public" test and deference to the legislature. The so-called significant expansion in the public use doctrine after *Kelo* is merely a natural progression from *Midkiff* and *Berman*. The law has not changed—public perception of the law has.

The Court cannot overturn *Kelo* without breaking decades of precedent. *Kelo* is not a single stick upholding the proposition that economic development is a valid use of the Takings

Clause. *Kelo* is one of many sticks in a bundle of cases and a century of jurisprudence, building a strong proposition that economic development is a valid reason for the government to exercise the power of eminent domain.

This chronological development shows that *Kelo* is the natural culmination of law. The opposition will raise the recent case of *Knick v. Township of Scott*, claiming that *Kelo* is inconsistent. *See generally Knick v. Twp. of Scott*, 588 U.S. 180 (2019). The opposition is mistaken. If the Court wanted to overturn *Kelo*, they would have explicitly done so. *Kelo* is not even mentioned in *Knick*, and there is no indication that the Court intended to overhaul *Kelo* and its precedents. *Knick* is also not concerned with drawing the boundaries of the public use doctrine. *Knick* stands for the proposition that litigants do not need to exhaust state remedies before bringing a federal §1983 claim for just compensation. *Id.* at 185. This brief will expand on this argument later, showing that the right to just compensation does not mean there is an implied cause of action under the Fifth Amendment.

4. There is high reliance on *Kelo* and stare decisis necessitates upholding it.

Kelo has been cited hundreds of times, with every circuit court of appeals and hundreds of lower courts relying on *Kelo* to resolve eminent domain disputes.[3] Each *Kelo* taking represents thousands, or even millions, of dollars of economic growth. One example is Village West in Kansas City, Kansas. The government used eminent domain to take land from two homeowners and developed the largest tourist attractions in Kansas—with thirty-eight businesses, close to 3,500 employees, and an estimated nine million visitors per year. Garreth Cooksey, *Takings Care of Business: Using Eminent Domain for Solely Economic Development Purposes,* 79 Mo. L Rev.

[3] A LexisNexis search on October 15, 2024, revealed that *Kelo* has been cited in 676 cases. Every circuit court of appeals has cited on *Kelo*. 315 federal courts and 330 state courts have cited *Kelo*.

715, 726 (2014). This brief need not discuss every time a court has relied on *Kelo*, as the argument would quickly grow by hundreds of pages. Instead, this section will explain why federalism and stare decisis demands that *Kelo* be upheld.

Critics of *Kelo* are quick to point out that many states have rejected *Kelo* by amending their state constitutions or passing laws banning economic development takings. This fact has nothing to do with the constitutionality of *Kelo*. Just because a state has decided to not engage in economic development takings does not make those takings unconstitutional. States are permitted to limit their constitutionally granted authority however they see fit. For example, the Court has ruled that the death penalty is constitutional in murder cases where the defendant is mentally competent and over the age of eighteen. *Roper v. Simmons,* 543 U.S. 551 (2005) (holding that the execution of individuals under eighteen at the time of the crime is unconstitutional); *Atkins v. Virginia,* 536 U.S. 304 (2004) (holding that the execution of intellectually disabled individuals is unconstitutional). Even so, thirty states have either abolished the death penalty or have not used it in many years. *Glossip v. Gross*, 576 U.S. 863 (2015). A state's decision to not use the extent of its constitutionally granted authority does not mean that the power granted is unconstitutional—it merely means that the state has decided to not exercise the extent of its constitutionally granted power.

Critics of *Kelo* must also face that the Court has declined to review the *Kelo* decision, and that Congress has refused to legislate against it. *Kelo, e.g., Eychaner v. City of Chicago,* 141 S. Ct. 2422, 2422 (2021) *cert. denied.* In 2005, the House attempted to pass a law preventing eminent domain for economic development, but the bill never passed the Senate. www.congress.gov, H.R.4128 - Private Property Rights Protection Act of 2005 https://www.congress.gov/bill/109th-congress/house-bill/4128/all-actions (Last accessed Oct. 15, 2024). The refusal to revisit *Kelo* and to legislate against it rebuts the proposition that *Kelo* is obviously wrong.

