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

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BRIEF FOR PETITIONERS

TEAM 3

Counsel for Petitioners

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QUESTIONS PRESENTED

I. Whether *Kelo v. City of New London,* which held that a purely economic taking can be for a public use, should be overruled?

II. Whether the Just Compensation Clause is self-executing when there is no state or federal cause of action that provides a remedy explicit in the text of the Constitution?

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

The Luxury Resort. The State of New Louisiana ("New Louisiana") contracted with a private company, Pinecrest, Inc., to build a luxury ski resort (the Resort). R. at 2. The Resort required 1,000 acres of land on the outskirts of the state capital. *Id.* The properties were owned by 100 different owners in three counties. *Id.* Nearly all of the landholders sold their properties for well below fair market value because the State was protected by its own laws. *Id*. The New Louisiana State Code required property owners to identify a statutory or executive waiver of sovereign immunity to obtain just compensation from the State for its taking. *Id.*

The Property Owners. Karl Fisher, along with nine other property owners (the "Property Owners"), brought suit against the State when the State initiated eminent domain proceedings. R. at 3. The Property Owners lived in small family-owned farms and single-family homes in a poor, predominantly minority neighborhood. R. at 2. The family farms were struggling to produce marketable crops because of the soil conditions. *Id*. Even though the Property Owners' homes required substantial improvements, the land did not pose any risk or threat to the public. R. at 3. The average income of the neighborhood was $50,000, making it difficult for families to find housing elsewhere. R. at 2–3. For example, for Mr. Fisher, the land had irreplaceable value because the property had been in his family for the last hundred and fifty years. R. at 3. Thus, the Property Owners were unwilling to sell their land for well below market value. *Id.*

The Forceful Taking. The State authorized Pinecrest to begin construction on the ninety purchased properties and initiated eminent domain proceedings against the Property Owners. *Id.* The Resort was projected to revitalize the economy by increasing tax revenue and jobs. R. at 1–2. The State notified the Property Owners that state law provided no right to just compensation. R. at

3. To stop the forceful taking, the Property Owners sought temporary and permanent injunctive relief against the State for violating the Takings Clause under the Fifth Amendment. *Id*.

II. PROCEDURAL HISTORY

The District Court. The Property Owners argued that the taking was not for public use, or alternatively, just compensation was required. R. at 3. New Louisiana filed a motion to dismiss both claims under Rule 12(b)(6). *Id.* The District Court of New Louisiana agreed with the State and held that the taking was valid—as *Kelo v. City of New London* upheld purely economic takings—and further held, that the Property Owners had no claim for just compensation concluding that the Fifth Amendment is not self-executing. R. at 4.

The Appellate Court. The United States Court of Appeals for the Thirteenth Circuit affirmed. R. at 10. Judge Hayes concurred, arguing that this Court should not overrule *Kelo*. R. at 11. Judge Willis, without a choice, concurred in part but wrote to encourage this Court to overrule *Kelo*. Judge Willis also wrote a dissent, arguing that the Just Compensation Clause is self-executing. R. at 17. Judge Willis argued that a self-executing claim of right better fit the importance that the Framers placed on property rights. *Id*. As a final attempt to save their properties, the Property Owners appealed. This Court granted review over both issues. R. at 20.

SUMMARY OF THE ARGUMENT

This case begins and ends with two settled constitutional limits on the states: the Fifth Amendment forbids takings that are not for "public use" and takings without payment of just compensation. The court below applied these limits incorrectly, and its judgment should be reversed.

I.

The Fifth Amendment prohibits states from taking private property that is not for "public

use". The textual limitation of the Takings Clause was interpreted by early American courts as either property owned by the government or used by the public. This Court first expanded the textual meaning of the Public Use Clause by finding that takings are valid when the taking eliminates a public harm or directly advances a public benefit as valid. But there was a complete abandonment of textual limitations when this Court decided *Kelo v. City of New London*.

There, this Court held that a purely economic taking was valid. But if an economic taking is valid, then anything is. As a result, *Kelo* has erased the Public Use language from the Constitution. This Court's holding in *Kelo* is badly reasoned due to its inconsistency with the text of the Constitution and the practical problems it led to. The stare decisis factors weigh strongly in favor of overruling *Kelo*. Thus, this Court should overrule *Kelo* and reinstate the textual limitations of the Fifth Amendment over the power of eminent domain.

II.

