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

RESPONDENT'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Under the Fifth Amendment's Takings Clause, (1) should *Kelo v. City of New London* remain the law of the land or, if not, (2) should the Court craft a public use rule that shows adherence to precedent by showing general deference to the legislature?

2. Should this Court keep to its long-time position that the creation of causes of action is a power of the Legislature when examining whether the Fifth Amendment's Takings Clause is self-executing?

SUMMARY OF THE CASE

The State of New Louisiana passed the Economic Development Act, a body of legislature intended to revitalize the economy by expanding the State's tourism and creating new jobs. R. at 1–2. Under this Act, the governor contracted with a developer to build a new ski resort outside the capital. R. at 2. This project is expected to create almost 3,500 new jobs, attract wealthy tourists, increase property values, and dramatically increase tax revenue. *Id.* 15% of the tax revenue resulting from the project is designated to revitalize the surrounding community. *Id.*

To build the resort, the State purchased 90 parcels of land from private landowners. *Id.* However, other landowners, Fishcher et al., refused to sell the ten remaining parcels vital to the project. *Id.* These farm properties do not produce much because of low soil quality, and some of the buildings are in poor condition. R. at 2–3. Unable to secure the land by sale, the State began eminent domain proceedings against the remaining parcels. R. at 2. Under New Louisiana state law, the landowners have no claim for just compensation. *Id.*

Fischer et al. brought suit against the State under the Fifth and Fourteenth Amendments seeking injunctive relief because the taking is not for public use, or, alternatively, demanding fair compensation. R. at 3. The State moved to dismiss under Rule 12(b)(6), successfully arguing both that *Kelo v. City of New London* allows takings for economic development and that the 5th Amendment does not provide a cause of action. The district court granted the motion to dismiss, agreeing with the State's reasoning. R. at 1. The circuit court affirmed. R. at 11. This Court granted Fischer et al.'s petition for certiorari. R. at 20.

SUMMARY OF THE ARGUMENT

This Court has always shown great respect for the principle of *stare decisis*, and thus will only overturn existing precedent when a special justification requires it. *Kelo v. City of New London* is good law, and all four factors that indicate whether or not to overrule a case suggest

there is no justification to overturn it. First, *Kelo* is workable because it provides a simple rule that lower courts can easily apply. Second, it is consistent with a long line of cases stretching back unbroken to the nineteenth century defining "public use" to mean for a "public purpose." Third, it applies that longstanding rule to the facts and comes to a reasoned, logical conclusion. Fourth, because it has been the law for almost twenty years, ongoing large development plans and legislative schemes could rely on its existence.

Even without the weight of *stare decisis*, *Kelo* should not be overruled because it shows good takings policy. Legislatures, not courts, are in the best position to make public policy judgments. Thus, barring a transfer to a private person solely for that person's benefit, the courts should show deference to the legislature's analysis on what constitutes a public purpose. Additionally, *Kelo* allows government to make such takings for economic development plans that serve the public. Without it, a small number of holdout landowners could block plans that benefit the whole community. So even if *Kelo* is overruled, the new rule should still show deference to legislatures and focus on preventing merely pretextual takings.

As for whether the Fifth Amendment's Takings Clause is a self-executing cause of action, the answer is unequivocally no. Nothing in the text of the 5th Amendment explicitly creates a cause of action. To imply one goes against the fundamental balance of power principle that the creation of causes of action and the ability to manage the debts and liabilities of the nation are powers of the legislature. This positions is further supported by a historical evaluation of takings claims, which shows the Fifth Amendment has never been used as its own cause of action.

If this Court chooses to imply a takings cause of action against precedent showing judicially-created causes of action are heavily disfavored, it has the potential to seriously hinder the cost and efficiency of public works projects. While not all cases involving takings have to go

to court, the inherent hostility present in these nonconsenting transfers of land means that if a Takings Clause cause of action is implied in the Fifth Amendment, many more of these cases will go to court instead of through administrative negotiations. This will drain the resources of local governments or disincentivize them to build public works beneficial to the community while also further backing up an already-clogged court system.

ARGUMENT

I. Stare decisis, backed by public policy, gives no reason to overturn *Kelo v. City of New London*; even if *Kelo* were overruled, a newly crafted rule based on precedent would not block New Louisiana's plan.

Government taking of private land for public use is of such great importance that the founders addressed it in the Fifth Amendment. U.S. Const. amend. V. This power is sizable: this Court has acknowledged that this public use requirement is coterminous with the scope of the sovereign's police powers. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984).