Stare decisis is a foundational doctrine that promotes consistency and confidence in the legal system. Stare decisis is important for several reasons. First, it allows individuals and governments to predict the legal consequences of their actions. Governments currently rely on *Kelo* to plan economic development projects. If the Court were to overturn *Kelo*, it is unknown how many millions of dollars already invested in these projects would be sent down the drain. Economic development projects currently underway would be dead in the water, with whatever dollars already invested going to waste. Overturning *Kelo* would lead to great instability by forcing legislatures to pivot from projects that take months and even years to develop.

Second, stare decisis builds confidence in the legal system. Judicial precedent should be upheld unless "the most cogent reasons and inescapable logic require it." *Hummel v. Marten Trans., Ltd.*, 282 Conn. 477, 494 (Conn. 2007). It would be an overstatement of the opposition to say that "inescapable logic" calls for *Kelo* being overturned, because many legally competent judges and attorneys have found that *Kelo* is constitutionally sound. Skeptics of the American political system would note that by overturning *Kelo,* the Court is implying that the hundreds of courts that relied on *Kelo* were mistaken.

On review of the *Dobbs* factors, *Kelo* should be upheld. Aside from the legal credence of the *Kelo* decision, many people have benefited from the economic development *Kelo* allows. It is the State's role to uphold the public health, safety, morals, and welfare—and economic development serves all those spheres of sovereignty. *Kelo* allows governments the proper deference to develop the economy for the good of their constituents—and the Court should not interfere with this power.

B. The Pinecrest Project Meets the *Kelo* Standard Because the Project Will Economically Develop the Area for the Public Good.

Economic benefits. The Pinecrest Project easily meets the *Kelo* standard for several reasons. First, the project serves the same public purpose as *Kelo*—to stimulate the economy. The project is expected to directly add 3,470 jobs , which will not only help those already there, but will attract new workers to the area. R. at 2. These workers will increase the demand for housing, goods, and services. The project will also increase property values of the surrounding areas. R. at 2. Higher property values create more wealth for nearby homeowners by adding equity to their properties. New Louisiana will also use fifteen percent of the tax revenue from the ski resort directly on the surrounding area, providing long lasting benefits. R. at 2.

These benefits are comparable to those in *Kelo*, where the project proposal outlined thousands of new jobs, millions of dollars in tax revenue, and increased property value for the surrounding area. *Kelo* 545 U.S. at 472. There clearly is a public purpose in the Pinecrest Project, as the project was contracted by the New Louisiana Governor to convey economic development to the area. The Project was only possible under New Louisiana's Economic Development Act, and once the legislature has identified a public purpose, courts cannot interfere with how the legislature pursues that purpose. *See Berman*, 348 U.S. at 33.

The opposition may argue that the Pinecrest Project is not comparable to *Kelo* as the City of New London was economically distressed and on the brink of great harm. Yet even opponents of *Kelo* recognize that economic development is not just available to treat economic decline, but to *prevent* it. *Kelo* 545 U.S. at 498 (O'Connor, J., dissenting).

Even so, takings for economic development need not only occur for the prevention of harm. The Court in *Kelo* explicitly stated that blight is not necessary to take land for economic development. *Id.* at 484. Even if prevention of harm was necessary for economic development

takings, prevention of harm once again falls to the legislature. Without *Kelo* and its precedents, the Court cannot begin to remedy the problem before it forms. While the properties in question in New Louisiana are not blighted yet, the lands are no longer productive and grow less and less productive each year from over farming.

The State of New Louisiana does not need to prove that the area is currently struggling to prevent economic decline. Neither logic nor the law requires that. An ounce of prevention is worth a pound of cure, and the State need not wait until the problem grows to unmanageable proportions before stepping in. Creating a more resilient economy up front helps prevent more costly economic development projects in the future.