The Fifth Amendment prohibits states from taking property without just compensation. This Court has repeatedly required that a citizen, who is forced to give up their property for "public use," is compensated for his or her sacrifice. Yet, New Louisiana refuses to provide the Property Owners with just compensation. This is a violation of the Petitioners' Fifth Amendment right to just compensation. New Louisiana has failed to provide a state law that allows claimants to bring just compensation claims. This is a violation of the Petitioners' Fourteenth Amendment right to due process.

Citizens who live in states that refuse to waive their Eleventh Amendment immunity deserve to have a cause of action directly rising under the Fifth Amendment. The Federal Constitution demands it. Currently, claimants can bring just compensation claims against federal agents. Claimants can also bring just compensation claims against state agents if the state waives

its Eleventh Amendment immunity. But not the Petitioners. It makes no sense that claimants, like the Petitioners, are the only ones that cannot bring just compensation claims. This case gives this Court the opportunity to uniformly enforce the federal protections provided for in the Constitution. Thus, this Court should reverse and hold that the Just Compensation Clause is self-executing when there is no state or federal cause of action.

ARGUMENT AND AUTHORITIES

Standard of Review. This Court reviews the district court's conclusions of law de novo. *See USA, Inc. v. Sandoz, Inc*., 574 U.S. 318, 328 (2015) (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947–48 (1995)).

I. THE STATE OF NEW LOUISIANA'S DEVELOPMENT PLAN VIOLATES THE FIFTH AMENDMENT'S TAKING CLAUSE.

The Fifth Amendment provides, "nor shall private property be taken for public use, without just compensation". U.S. Const. amend. V. This Court recognized two limitations on a government's eminent domain power: the taking must be for public use and just compensation must be paid to the owner. *Brown v. Legal Foundation of Wash.*, 538 U.S. 216, 231-32 (2003). Together these two limits ensure that every citizen of the United States of America is safeguarded against excessive, unpredictable, or unfair use of the eminent domain power by government actors. *Kelo v. City of New London*, 545 U.S. 469, 496 (2005) (O'Connor, J., dissenting).

But this Court's decision in *Kelo* was a 5-4 loss for constitutional rights that virtually removed all federal constitutional protection from state takings. Dana Berliner, *Looking Back Ten Years After Kelo* (July 07, 2015), http://www.yalelawjournal.org/forum/looking-back-ten-years-after-kelo. Under *Kelo*, a property may be condemned if another private use can generate more taxes. *Kelo*, 545 U.S. at 484. But nearly all private residences and small businesses

generate fewer tax dollars than a large corporation, and under *Kelo*, condemnation of any such property would be for public use. As a result, governments routinely condemn perfectly good homes and businesses for more money.[1]

But prior to *Kelo*, this Court only allowed ownership by private parties in two situations: to remove certain public harm or to provide a public service. *Berman v. Parker*, 348 U.S. 26, 34–35 (1954); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241–42 (1984). Yet in *Kelo*, property was transferred from a private citizen to a private company, who would have derived the profits from the development plan and closed access to the public. Of course, none of that happened. Even though this Court ruled in favor of the development plan, the project was a colossal failure. *See* Alex Nunes, *Residents Haul Debris to Fort Trumbull* (Aug. 30, 2011), http://www.theday.com/article/20110830/MEDIA0101/110829587. Far from promoting economic growth, the condemnation in *Kelo* inflicted economic and social harms to the public.

The fundamental issue with this Court's holding in *Kelo*, simply put, is that it is *always* possible that a given property may be used more efficiently by a different owner and generate increased employment and tax revenue. But the Takings Clause demands otherwise. *See* U.S. Const. amend. V. ("nor shall private property be taken for *public use,* without just compensation"). It is vital that this Court take the opportunity to overrule *Kelo* and hold that "public use" must eliminate a public harm or directly advance a public benefit.

[1] *See Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 628, (Mich. 1981) (overruled by *County of Wayne v. Hathcock*, 471 Mich. 445 (Mich. 2004)) (resulting in around 4200 people losing their homes and numerous businesses, churches, and other community institutions were destroyed so that General Motors could build a new factory); *see also* Nick Schou, *More Freebies for the Rich* (June 28, 2001), https://www.ocweekly.com/more-freebies-for-the-rich-6389118/.