Under *Kelo v. City of New London*, 545 U.S. 469, 490 (2005), taking of private property for an economic development plan does not violate the Fifth Amendment. As the court below properly held, *Kelo* unambiguously controls this case. R. at 10. This Court should not overrule *Kelo*, both for *stare decisis*, and because it provides good public policy. Thus, we ask the Court to affirm the decision of the Thirteenth Circuit.

A. All factors of whether or not to ignore *stare decisis* counsel against overturning *Kelo*.

Bedrock to our legal system is the principal of *stare decisis*, the law of precedent which teaches that like cases should generally be treated alike. *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 510 (2018). "*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles . . . . " *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Thus, barring some special reason, the Court should not overturn its precedent.

Of course, the Court does have the ability to overturn its previous precedent when governing decisions are unworkable or poorly reasoned. *Id.* at 827. Still, even in constitutional cases such as this one, *stare decisis* carries such persuasive force that the Court has always required a departure from precedent to be supported by a special justification, over and above the belief the precedent was wrongly decided. *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 456 (2015).

The Court has identified several factors in whether or not to overturn a previous case. *Janus v. AFSCME, Council 31*, 585 U.S. 878, 917 (2018). The four most relevant here are workability of the rule, consistency with other related decisions, quality of the reasoning, and reliance on the decision. *Id.* All four weigh in favor of retaining *Kelo*.

1. *Kelo* is workable because its rule is simple, consistent, and predictable, and no other plausible rule could be workable.

The workability factor examines whether the existing rule can be understood and applied consistently and predictably. *Dobbs v. Jackson Women's Health Org.,* 597 U.S. 215, 220 (2022). *Kelo*, following from over a century of precedent, provides a simple, easy-to-understand rule in determining public use: flexibility and general deference to the legislature. *Kelo*, 545 U.S. at 483. The courts should defer to a legislature's carefully formed and reasoned economic development plan as a viable public use, so long as it does not take property from A and transfer it to B solely for B's private benefit. *Id.* at 484. Even some of *Kelo*'s opponents acknowledge how easy it is for a court to understand and apply it. *E.g.*, R. at 15–16.

Furthermore, it is telling that as early as the nineteenth century, the Court considered and explicitly rejected the alternate rule defining "public use" to mean "use by the public," because such a definition is unworkable. *Kelo*, 545 U.S. at 480. History has proven that such a rule was difficult to administer and could not encompass the needs of society. *Id.* at 479. Similarly, *Kelo*

also considered and rejected other possible rules such as "reasonable certainty of" or "substantially advances" public benefits. *Id.* at 487–88. Both such rules were rejected out of obvious practical difficulties. *Id.* at 488. "A constitutional rule that required postponement of the judicial approval of every condemnation until the likelihood of success of the plan had been assured would unquestionably impose a significant impediment. . . ." *Id.*

The landowners in *Kelo*, like all those in the century of public use jurisprudence before them, did not fail from a lack of creativity in devising an alternate rule. Rather, the simplicity of applying *Kelo*, combined with the lack of any other feasible workable rule, leads to the conclusion that *Kelo* is workable, and no other viable workable alternatives exist.

2. *Kelo* is consistent with other decisions because it is the latest in an unbroken line of public use jurisprudence dating back to the nineteenth century.

Kelo stands as the latest in a long line of public use jurisprudence reaching all the way back to the nineteenth century. This strength of consistency provides one of the strongest reasons to retain it. As early as 1896, in *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 164 (1896), the Court interpreted "public use" in the Fifth Amendment as what serves the "public purpose." This holding is still good law, and the "public purpose" test pervades all of the Court's public use jurisprudence.

Next in line came the landmark decision in *Berman v. Parker*, 348 U.S. 26 (1954). *Berman* inquired to the constitutionality of a land redevelopment plan in Washington D.C. *Id.* at 29. The area condemned contained blighted slum housing, but the plaintiff in that case owned a department store that was not blighted. *Id.* at 31. The Court upheld the renovation, recognizing that "the concept of public welfare is broad and inclusive . . . . [i]t is not for us to reappraise [Congress's determinations]." *Id.* at 33.

Then came *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984). It approvingly cited heavily to *Berman*, keeping the *stare decisis* chain unbroken. *Midkiff*, 467 U.S. at 239–40. *Midkiff* involved forced conveyances of large portions of land to break up a land ownership oligopoly. *Id.* at 233. The Court upheld the conveyance's constitutionality, despite it apparently blatantly taking land from one private party and giving it to benefit another private party. For here, too, the Court recognized that it had never held a taking rendered impermissible by the public use clause, so long as it was "rationally related to a conceivable public purpose." *Id.* at 241.