Federalism. The Court should not interfere with a sovereign state's economic development project because of its subjective belief that the taking is not "worth" the economic benefits. The Court recognizes that "the means of executing the project are for Congress and Congress alone to determine once the public purpose has been established." *Berman*, 348 U.S. at 33 (citing *Luxton v. North Bridge Co.,* 153 U.S. 525, 529-30 (1894); *cf. Highland v. Russel Car Co.*, 279 U.S. 253 (1929)). While courts are well suited for interpretation of law, they are poorly designed for determining good public policy. The Court has previously recognized that "the responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones." *Brown & Williamson Tabacco Corp.*, 529 U.S. at 132.

Conversely, the legislature is close to the needs of the constituents and is aware of the day to day lives of the people. The judiciary is set apart and often does not have time or the ability to immerse itself completely in the political landscape necessary to fully grasp the policies. This is not a condemnation of the judiciary, but a recognition of the natural confines of the system. These natural confines are the very reason why the Framers heavily emphasized the separation of

powers—to ensure that the branch best suited for each task would have the ability to work effectively without interference.

Kelo has become a lightning rod for public disagreement. This is not a bad thing. Legislatures *should* take their constituents' beliefs and desires about economic development seriously; and the Court *should not* take the ability to make these decisions away from the legislature.

Reason. Bad facts often make bad law. If the Court allows itself to be swayed by the distressed petitioners in this specific case, the Court knocks over the first domino in a line of precedent. The petitioning holdouts will rely heavily on facts. They will make a sympathetic case that their homes have been in their families for generations, and that they will face great challenges if their homes are used for the Pinecrest Project. While their cause *is* sympathetic, this makes the takings no less constitutional. The Court has spent the last century gradually building the precedent to *Kelo* because it is the correct interpretation of the Fifth Amendment.

Overruling *Kelo* will threaten *Berman*, *Midkiff*, and *Fallbrook Irrigation Dist.*—cases that all recognized the untenability of the "use by the public" test. Without this precedent history will repeat itself. If the Court were to overturn *Kelo* and return to the "use by the public" test, courts would ultimately hear cases where the need for economic development is so great that they make exceptions to the suffocatingly narrow standard until *Kelo* is revived. This Court should not move backwards. It is better for the Court to remain firm on its original decision than to allow ten parties to change a century of carefully crafted precedent.

Ten holdouts stand in the way of thousands of jobs, millions in tax revenue, and a boom in business. While some may find the facts of this particular case unflattering, that does not make the law any less constitutional or the project any less vital. Economic benefits are felt by all—not just

those within the immediate vicinity. The Pinecrest Project will not just attract wealthy tourists—it will attract businesses to serve those tourists. These businesses will hire people from every social stratum, from the working class to wealthy investors.

We do not rely on *Kelo* because it is the law—we rely on *Kelo* because it is *good* law. *Kelo* struck the appropriate balance of power the Takings Clause needs to be effective, and it is in the best interest of the states to uphold it.

II. THE COURT SHOULD HOLD THAT THE TAKINGS CLAUSE IS NOT SELF-EXECUTING.

The Fifth Amendment Takings Clause is obviously not self-executing. Nothing in the constitutional text, legislative history, or judicial precedent supports an interpretation of the Takings Clause as an implied cause of action. This is especially true if this cause of action would permit private owners to sue states, which are separate sovereigns, in federal courts. In over two centuries of the Fifth Amendment's history, the Court has refused to say a seemingly simple truth: that the Takings Clause is self-executing. This is because it is not.

The Court has refused to hold that the Takings Clause is self-executing for a reason. It would open the floodgates of litigation, incite judicial chaos, and infringe upon the separation of powers. This section will describe each of these systemwide consequences in detail.

This argument is divided into two parts: A) why the Fifth Amendment Takings Clause is not self-executing and B) why interpreting the Clause as self-executing would needlessly interfere with legislative authority.

A. The Takings Clause is not Self-Executing as Separate Sources of Law Are Necessary to Sue for Just Compensation.

The Court should affirm the lower courts' holding. The Takings Clause is not self-executing because 1) no modality of constitutional interpretation would lead to the conclusion that

the Takings Clause is self-executing, and 2) Congress has established that separate sources of law, not the Takings Clause itself, provides the right to sue for just compensation.