A. This Court Should Overrule *Kelo v. City of New London*.

There are special occasions when past precedent should be overturned, this is one of them. *Stare decisis* is a principle of policy. *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). It has never been an inexorable command nor a mechanical formula of adherence to precedent. *Ramos v. Louisiana*, 590 U.S. 83, 105 (2020); *Payne*, 501 U.S. at 828. Especially when the Court interprets the Constitution, *stare decisis* is at its weakest. *Ramos*, 590 U.S. at 105. As this Court's interpretation of the Constitution can only be altered through constitutional amendment or overruling precedent. *Agostini v Felton*, 521 U.S. 203, 235 (1997). It is this Court's duty, then, to balance the importance of having constitutional questions decided against the importance of having them decided *right*. *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 378 (2010) (Roberts, C. J., concurring).

When fidelity to any particular precedent does more damage than to advance it, this Court must be willing to depart from that precedent. *Citizens,* 558 U.S. at 378. In fact, this Court has "never felt constrained to follow precedent" that was unworkable or badly reasoned. *Payne,* 501 U.S. at 827; *see also Ramos,* 590 U.S. at 111 (overturning *Apodaca v. Oregon* because it was poorly reasoned, inconsistent with other Sixth Amendment decisions, and undermined by recent decisions); *Janus v. AFSCME, Council 31*, 583 U.S. 878, 929 (2018) (overturning *Abood v. Detroit Board of Education* because poorly reasoned, inconsistent with other First Amendment cases and undermined by recent decisions); *Dobbs v. Jackson, Women's Health Org.,* 597 U.S. 215 (2022) (overturning *Roe v. Wade* because it is badly reasoned, inconsistent with text of the Constitution, and unworkable). This Court should also overturn *Kelo* because all these reasons—*Kelo's* bad reasoning, inconsistency with the text of the Constitution, inconsistency with other Fifth Amendment precedent, and low reliance on the precedent—provide the special justification

needed to overrule *Kelo*.

1. *Kelo* is poorly reasoned because it confuses public use with public purpose.

When interpreting the Constitution, the Court begins with the presumption that every word has an independent meaning. *Wright v. United States*, 302 U.S. 583, 588 (1938). Reflecting the widely held understanding that no word in the Constitution was unnecessarily used or needlessly added. *Id*. The Taking Clause means what it says. The plain language of the clause explicitly indicates that property may only be taken for public use. *See Midkiff*, 467 U.S. at 245. Given the explicit text and structure of the Constitution "public use" cannot mean any rational purpose. *Eychaner v. City of Chicago*, 141 S. Ct. 2422, 2423 (2021) (Thomas, J., dissenting) (arguing that "public use" means something more than any conceivable public purpose). Interpreting the "public use" language any differently would make the Public Use Clause meaningless and empty. *Kelo*, 545 U.S. at 484 (Thomas, J., dissenting).

But the Court in *Kelo* offered no explanation as to how a purely economic taking can be upheld as constitutional when the Public Use Clause expressly limits takings to public use. *See generally Kelo* 545 U.S. at 469–490 (failing to analyze text of Fifth Amendment). *Kelo* is badly reasoned because the majority opinion does not grapple with the text of the Public Use Clause.

Also, if "public use" had such a broad meaning, the Public Use Clause would actually broaden rather than limit the eminent domain power implied in the Necessary and Proper Clause. U.S. Const. art. 1, § 8. Which would be directly contrary to the purpose of the Fifth Amendment and the rest of the Bill of Rights—to clarify the limits on the exercise of powers already granted. *Knapp v. Schweitzer*, 357 U.S. 371, 377 (1958). This Court should maintain absolute fidelity to the Public Use Clause's express limit on the power of the government, just as this Court does with every other liberty expressly enumerated in the Bill of Rights. *Kelo*, 545 U.S. at 506

(Thomas, J., dissenting).

Further, *Kelo's* extreme deference to the legislative branch is unheard of for enumerated rights under the Constitution. The Court in *Kelo* believed it was an impossible task to dissect the subjective motivation of those enacting statutes. *Kelo*, 545 U.S. at 488. Yet, this Court frequently examines the purposes of government action when deciding constitutional claims. *Brickmann v. Town of Southold*, 96 F.4th 209, 220 (2d Cir., 2024) (Menashi, J., dissenting) (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp*., 429 U.S. 252, 265, (1977)) (requiring proof of racially discriminatory intent or purpose to show violation by government action); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533, (1993) (explaining ways in which claimant can establish that object or purpose of a law is suppression of religion or religious conduct); *Allen v. Milligan*, 599 U.S. 1, 11, (2023) (inquiring into whether city purposefully excluded claimant from participating in election process, thereby violating Fifteenth Amendment). But regardless, this Court in *Kelo* did not need to engage in a subjective analysis. Rather, the inquiry is objective—does the taking provide only an incidental benefit to the public, thereby violating the Fifth Amendment.