That leads to *Kelo v. City of New London*, 545 U.S. 469 (2005) as the most recent public use case. There, the city of New London, Connecticut authorized eminent domain to allow Pfizer Inc. to build a research plant as part of a comprehensive economic revitalization plan. *Kelo*, 545 U.S. at 473. Consistent with its precedent, relying on *Berman* and *Midkiff*, the Court upheld the taking as valid public use, because the economic development plan had a public purpose. *Id.* at 483–84. *Kelo*, then, is the opposite of a departure from other decisions. Indeed, consistency with other decisions would require *Kelo* to turn out the way it did.

This chain of precedent remains ironclad to this day. For despite what petitioner may argue, *Knick v. Twp. of Scott*, 588 U.S. 180 (2019) does not conflict with *Kelo*. That case dealt with the question of whether landowners must seek just compensation in state court before bringing a federal takings claim. *Id.* at 187. *Knick* did not address at all whether or not the taking fell under public use or not. *See Knick,* 588 U.S. Thus, any attempts to analogize to it in this case must fail.

All these cases since *Berman* remedied a different harm—blighted slum housing in *Berman*, land oligopoly in *Midkiff*, and economic crisis in *Kelo*. Yet all of them, *Kelo* included, draw from the same core "public purpose" analysis to justify a taking as a public use.

3. *Kelo* is well reasoned because it builds on longstanding case law defining public use as a public purpose, then applies it to the facts of that case.

As already discussed, *Kelo* builds on the groundwork of previous takings cases. It uses the "public use" definition the Court has utilized for over a century in a new fact pattern: economic development to benefit a struggling community.

Faced with a new fact pattern to apply the longstanding law to, the Court's result was, predictably, a continuation of the bedrock "public purpose" analysis. *Kelo* quite rationally reasoned that because economic development is a "traditional and long-accepted function of government," there was no "principled way of distinguishing economic development from other public purposes that we have recognized." *Kelo*, 545 U.S. at 484.

Again, *Kelo* did not invent the "public purpose" definition of public use. It simply drew on the solid precedent already established by *Bradly, Berman*, *Midkiff*, and the other public use cases. Taking one private person's property for the benefit of another without a justifying public purpose is forbidden by the taking's clause. *Thompson v. Consol. Gas Corp.*, 300 U.S. 55, 80 (1937). But that is not what *Kelo* did, because there was that vital public purpose. *Kelo*, 545 U.S. at 485. It simply applied the established rule to the facts at hand and came to the logical result.

4. *Kelo* has been relied on for almost twenty years by developers and legislatures.

Kelo has been on the books for almost twenty years. During that time, it has given legislatures the leeway required to go ahead with large-scale economic development projects. And the kind of economic development projects that *Kelo* governs are no small matters. *Kelo*

itself provides an example of the lengthy and expensive process involved. The City of New London needed years of planning and help in the form of $15.4 million in loans from the state to even begin its revitalization plan. *Kelo*, 545 U.S. at 473. If *Kelo* is now overturned, any such beneficial redevelopment projects now in progress, from the early negotiation stages to late in progress, could be thwarted. *See* Lynn E. Blais, *Urban Revitalization in the Post-Kelo Era*, 34 Fordham Urb. L.J. 657, 659 (2007).

Additionally, based on the holding in *Kelo*, a majority of states passed laws to regulate eminent domain for economic use. Diana Berliner, *Looking Back Ten Years After Kelo*, 125 Yale L. J. 82, 84 (2015). *Kelo* expressly approved the possibility of such state regulation, again showing deference to legislatures. *Kelo*, 545 U.S. at 489. However, if *Kelo* were overturned and a new constitutional rule announced, the new rule would call into question all those statutes that relied on *Kelo*. Each of these states would have to engage in exhaustive analysis on whether the state statutes complied with the new rule. If any of them do not, then any urban redevelopment plan currently based on those rules could also be thwarted.

B. *Kelo* provides good policy by deferring to legislatures which can create economic development to benefit the entire community.

Strong public policy shows the necessity of retaining *Kelo*. This Court has consistently held that so long as the exercise of eminent domain is rationally related to even a conceivable public purpose, the taking is not proscribed by the Public Use clause. *Midkiff*, 467 U.S. at 241. The purpose of the taking can range broadly from physical to monetary to aesthetic to spiritual. *Berman*, 348 U.S. at 33. The legislature, not the courts, can best make that kind of policy analysis. *Id.* at 32.

And this deference is necessary because the local legislature will know best when a community needs economic revitalization, even over the objections of a handful of landowners

who refuse to sell vital property. The legislature has the best position to determine when eminent domain best serves the interest of the community. But if *Kelo* is overturned, a tiny number of landowners who refuse to sell could block an economic development project that benefits the whole community.