1. Nothing in the Constitution's text or history indicates that the Takings Clause is explicitly or implicitly self-executing.

Textual. The Takings Clause is not explicitly self-executing. According to the Clause's text, "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. The Court has already agreed that this language falls short of creating an express cause of action. *Maine Comty. Health Options v. United States*, 590 U.S. 296, n.12 (2020) (the "Constitution did not expressly create a right of action when it mandated just compensation for Government takings of private property for public use") (edited for clarity). This text merely creates a constitutional duty to pay just compensation when private property is taken for public use. The Constitution is notably silent on *how* that duty is satisfied. Nothing in the Clause's text specifies that it is self-executing, nor does it state that property owners may pursue takings claims through litigation.

The text of the Constitution does specify *who* decides how constitutional obligations are fulfilled: Congress. The Necessary and Proper Clause grants Congress the authority "[t]o make all Laws which shall be necessary and proper for carrying into Execution … all … Powers vested by this Constitution in the Government of the United States." U.S. Const. art. I, §8, cl. 18. The constitutional duty to provide just compensation naturally carries with it the power to do so, thus empowering Congress to determine the procedural mechanisms "necessary and proper" to satisfy this duty. *Id.* To this day, Congress has not enacted any federal statute that reflects a self-executing Takings Clause, let alone any federal statute that permits private enforcement of takings claims against the states in federal court.

Moreover, the Takings Clause is not implicitly self-executing. Implying a cause of action equates to creating a cause of action, which is a "disfavored judicial activity." *Ziglar v. Abbasi*, 582 U.S. 120, 135 (2017) (internal quotation marks omitted). The opposition may insist that because "just compensation is a constitutionally mandated remedy," the Takings Clause is self-executing, and creates an implied cause of action. R. at 4. (internal quotation marks omitted). This leap in interpretation goes beyond the meaning of the instrument. The Court knows that when the "text of a constitutional provision is not ambiguous," the courts should not "search for its meaning beyond the instrument." *Lake County v. Rollins*, 130 U.S. 662, 670 (1889). To say that the Takings Clause imposes a constitutional duty to provide just compensation is not the same as saying that it is a cause of action under which private parties may directly sue the states in federal court.

The opposition may raise *Knick* and *First Eng. Evangelical Lutheran Church* relying on the fact that the Court stated that just compensation is a constitutionally mandated remedy, and therefore provides an implicit cause of action. *Knick,* 588 U.S. at 192; *First Eng. Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 305, 315 (1987). This claim seems disingenuous given that both cases were resolved under other sources of law. *Knick*, 588 U.S. at 192 (42 U.S.C. § 1983 claim); *First Eng. Evangelical Lutheran Church*, 482 U.S. at 308 (state inverse condemnation law). This fact takes a significant amount of weight out of the arguments that the Takings Clause has an implicit cause of action.

What's more, the first chance the Court had to implement *Knick* and *First English's* claim that the Takings Clause was self-executing, it failed to do so. In *DeVillier v. Texas*, the Court notably dodged resolving whether the Takings Clause was self-executing by remanding the case to state court because of an available separate source of law. *DeVillier v. Texas*, 601 U.S. 285, 288 (2024) ("this case does not require [this Court] to resolve that question"). If it was so obvious that

the Takings Clause is self-executing from the text, or at least unambiguous enough to be within the Court's authority to decide, then why would the Court avoid using the Fifth Amendment? These cases reveal the Court's desire to see the Takings Clause as self-executing, but a reluctance to actually practice it. This reluctance is wise for policy reasons this brief discusses later.

It is one thing for the Court to conclude that the language of the Takings Clause requires just compensation, which exemplifies the role of the judiciary to interpret constitutional text. But it is entirely another thing for the Court to hold that the Takings Clause is *itself* implicitly self-executing. This deprives Congress of their privilege in choosing how the government satisfies its duty to pay just compensation.