It is implausible that the Framers intended to defer to legislatures as to what satisfies the Public Use Clause. *Kelo*, 545 U.S. at 517–18 (Thomas, J., dissenting). Specifically, given the uniqueness of the Fifth Amendment among all the express provisions of the Bill of Rights. *Id*.; *see also Chic. Burlington & Quincy Ry. v. Chicago*, 166 U.S. 226, 239 (1897) (Takings Clause was first constitutional provision to be incorporated against states). It was also this Court that acknowledged the need for a judiciary check, regardless of how narrow the review may be. *Berman,* 348 U.S. at 32. In effect, this Court in 1954 predicted the harm that would flow from refusing to engage in a judiciary check on the objective purpose of a taking.

It was James Madison, when he presented the Bill of Rights to Congress, who envisioned the independent tribunals of justice as guardians of every American's most fundamental rights. *Davis v. Passman*, 442 U.S. 228, 242 (1979) (citing 1 Annals of Cong. 439 (1789)). In refusing to engage in a judicial check, the Court in *Kelo* refused to be the guardian of the Constitution. But one of the Court's first duties to its citizens is to resist every encroachment upon rights expressly stipulated for in the Constitution. *Davis*, 442 U.S. at 243.

Kelo's reasoning is further undermined because it has led to practical problems and abuse. In its reasoning, the Court, in *Kelo,* emphasized that requiring the likelihood of success for a proposed economic plan would unquestionably serve as a significant impediment to the execution of such plans. *Kelo*, 545 U.S. at 488. Yet, despite the well-developed economic plan that existed in *Kelo*, the plan was never implemented after the case was decided. No building was ever constructed on the site of the condemned homes. *See* Alec Torres, *Nine Years After Kelo, the Seized Land is Empty* (Feb. 5, 2014), http://www.nationalreview.com/article/370441/nine-years-after-kelo-seized-land-empty-alec-torres. In fact, the project site continues to be filled with a field of weeds, feral cats, and storm debris. *See* George Lefcoe, *Jeff Benedict's Little Pink House: The Back Story of the Kelo Case*, 42 Conn. L. Rev. 925, 936 (2010); David Collins, *Feral Cats Ignore Eminent Domain* (Dec. 10, 2008), http://www.theday.com/article/20081210/DAYARC/312109860.

The gross failure of this well-thought and well-developed economic plan undermines the rational in *Kelo* even further. Dana Berliner, *Looking Back Ten Years After Kelo* (July 07, 2015), http://www.yalelawjournal.org/forum/looking-back-ten-years-after-kelo. Before the taking in *Kelo*, the same area was a working-class neighborhood. *See* Kathleen Edgecomb, *'It Still Hurts': Fight to Save Home Scars One Fort Trumbull Family* (June 23, 2013),

https://www.theday.com/local-news/20130623/it-still-hurts-fight-to-save-home-scars-one-fort-trumbull-family/. A land that families lived and cherished for generations is now empty, and it has been for the last nineteen years. Ilya Somin, *Will There Finally Be Some Development On The Land Condemned In Kelo v. City Of New London* (May, 06 2023), https://reason.com/volokh/2023/05/06/will-there-finally-be-some-development-on-the-land-condemned-in-kelo-v-city-of-new-london/. The inefficient use of land after a government taking, present in *Kelo*, can be found in a number of other cases. Where a court allows a state to infringe on the free market and individual property rights, but the land after the taking remain the same or worsens. *See* Institute of Justice*, Redevelopment Wrecks: 20 Failed Projects Involving Eminent Domain Abuse*, (June 2006), http://castlecoalition.org/pdf/publications/ Redevelopment%20Wrecks.pdf. Thus, this Court should overrule *Kelo*.

2. *Kelo* may be workable, but it ignores the Constitutions explicit limit on a state's eminent domain power.