1. Courts should show deference to the legislature when making public use policy judgments.

The Court has always shown deference to the legislature when making policy judgments. "[T]he legislature, not the judiciary, is the main guardian of the public needs to be served by public legislation." *Berman*, 348 U.S. at 32. Thus, while the courts do have some role in determining if the judiciary's exercise of eminent domain is for a public purpose, that role "is an exceedingly narrow one." *Id.* "In short, the Court has made clear it will not substitute its judgment for a legislature's judgment as to what constitutes public use 'unless the use be palpably without reasonable foundation.'" *Midkiff*, 467 U.S. at 241 (quoting *United States v. Gettysburg Electric R. Co.*, 160 U.S. 668, 608 (1896)).

Kelo respects that reality by giving deference to the legislature. *Kelo*, 545 U.S. at 486. It poses no problem that the legislature determined there, as in this case, that transferring the property to a private citizen for economic development was the best public use. A legislature might conclude the public ends are best served by private enterprise's means. *Berman*, 348 U.S. at 33–34. *Kelo* understands and respects this division of roles whereby the legislature knows the public's needs the best. *Kelo*, 545 U.S. at 488. Overruling it would invite the courts to barge into the policymaking areas better suited for legislatures.

Petitioner's potential concerns that the restrictions in *Kelo* are mere form, thus providing grounds to overturn it, are unfounded. *Kelo* specifically forbids the taking under mere pretense of public purpose with an actually purpose to bestow a private benefit. *Kelo*, 545 U.S. at 478.

Justice Kennedy's concurrence emphasizes this substantive protection. *Id.* at 491. Under *Kelo*, a court should take seriously a plausible claim by challenging landowners of impermissible favoritism. *Id.* However, petitioner here has not made any such claim. More to the point, any argument that a lack of such substantive protection is a reason to overrule *Kelo* carries no weight.

Certainly, the government cannot take one private person's property for the benefit of another without a justifying public purpose. *Thompson v. Consol. Gas Corp.*, 300 U.S. 55, 80 (1937). But so long as the legislature has that justifying public purpose, the courts ought to exercise deference to the policymaking skills of the legislature, just as *Kelo* does. Thus, *Kelo* ought not be overruled.

2. Without *Kelo*, a few holdout landowners can block beneficial economic development projects.

Most of the time, the vast majority of the property necessary for renewal is acquired through voluntary purchase agreements. Lynn E. Blais, *Urban Revitalization in the Post-Kelo Era*, 34 Fordham Urb. L.J. 657, 683 (2007). Even in *Kelo* itself and the very case at hand, the majority of landowners willingly sold their land. *Kelo*, 545 U.S. at 472; R. at 2. Eminent domain, and *Kelo*, are necessary to ensure these beneficial projects can be built at all over the objections of a few stubborn holdouts.

And without the power of eminent domain, economic realities mean these publicly beneficial projects can become so prohibitively expensive that the costs outweigh the benefits. Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61, 75 (1986). Individual landowners who have even a small amount of the land necessary for a large-scale project can charge significantly more than the property's cost. *Id.* at 77. Economists have identified this as a monopoly power of the holdout landowner. *Id.* at 75; *see* L. Berger, *The Public Use Requirement in Eminent Domain*, 57 Or. L. Rev. 203, 225–46 (1978). *Kelo* minimizes that monopoly power.

The case at hand shows the importance of giving local government the power to make economic development. The land held by the handful of landowners who refuse to sell currently has low value and produces little. R. at 2. In contrast, New Louisiana's plan will put the land to use that significantly benefits the community: creating almost 3,500 jobs, dramatically increasing tax revenue, attracting wealthy tourists, increasing property values, and even directly revitalizing the community whose land it uses. R. at 2.

These benefits to the community are all only possible with to the flexibility *Kelo* provides. If the Court overturns *Kelo*, these public benefits will be stymied by the a few holdouts' unwillingness to sell. To the extent this Court makes decisions based on policy, then, the best policy is to maintain *Kelo* and allow the states to make beneficial economic development plans.

C. Alternatively, if *Kelo* is overruled, the new rule defining public use must be deferential to legislature and focus on preventing pretextual takings.

If the Court does choose to overrule *Kelo*, then it may need to give a new definition of "public use." As already discussed, *Berman* and *Midkiff* make it clear that public use must have a broad meaning. *Berman*, 348 U.S. at 33; *Midkiff*, 467 U.S. at 241.

The Court has historically avoided bright lines in defining the boundaries of public use because such bright lines are impracticable. *Kelo*, 545 U.S. at 479. Petitioner may suggest that public use must equal use by the general public, not any private body. But as *Kelo* pointed out, such a definition is both unworkable for the courts and incompatible with the always evolving needs of society. *Id*. Even if *Kelo* is overruled, this unworkability point still stands.