Historical Practices. History also confirms that the Takings Clause is not implicitly self-executing. In *DeVillier,* the Court ultimately deferred to an alternative remedy existing under Texas law. *DeVillier*, 601 U.S. at 288. This was a choice that is consistent with a long tradition of how takings claims are resolved in both state and federal court. Ann Woolhandler et al., *Takings and Implied Causes of Action*, *in* Cato Supreme Court Rev. 249, 266 (2024).

History further reinforces this considering that takings claims were initially not litigated at all, but rather directly resolved through private acts of Congress. *Lib. of Cong. v. Shaw*, 478 U.S. 310, 316 n.3 (1986). After the Takings Clause was incorporated against the states under the Due Process Clause of the Fourteenth Amendment, the states began to provide their own remedies to takings claims—whether by common law or legislation. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 239 (1897). Even the states provide that these claims must have a separate source of law. Considering the constitutional text and historical practices of the Takings Clause, nothing supports an interpretation that the Clause is explicitly or implicitly self-executing.

2. Congress established that separate sources of law, rather than the Takings Clause itself, provide the right to sue for just compensation.

Separate sources of law are necessary for private landowners to sue for just compensation against a taking. *See Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) ("private rights of action to enforce federal law must be created by Congress"). Further, courts specifically note that a Takings Clause plaintiff "has no cause of action directly under the United States Constitution." *Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992). Seeing the need to provide a procedural vehicle for private landowners to seek just compensation, Congress promulgated two federal statutes that apply to takings claims: the Tucker Act, 28 U.S.C. § 1491, and 42 U.S.C. § 1983. *United States v. Great Falls Mfg. Co.*, 112 U.S. 645, 657 (1884); *Felder v. Casey*, 487 U.S. 131, 139 (1988). When coupled with the Fifth Amendment, these statutes create a cogent cause of action. Both statutes provide a cause of action for damages as well as a waiver of sovereign immunity. *Great Falls Mfg. Co.*, 112 U.S. at 657; *Casey*, 487 U.S. at 139.

The opposition will attempt to diminish the importance of these statutes by categorizing them as mere waivers of immunity, with the underlying constitutional right providing the cause of action. This argument is unpersuasive. The Court has already established that "[c]onstitutional rights do not typically come with a built-in cause of action." *DeVillier*, 601 U.S. at 291. Instead, constitutional rights are asserted under separate sources of law designed for that purpose. *Id.* *Devillier* even implies that § 1983 is specifically designed for that purpose by citing it. *Id.* ("see, *e.g.*, 42 U.S.C. § 1983"). The Takings Clause should not be treated any differently.

The Tucker Act. The very creation of the Tucker Act indicates that constitutional rights are not self-executing—because if they were self-executing, then there would be no need for the Tucker Act. Assuming the Takings Clause contains a cause of action, litigation would have always been a viable option to resolve claims for just compensation. But this is not the case.

Congress enacted the Tucker Act to allow private parties to sue the federal government in the United States Court of Federal Claims over claims against the "United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department." This includes property owners suing for just compensation for a taking. *Ruckelshaus v. Monsanto Co*., 467 U.S. 986, 1016-17 (1984) (citing *United States v. Causby*, 328 U.S. 256, 267 (1946)).

Prior to the Tucker Act, takings claims against the United States were not litigated in federal courts. Instead, the claims were directly resolved through private acts of Congress. *Lib. of Cong, v. Shaw*, 478 U.S. 310, 316 n.3 (1986). *Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 431 (1990). In fact, Congress was initially very reluctant to delegate any power over takings claims to the courts.[4] Here, Congress's hesitancy suggests that litigation was only a viable option after Congress made it so through the Tucker Act. This supports that the Tucker Act creates a cogent cause of action for takings claims that was not available to property owners prior to its enactment.