The Court's holding in *Kelo* strayed from the Constitution and diminished the right to be free from takings. *Eychaner,* 141 S. Ct. at 2423. Under *Kelo*, a purely private economic taking is constitutional. *See Kelo*, 545 U.S. at 484–85. While this rule may be easy to apply, it ignores the express limit on a state's eminent domain power. The fact that a private use can be for the general welfare, by providing taxes and employment, does not change the use from private to public. *See Inspiration Consol. Copper Co. v. New Keystone Copper Co.*, 144 P. 277, 279 (Ariz. 1914). States like Kentucky, Maine, New Hampshire, South Carolina, Washington, and Michigan agree that economic development by itself is not "public use". *See* Murray N. Rothbard, *Man, Economy, and State: A Treatise on Economic Principles* supra note 4, at 78–79 (Ludwig Von Mises Institute rev. ed. 1993); *see also* Joseph F. Becker, *Procrustean Jurisprudence: An Austrian School Economic Critique of the Separation and Regulation of Liberties in the Twentieth Century United*

States, 15 N. Ill. U. L. Rev. 671, 695 (1995).

A beneficial use is not a public use. *Manufactured Housing Communities of Washington v. State*, 13 P.3d 183, 189 (Wash. 2000). Strictly as a matter of plain textual meaning, "public use" can only mean government ownership of or government control of the use of the property. This Court should not give the legislature power to make a taking public use, which in its nature is a private use. *Inspiration*, 144 P. at 279.

3. *Kelo* is inconsistent with other Fifth Amendment precedent.

This Court, in *Berman and Midkiff*, held that the transfer of property from one private property to another is justifiable because each transfer directly achieved a public benefit. *Kelo*, 545 U.S. at 500 (O'Connor, J., dissenting); *see Berman*, 348 U.S. at 34–35 (upheld taking unblighted area because land was part of redevelopment plan targeting blighted area); *see also Midkiff*, 467 U.S. at 241–42 (upheld transfer of fee titles from private parties to other private individuals to eliminate land oligopoly); *see also Ruckelshaus v. Monsanto Co*., 467 U.S. 986, 1003–04 (1984) (upheld publishing data, including trade secrets, submitted by prior pesticide applicants because data eliminated significant barrier to entry in pesticide market).

But, in *Kelo*, the taking was purely economic with only some incidental benefit for the public (tax revenue and more jobs). *Kelo*, 545 U.S. at 501 (O'Connor, J., dissenting). The taking in *Kelo* was not to directly eliminate blight, not taken to reduce land oligopoly, nor taken to increase market participation. *Kelo*, 545 U.S. at 500–01 (O'Connor, J., dissenting). The only public benefits in *Kelo*, that were never even realized[2], were completely dependent upon private parties actually making a profit. *Kelo*, 545 U.S. at 502 (O'Connor, `J., dissenting). This Court

[2] *See* David Collins, *Feral Cats Ignore Eminent Domain* (Dec. 10, 2008), http://www.theday.com/article/20081210/DAYARC/312109860.

should overrule *Kelo* because its reasoning is inconsistent with this Court's prior Fifth Amendment precedent.

4. Reliance on *Kelo* is low because majority of states have taken steps to circumvent its holding.

This Court should overturn *Kelo* because reliance on the precedent is low. After *Kelo* was decided, forty-four states changed their laws; eleven changed their constitution[3] and forty enacted statutory changes[4]. Most of the changes enacted by state governments define the limits of public

[3] Fla. Const. art. X, § 6 (2006); Ga. Const. art. IX, § II, para. V (2006); La. Const. art. I, § 4 (2006); Mich. Const. art. X, § 2 (2006); Miss. Const. art. 3, § 17A (2012); Nev. Const. art. 1, § 22 (2008); N.H. Const. Pt. First, art. 12-a (2006); N.D. Const. art. I, § 16 (2006); S.C. Const. art. I, § 13 (2007); Tex. Const. art. I, § 17 (2009); Va. Const. art. I, § 11 (2013).