It is telling that scholars, too, have struggled to clearly define public use, often instead focusing on the means that governments use. Blais, *supra*, at 683. This, combined with the

Court's attitude of permitting flexibility, indicates that any kind of bright line the petitioner may advocate for is not feasible. Deference is key.

Thus, if the Court overrules *Kelo*, it should retain its attitude of deference to the legislatures embodied in *Berman* and *Midkiff*. Again, the legislature, not the courts, are in the best position to discover the needs of the community, and thus what the public use is. *Midkiff*, 467 U.S. at 240. The new rule should focus its analysis on preventing merely pretextual public purposes that actually intend to bestow a private benefit. *See Kelo*, 545 U.S. at 491 (Kennedy, J., concurring).

Whatever rule the Court fashions under this framework, the facts of the case at hand indicate that New Louisiana's actions do not violate public use. Giving deference to the state's local legislature indicates that the public use will be best served by this eminent domain proceeding. R. at 2. Furthermore, the taking is not pretextual but rather comes from the genuine goal of revitalizing the state's economy and benefiting the community. R. at 1. Thus, even if the Court overrules *Kelo*, the Court should affirm the lower court's granting of respondent's motion to dismiss.

II. The Takings Clause has never been interpreted as self-executing, and public policy implications indicate the Court should not now make it so.

New Louisiana understands the importance of property rights, especially those guaranteed by the Constitution. However, this case is in fact not about those substantive rights, but is instead asking the question of who decides how those rights are enforced. Balance of power principles, constitutional text, and history all indicate it is the legislature.

The Fifth Amendment cannot provide a cause of action for monetary relief as it would go against Congress's exclusive power to pay the nation's debts, which includes authority to "examine and determine claims for money against the United States." *Williams v. United States*,

289 U.S. 553, 569 (1933). Also, for the first century of the Fifth Amendments existence, claims for just compensation were exclusively resolved by Congress through private acts, not litigation. It seems highly unlikely the Founders created a cause of action that no one proceeded to use. Finally, the benefits of maintaining the current status of the Takings Clause substantially outweighs the possible detriments, which can be mitigated by the availability of equitable relief or Congressional action.

A. An implied cause of action in the Takings Clause is not found in the text and goes against Constitutional balances of power.

Nothing in the text of Constitution or the structure of the U.S. Government supports the idea that the Takings Clause by itself provides a cause of action for damages. It is instead Congress who creates causes of action. If they have yet to pass a statute that permits the Petitioners to seek just compensation against New Louisiana, then Petitioners must seek alternative remedies.

1. The text of the Fifth Amendment does not expressly create its own cause of action.

The language of the Takings Clause is concise: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. Nothing in the Clause itself tells the government how it must provide said just compensation, only that they are required to provide it. This Court has in fact recognized that "the Constitution did not 'expressly create ... a right of action' when it mandated 'just compensation' for Government takings of provide property." *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1328 n.12 (2020).

Because the Takings Clause does not expressly indicate how the federal government must provide just compensation, the Necessary and Proper Clause permits Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution." U.S. Const. art. I, §8, cl. 18. Congress has addressed this duty in several

different ways through the years. For the first century of the Fifth Amendment's existence, all takings claims were brought through individual private acts of Congress. *Lib. Of Cong. v. Shaw*, 478 U.S. 310, 316 n.3 (1986). The passage of general waivers of sovereign immunity in the Tucker Act in 1887 and 42 U.S.C. §1983 in 1871 further indicate Congressional recognition of their role in ensuring a citizen's rights are guaranteed.

2. An implied takings cause of action goes against Congress's exclusive right to manage the debts of the Nation.

If we read into the U.S. Constitution itself, it also undermines the contention that an implied takings cause of action exists. Instead, it further supports the established principle that Congress carries the power to provide just compensation. One of the more glaring issues is that an implied cause of action would go against the Legislature's exclusive right administer the debts and funds of the nation.

The Constitution provides that "[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I. §9, cl. 7. It also states that Congress "shall have Power to lay and collect Taxes, Duties, Imposts and Excises [and] to pay the Debts." *Id*. §8, cl. 1. When the government takes property, the Fifth Amendment, by stating the government must pay just compensation, imposes a debt. However Congress must still legislate how to pay that debt.

This court has stated that clause "provides an explicit rule of decision" that any claim for money from the Federal Government must be "authorized by statute." *OPM v. Richmond*, 496 U.S. 414, 424 (1990). This rule also applies to "a judicial proceeding seeking payment of public funds." *Id*. at 425. This is a hardline rule, even for a taking where Congress made "no provision by any general law for ascertaining and paying this just compensation." *Langford v. United States*, 101 U.S. 341, 343 (1879).