42 U.S.C. § 1983. Section 1983 provides an independent cause of action for takings claims in federal court. *DeVillier*, 601 U.S. at 291. To categorize § 1983 as a mere waiver of immunity is a blatant misinterpretation of the statutory text, congressional intent, and judicial precedent. Congress enacted § 1983 to "create a species of liability in favor of persons deprived of their federal civil rights by those wielding state authority." *Casey*, 487 U.S. at 139. The Court has repeatedly emphasized that "a broad construction of §1983 is compelled by the statutory language" as to the rights asserted under the statute. *Dennis v. Higgins*, 498 U.S. 439, 443 (1991); *Golden State Transit Corp. v. City of Los Angele*s, 493 U.S. 103, 105 (1989). If § 1983 was just a

[4] Congress initially conferred extremely limited power to the federal courts under the 1855 Act. *United States v. Mitchel*, 463 U.S. 206, 212-13 (1983). The courts could hear claims, report findings, and submit a draft of a private bill to Congress for final judgment. *Id.* at 213. But even this limited power "failed to relieve Congress from the laborious necessity of examining the merits of private bills." *Id.* (quoting *Glidden Co. v. Zdanok*, 370 U.S. 530, 553 (1962)).

waiver of immunity, and not a cause of action, then substantive rights could not be asserted under the statute. This drastically limits the scope and defeats the purpose of § 1983. Therefore, consistent with the statute's text and objectives, § 1983 is both a waiver of immunity and an independent cause of action.

Equitable Relief. The opposition will attempt to dispute that separate sources of law are required by pointing to early takings cases in which the Takings Clause authorized claims for non-monetary equitable relief. But the Court in *DeVillier* has already found this argument unconvincing. It observed that "the mere fact the Takings Clause provided the substantive rule of decision for equitable claims in those cases does not establish that it creates a cause of action for damages." *DeVillier*, 601 U.S. at 292. This distinction turns on the fact that just compensation is a legal form of relief, while other remedies are equitable. *Id.*

Just compensation and equitable relief are two completely different remedies, the latter of which is not mentioned in the Takings Clause at all. The Court has consistently differentiated between the two. *DeVillier*, 601 U.S. at 292; *Ruckelshaus*, 467 U.S. at 1016 (citing *Larson v. Domestic & Foreign Commerce Corp*., 337 U.S. 682, 697 n. 18 (1949)). Just compensation is monetary relief and requires the fair market value of the property to put the owner "in as good position pecuniarily as he would have occupied if his property has not been taken." *United States v. Miller*, 317 U.S. 369, 373 (1943). In contrast, equitable relief is not available "when a suit for compensation can be brought against the sovereign subsequent to the taking." *Ruckelshaus*, 467 U.S. at 1016. Just compensation and equitable relief serve two different functions, and it is a misconception to mix the two.

B. Holding that the Takings Clause is Self-Executing Needlessly Interferes with Legislative Authority to Create a Cause of Action.

Because the Takings Clause does not establish an independent cause of action, the Court should only recognize an independent cause of action in significant or compelling circumstances. The case at hand presents no such circumstances. Such a holding is needless because other sources of law provide recourse to landowners and the holding would conflict with the separation of powers and sovereign immunity

1. Congress is better equipped to create a federal cause of action against states for claims for just compensation.

As noted by the Court, Congress is the proper party to create causes of action. *Egbert v. Boule*, 596 U.S. 482, 491 (2022) ("creating a cause of action is a legislative endeavor"). The opposition may raise the *Bivens* claim as an example of judicially created causes of actions. But *Bivens* was the exception, not the rule. *See Hernandez v. Mesa*, 589 U.S. 93, 101-02 (2020). Since *Bivens*, the Court has refused to create any new constitutional damages claims, labeling that as a "disfavored judicial activity." *Ziglar*, 582 U.S. at 135 (internal quotation marks omitted). This is because the Court has "come to appreciate more fully the tension between judicially created causes of action and the Constitution's separation of legislative and judicial power." *Hernandez*, 589 U.S. at 100. The Court's refusal to encroach on legislative authority is significantly relevant here because the judicial creation of a takings cause of action would permit private enforcement against the states in federal courts. For the Court to create such a cause of action not only places greater tension on separation of powers principles, but also implicates federalism.