[4] S.B. 68, 2005 Leg., 2d Special Sess. (Ala. 2005), H.B. 654, 2006 Leg., Reg. Sess. (Ala. 2006); H.B. 318, 24th Leg., 2d Sess. (Alaska 2006); S.B. 53, 1206, 1210, 1650, and 1809, 2005-2006 Leg., Reg. Sess. (Cal. 2006); H.B. 1411, 2006 Gen. Assemb., Reg. Sess. (Colo. 2006); S.B. 167, 2007 Gen. Assemb., Reg. Sess. (Conn. 2007); S.B. 7, 145th Gen. Assemb., Reg. Sess. (Del. 2009); H.B. 1567, 2006 Leg., Reg. Sess. (Fla. 2006); H.B. 1313, 2005-2006 Gen. Assemb., Reg. Sess. (Ga. 2006); H.B. 555, 2006 Leg., Reg. Sess. (Idaho 2006); S.B. 3086, 94th Gen. Assemb., Reg. Sess. (Ill. 2006); H.B. 1010, 114th Gen. Assemb. 2d Reg. Sess. (Ind. 2006); H.F. 2351, 81st Gen. Assemb., Reg. Sess. (Iowa 2006); S.B. 323, 2005-2006 Leg., Reg. Sess. (Kan. 2006); H.B. 508, 2006 Leg., Reg. Sess. (Ky. 2006); L.D. 1870, 122d Leg., 2d Reg. Sess. (Me. 2006); S.B. 3, 2007 Leg., Reg. Sess. (Md. 2007); H.B. 5817, 5818, 5819, 5820, 5821, 93d Leg., Reg. Sess. (Mich. 2006); S.F. 2750, 84th Leg., Reg. Sess. (Minn. 2006); H.B. 1944, 2006 Leg., Reg. Sess. (Mo. 2006); S.B. 41, 363, 56th Leg., Jan. Reg. Sess. (Mont. 2007); L.B. 924, 99th Leg., 2d Sess. (Neb. 2006); A.B. 102, 2009 Leg., 74th Sess. (Nev. 2007); S.B. 287, 2006 Gen. Ct., Reg. Sess. (N.H. 2006); H.B. 393, 2007 Leg., Reg. Sess. (N.M. 2007), S.B. 401, 2007 Leg., Reg. Sess. (N.M. 2007); H.B. 1965, 2005-2006 Gen. Assemb., Reg. Sess. (N.C. 2006); S.B. 2214, 60th Leg. Assemb., Reg. Sess. (N.D. 2007); S.B. 167, 126th Gen. Assemb., Reg. Sess. (Ohio 2005), S.B. 7, 127th Gen. Assemb., Reg. Sess. (Ohio 2007); H.B. 2054, 2005-2006 Gen. Assemb., Reg. Sess. (Penn. 2006), S.B. 881, 2005-2006 Gen. Assemb., Reg. Sess. (Penn. 2006); S.B. 2728A, 2008 Gen. Assemb., Jan. Sess. (R.I. 2008); H.B. 1080, 2006 Leg., 81st Sess. (S.D. 2006); H.B. 3450, 3700, 104th Gen. Assemb., Reg. Sess. (Tenn. 2006), S.B. 3296, 104th Gen. Assemb., Reg. Sess. (Tenn. 2006); H.B. 1495, 80th Leg., Reg. Sess. (Tex. 2007), S.B. 7, 79th Leg., 2d Called. Sess. (Tex. 2005); H.B. 365, 2007 Leg., Gen. Sess. (Utah 2007), S.B. 117, 2006 Leg., Gen. Sess. (Utah 2006); S.B. 246, 2005-2006 Gen. Assemb., Reg. Sess. (Vt. 2006); H.B. 2954, 2007 Gen. Assemb., Reg. Sess. (Va. 2007), S.B. 781, 1296, 2007 Gen. Assemb., Reg. Sess. (Va. 2007); H.B. 1458, 2007-2008 Leg., Reg. Sess. (Wash. 2007); H.B. 4048, 2006 Leg., Reg. Sess. (W. Va. 2006); A.B. 657, 2005-2006 Leg., Reg. Sess. (Wis. 2006); H.B. 124, 2007 Leg., Gen. Sess. (Wyo. 2007).

purpose. Berliner, *supra.* Generally, requiring a closer connection between the taking and the protection of public health or safety. La. Const. art. I, § 4 (2006) (requiring that blighted property cause health and safety problem to be subject to condemnation); S.C. Const. art. I, § 13 (2007) (requiring that blighted property must be danger to public health or safety). Going a step further, some states limit the government's ability to use blight on a few properties to designate large areas as blighted. Ga. Code Ann. § 22-1-1(1) (West 2015) (requiring blight to be determined on a property-by-property basis and imposing stricter requirements for health and safety problems); Idaho Code Ann. § 7-701A (West 2015) (requiring clear and convincing evidence of blight, imposing stricter requirements for health and safety problems, and requiring blight to be determined on a property-by-property basis).