The Appropriations Clause and an implied takings cause of action cannot coexist with each other. Instead they both support the contention that when the federal government takes property or incurs a debt, it has a duty to pay but the means by which it does so is a Legislative question.

3. Implying a Takings Clause cause of action also goes against Article III and The Supremacy Clause of the U.S. Constitution.

Aside from the Appropriations Clause, there are two other clauses of the Constitution that discredit the idea the Fifth Amendment created an implied cause of action.

First, Article III states that Congress has the power to create lower federal courts who will have original jurisdiction over cases "in which a State shall be Party," but not those "to which the United States shall be a party." U.S. Const. art. III §2, cl. 1-2. This is relevant because until 1897 the Takings Clause was only applied against the federal government. *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 235-241 (1897).

Unless Congress created federal courts authorized to act on takings claims, there would be no federal forum in which a takings claim could go forth. This weakens the idea that the Fifth Amendment has always included a cause of action for just compensation within it.

Second, the Supremacy Clause prohibits the States from enacting laws that go against "the operations of the constitutional laws enacted by Congress." *M'culloch v. Maryland*, 17 U.S. 316, 436 (1819). This makes the Supremacy Clause self-executing, as any violation voids state law without need for further action by Congress. However, this Court has held that the Supremacy Clause, of its own force, still does not create a cause of action against the States.

In *Armstrong v. Exceptional Child Ctr., Inc.*, the Court said that if the Supremacy Clause did include a private cause of action, "then the Constitution requires Congress to permit the enforcement of its laws by private actors, significantly curtailing its ability to guide the

implementation of federal law." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326 (2015). Because there is nothing in the Supremacy Clause depriving Congress of its authority over deciding how federal law should be enforced, Congress maintains the ability to choose "the means by which the powers [the Constitution] confers are to be carried into execution.". *Id*. Those powers include the Takings Clause.

B. Historically the Takings Clause was not treated as having an implied cause of action, and modern courts are generally reluctant to judicially create causes of action.

A review of early American history further supports the contention that the Fifth Amendment itself does not provide a takings cause of action for just compensation. Early in this country's history, claims for just compensation had nothing to do with litigation, but were entirely resolved by actions of the legislature. If an implied cause of action for just compensation existed in the Fifth Amendment, it does not make sense that it was simply never used.

Our early administrations were controlled by the very same people who wrote the Constitution. It would be a fair assumption to make that those who wrote the Constitution understand better than most what its intended effect was. Yet the founders never saw any judicial cases brought for just compensation, instead participating in the legislative resolution of these claims.

It would be an unwise decision for this Court to judicially create a takings cause of action for several reasons. One reason has to do with equity and is discussed later, while another reason is simply that precedent shows balance-of-power concepts heavily discourages judicially created causes of action.

1. The early history of takings claims confirms that it does not provide an implied cause of action.

Early takings claims were not resolved through litigation but instead were permitted or disallowed directly by Congress. Given the importance the founders placed on property rights, if the Fifth Amendment really created an implied cause of action, it seems highly unlikely that for the century between the ratification of the Fifth Amendment in 1791 and the passage of the Tucker Act in 1877, no one used it for that purpose.

For decades, no statute existed consenting lawsuits against the United States for monetary damages. This meant a citizens only means of obtaining just compensation was to petition their local congressman, who could get an individual waiver of sovereign immunity passed for that specific citizen's complaint. *Shaw*, 478 U.S. at 316. These private bills were not incidental tasks of Congress. Between 1789 and 1909, "more than 500,000 private claims were brought before Congress." Charles E. Schamel, *Untapped Resources: Private Claims and Private Legislation in the Records of the U.S. Congress*, Prologue Magazine, Spring 1995. All the way until the passage of the Tucker Act, takings claims were handled by a legislative committee dedicated to "Private Land Claims." *Id*.

In 1855 Congress the Court of Claims to hear claims against the United States. However, the Court of Claims still was not permitted to hear takings cases until the passage of the Tucker Act in 1887. Congress's refusal to give the Court of Claims authority over takings claims caused the court to declare "that Congress has made no provision by any general law for ascertaining and paying … just compensation." *Langford*, 101 U.S. at 343. However, the court still respected Congress's decision because it was free to "prescribe in what tribunal or by what agents the taking and the ascertainment of the just compensation should be accomplished." *Kohl v. United States*, 91 U.S. 367, 375 (1875).