The Court has refused to recognize a cause of action under a constitutional right if, "there is *any* reason to think that Congress might be better equipped to create a damages remedy." *Egbert*, 596 U.S. at 492 (emphasis added). Such reasons include the existence of alternative remedial

structures and the unpredictability of "systemwide consequences" of a judicially created cause of action. *Id.* at 492-93. Here, the existence of alternative remedies for New Louisiana property owners should be enough for the Court to refuse to imply a cause of action and defer to Congress instead. *Id.* at 493. If the parties wanted just compensation, they could have easily sued New Louisiana Governor Anne Chase under §1983.

Through § 1983, Congress created a cause of action that enforces the Takings Clause against those wielding state authority—but *not* against the states. *Casey*, 487 U.S. at 139; *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989). Under the negative-implication canon of *expressio unius est exclusio alterius*, it follows that Congress implicitly excluded the states from this remedial structure. *See, e.g. Jennings v. Rodriguez*, 583 U.S. 281, 300 (2018) (noting that "[t]he expression of one thing implies the exclusion of others" (quoting A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 107 (2012)). Further, "[t]he Supreme Court looks to analogous statutes for guidance on the appropriate boundaries of judge-made causes of action." *See Jesner v. Arab Bank, LLC*, 584 U.S. 241, 265 (2018). Because no federal statute provides private enforcement of a takings claim against a state, § 1983 is the closest analogous statute. But § 1983 implicitly excludes states from private enforcement under that statute in federal court. Looking at § 1983 for guidance, holding that the Takings Clause is self-executing would exceed those appropriate boundaries of judge-made causes of action because it creates a cause of action against the states in federal court. *Jesner*, 584 U.S. at 265.

Congress is also better equipped to predict the "systemwide consequences" of an implied cause of action under the Takings Clause. *Egbert*, 596 U.S. at 493 (noting that "[u]ncertainty alone is a special factor that forecloses relief"). There is a lot of uncertainty here. If the Court holds that the Takings Clause is self-executing, then this opens the federal courts up to a flood of additional

unanswered questions that are normally addressed through legislation. Therefore, what was then a small encroachment of federalism by the Court becomes a big one. Without legislative direction, the federal courts will then need to answer fundamental procedural questions—what pleading rules apply, what affirmative defenses are available, what the statute of limitations should be, as well as critical questions pertaining to state sovereign immunity. It is easy to see how one seemingly small violation of the separation of powers can turn into many.

2. A self-executing Takings Clause will not defeat the sovereign immunity states enjoy in federal court.

To make states involuntarily suable in federal court, Congress can abrogate state sovereign immunity under § 5 of the Fourteenth Amendment. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). Congress has not abrogated sovereign immunity in federal court for takings claims. Nor has Congress provided that states are suable "persons" and thus directly subject to suit under § 1983. *Will,* 491 U.S. at 71.

The majority of federal circuit courts have held that Eleventh Amendment immunity bars takings claims against nonconsenting states in federal court, so long as a remedy is available in state courts. *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 552 (4th Cir. 2014); *Jachetta v. United States*, 653 F.3d 898, 909 (9th Cir. 2011). NL Code § 13:5109 provides that a statutory or executive waiver of sovereign immunity is required for a property owner to obtain just compensation from the State for a taking. R. at 2. The petitioners have a separate source of law to receive just compensation: § 1983. And if New Louisiana refused to waive sovereign immunity for that claim, the holdouts should challenge the constitutionality of that statute—*not* try to create a cause of action where there is none. This legal puzzle does not justify overhauling centuries of law to make the Takings Clause self-executing.

If recognizing a cause of action already raises separation of power concerns between judicial and legislative powers, then recognizing a cause of action that abrogates state sovereign immunity inflates such concerns. A self-executing Takings Clause does not flow naturally from constitutional text, history, or judicial precedent.

The opposition places this Court in a position that threatens federalism and separation of powers. This is needless considering that other avenues of recourse are available. The long tradition of takings remedies undermines any argument for the necessity of this Court to hold that the Takings Clause is self-executing.

CONCLUSION

This Court should AFFIRM the judgment of the United States Court of Appeal for the Thirteenth Circuit in all respects.

Respectfully submitted,

_____

Counsel for Respondent