2. Many of the founders participated in the passage of private takings bills.

The early administrations of the United States government were made up of the very same men who created our national government. The actions of these men regarding takings should hold considerate value when trying to interpret language they wrote. Those actions support the contention that the Fifth Amendment was never intended to provide a cause of action.

The Congresses of the founders exclusively used the private bill method to provide citizens with just compensation just like its successors. Litigation never came into the issue. During the Adams Administration, Congress passed several acts to provide just compensation, including one for what is now Brown University. *An Act for the relief of the corporation of Rhode Island college*, ch. 24, 6 Stat. 40 (1800).

In the subsequent Jefferson Administration, Congress continued the practice, such as this act to compensate for a lost ship. *An Act for the relief of John Coles*, ch. 7, 6 Stat. 51 (1804). Even the administration of James Madison, widely proclaimed as the "Father of the Constitution" did not find a cause of action for just compensation in the Fifth Amendment, instead opting to continue with the private bill method. *An Act for the relief of William Robinson, and others*, ch. 26, 6 Stat. 146 (1815).

This is how takings claims for just compensation were resolved for nearly a century. It simply does not make sense that Congress would spend so much time and effort resolving takings claims if a cause of action already existed.

3. Historical separation-of-power principles also preclude the possibility of a judicially-created cause of action.

The text and historical treatment of the Fifth Amendment do not indicate it permits an implied cause of action for just compensation. This Court still could find for Petitioner if they

decide to go against the history and create a Fifth Amendment takings cause of action with this case. Doing so however would go against decades of separation-of-powers precedent.

This Court has not created a constitutional damages claim since the *Bivens* cases more than 40 years ago. *Hernandez v. Mesa*, 589 U.S. 93, 102 (2020). Expansion of *Bivens* has been deemed a "'disfavored' political activity," *Id.* at 93, and the Court has generally expressed doubt about its authority to recognize causes of action not expressly created by Congress. *See Jesner v. Arab Bank, PLC*, 584 U.S. 241, 242 (2018).

Since *Bivens*, this Court has reversed their course on judicially created causes of action, recently stating that "[a]t bottom, creating a cause of action is a legislative endeavor." *Egbert v. Boule*, 596 U.S. 482, 491 (2022). To remain consistent with this holding, the Court should not recognize an implied constitutional cause of action if there is "any rational reason (even one) to think that *Congress* is better suited to 'weigh the costs and benefits of allowing a damages action to proceed.'" *Id*. (quoting *Ziglar v. Abbasi*, 582 U.S. 120, 136 (2017)). Under this approach, if there is even the "potential" the judicial action will be "harmful or inappropriate", a court cannot afford a plaintiff that judicially created remedy. *Id*. at 496.

One of the most important reasons creation of an implied cause of action could be inappropriate once again turns on separation-of-powers concerns, but not between the branches of federal government. Petitioners wish for the Court to recognize a federal cause of action against a State, who are separate sovereigns. If federal statutes are ambiguous courts should not apply them to the States. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989). This Court should be even more reluctant when looking at the Constitution, especially because the language of the Takings Clause is not ambiguous.

The history of takings claims and actions of our founders show that no cause of action existed for just compensation in the Fifth Amendment when it was ratified. Petitioners may hope the Court implies a cause of action for the first time in this case, but more recent judicial history heavily discourages this approach, and there appear to be no grounds upon which this Court could reasonably find an implied cause of action.

C. An implied takings cause of action would stifle any sort of state-initiated construction projects and is unnecessary as Petitioners have alternate remedies.

Society accepts that eminent domain is a very important power in the hands of the State. Almost no public projects could be accomplished without eminent domain. A lack of public works would increase inequity and decrease social welfare. Should this Court choose to create a Fifth Amendment takings cause of action, it will hinder state action on public works and services by making the proceedings surrounding these works more expensive and time consuming.

The inherent inequity of a takings action with no actionable just compensation claim is mitigated by the other remedies already available to Petitioner, most notable a claim for injunctive relief which can be made directly under the Fifth Amendment. Petitioner has a remedy at law he could have pursued, but he chose instead to pursue a cause of action he procedurally could not pursue. His failure to follow proper procedure should not spur this Court to create a cause of action where there is none.

1. Sovereign immunity, while contentious, provides many benefits to a state government and its citizens.

Almost every single government construction project, whether infrastructural or economic, requires the utilization of eminent domain. It is as inherent to the United States governmental system as is the importance of private property rights, both of which came to the United States as part of the British common law. As said by this Court in one of its first examinations of the doctrine, the authority of the federal government to appropriate property for

public uses is "essential to the country's independent existence and perpetuity." *Kohl v. United States*, 91 U.S. 367, 371 (1875).

These benefits can also only be realized to their full potential when they are provided by the government. As said by Professor Steve Calandrillo from the University of Washington, "private suppliers suffer from serious obstacles in their attempt to provide public goods (like roads and parks), including the reality that they must be able to charge a fee for use and prevent unauthorized use." Steve P. Calandrillo, *Eminent Domain Economics: Should Just Compensation Be Abolished, and Would Takings Insurance Work Instead*, 64 Ohio St. L.J. 451, 455 (2003).

The inherent benefits public works provide the nation combined with the inherent drawbacks that come from private entities providing those public works makes eminent domain proceedings a critical tool in every U.S. government's toolbox. To argue otherwise would be to argue against basic principles of social welfare.

2. If the Fifth Amendment is made self-executing, the cost of public works projects will rise and governmental efficiency will fall.

To soothe concerns surrounding takings, state and federal governments have established several remedies and associated causes of action for a citizen whose property has been taken under eminent domain. The Fifth Amendment itself is not one of these, and if this Court tried to impose otherwise, it would have serious consequences on the efficiency and effectiveness of government action.

Eminent domain proceedings are hostile affairs. A lack of required consent immediately raises fears and suspicions of government overreach. Therefore if this Court chooses to allow a Fifth Amendment takings cause of action to be brought instead of having the landowner negotiate with the government about the looming taking, claims will be settled less and less out of the courtroom.

The first issue that arises from this is the resource drain having to defend every takings action at court would have on a state or local government. Eminent domain proceedings are already lengthy and expensive affairs without a looming court case at the end of it all. "Long public debates county meetings, and endless hearings" about whether the proposed government project is necessary or even desirable accompany every eminent domain proceeding. *Id*. at 498.

Permitting a Fifth Amendment takings cause of action with no additional restrictions would further draw out these administrative proceedings by tacking on what would essentially become a mandatory additional judicial proceeding if the landowner was not wholly satisfied with how the process went, which they often are not. This would cost the government money that could have been spent on vital social programs and projects and will cost time that could have been spent on the public works project.

Instituting a Fifth Amendment implied cause of action would also further hinder the American judicial system by further clogging a system with an already massive backlog. At the end of 2023, 702,433 cases were pending in front of U.S. District Courts. *Federal Judicial Caseload Statistics 2023*, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2023 (last visited October 20, 2024). While that number is down from 2022, it is still staggering. Statistics for state courts are harder to come by, but given the fact state courts adjudicate the majority of cases, one can make the inference the current backlog may be equally disconcerting. This Court should not grant a Fifth Amendment cause of action and further the backlog in our court systems.

3. Though Petitioner cannot bring a claim for just compensation, they still could have sought an equitable remedy.

We admit that if Petitioner had no remedy at law whatsoever, that would be deemed inequitable and *may* give rise to a need for a court to create its own cause of action. However,

that is not the case here. Petitioner has always had the option if he wished to bring a claim against New Louisiana for equitable or injunctive relief directly under the 5th Amendment, which is fully permitted by *Ex parte Young*. *Ex parte Young*, 209 U.S. 123 (1908).

It has been well established that *Ex parte Young* created a "narrow exception grounded in traditional equity practice—one that allows certain private parties to seek judicial orders in federal court preventing state executive officials from enforcing state laws that are contrary to federal law." *Whole Woman's Health v. Jackson*, 595 U.S. 30, 38 (2021). This would have permitted Petitioner to seek injunctive relief against New Louisiana officials for this allegedly unconstitutional eminent domain proceeding. Instead, Petitioner chose to try and seek just compensation, which is not an available remedy to him.

The availability of these alternate remedies mitigates the inequity that arises from a taking with no just compensation. Petitioners may cite to cases where takings claims were brought with no direct mention to 42 U.S.C. §1983 to try and prove their just compensation theory, but all those claims prove is that there is a limited exception that permits a claim to be brought directly under the amendment for *equitable* or *injunctive* relief. It says absolutely nothing about whether it provides a cause of action for just compensation.

It should be noted this Court has also said in the past that determinations of whether a given remedy is adequate to resolve a citizen's issue is "a legislative determination that must be left to Congress, not the federal courts." *Boule*, 596 U.S. at 498. Congress has provided multiple remedies for takings issues like these, from 42 U.S.C. §1983 to a direct claim for injunctive relief. It is not this Court's place to question the adequacy of these remedies.

CONCLUSION

For the reasons above, this Court should not overturn *Kelo* or alternatively should establish a new rule while still adhering to precedent, and should dismiss Petitioner's complaint for failure to plead a proper cause of action.

Dated: October 21, 2024

Respectfully Submitted,

Team 27

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