Thus, reliance interests on *Kelo* are very low because a total of forty-seven states increased protection against takings for private use. If this Court overrules *Kelo*, it will not be a surprise to the states. Although the concurrence below worried about community development and growth via eminent domain. As explained above, most states have taken steps to ensure that eminent domain power is limited. Therefore, this court should overrule *Kelo*.

B. Property Taken For Public Use Must Be Owned By The Government Or Used By The Public.

The most natural reading of the Clause only allows the government to take property 1) if the government owns the property or 2) if the public has a right to use the property. *Kelo*, 545 U.S. at 508 (Thomas, J., dissenting). Over the last two decades, this Court expanded that natural reading to include takings that eliminate a public harm or directly advance a public benefit. *See Berman*, 348 U.S. at 34–35; *see also Midkiff*, 467 U.S. at 241–42. But if purely economic development takings are for "public use", then any taking is. And the Court has, in effect, erased the Public Use Clause from the Federal Constitution. *Kelo*, 545 U.S. at 506 (Thomas, J.,

dissenting).

Even though "public use" defies definition because it changes with the evolving conceptions of the scope and functions of government. *Kelo, et al. v. City of New London*, 843 A.2d 500, 524–25 (Conn. 2004). One thing never changes. The text of the Constitution. The textual requirement of "public use" should *always* be imposed on states. As Justice Thomas argued: the Constitution's text, common-law background, and early practice of eminent domain all indicate that the Takings Clause authorizes takings only if public has a right to employ it. *Eychaner*, 141 S. Ct. at 2423 (Thomas, J., dissenting) (arguing that *Kelo* was wrongly decided and remains wrong today).

1. The language of the Fifth Amendment and early American courts limit takings to government acquisition for public use.

This Court should hold that "public use" implies a possession, occupation, and enjoyment of land by the public at large or by public agencies. *Ottofaro v. City of Hampton*, 574 S.E.2d 235, 237 (Va. 2003) (citing *Phillips v. Foster*, 211 S.E.2d 93, 96 (Va. 1975)). Due protection of private property should preclude any state from seizing land, under vague grounds of public benefit, and giving it to another private party who will enjoy a more profitable use. *County of Wayne*, 471 Mich. at 497 (Mich. 2004) (citing *Portage Twp. Bd. of Health v. Van Hoesen*, 87 Mich. 533, 538 (1891)). Indeed, this Court acknowledged in *Kelo*, many state courts in the mid-19th century endorsed 'use by the public' as the proper definition of public use. *Kelo*, 545 U.S. at 479.

Considering the Constitution's structure, the Framers employed the term "use" consistently with the word's plain meaning: "employment for one's own purpose." See U.S. Const. art. I. § 10, cl. 2 (stating that state taxes "shall be for Use of Treasury of United States"). Clearly, the U.S. Treasury is meant to "use" the tax levies. *See* Roger Clegg, *Reclaiming the Text of the Takings Clause,* 46 S.C. L. Rev. 531, 542 (1995). It follows, that when the Framers used

the phrasing "public use" to limit eminent domain proceedings, it intended to ensure that the public can *use*—own or direct the use of—the taking.

Early American courts followed a simple three-part categorization: public ownership, public control of a common carrier, and pure private ownership. The first two categories fell within the definition of "public use". While the last category was private use and thus, unconstitutional. *See Midkiff*, 467 U.S. at 241. In the second category, the public's right of access ensured that the public uses the property even though a private delegate happens to own the property. *Beekman v. Saratoga & Schenectady R.R.*, 3 Paige Ch. 45, 74 (N.Y. Ch. 1831) (upholding use of eminent domain for construction of private railroad). This Court should reinforce this three-part categorization. In other words, this Court should hold that a taking is only valid if the property is owned by the government or used by the public[5].

2. A single luxury ski resort is not public use because the government is not the owner and the public does not have access.

Taking private land for the purpose of conferring a private benefit on an identified private party is forbidden. *Kelo*, 545 U.S. at 478. A government is prohibited from taking property under the mere pretext of a public purpose, where its actual purpose is to benefit a private party. *Id.* Here, the New Louisiana taking violates the public use clause because the actual purpose of the luxury ski resort is to benefit Pinecrest, Inc. – an identified private party.

This case is distinguishable from *Kelo* for several, independent reasons. First, a state cannot take property with only incidental or pretextual public benefits. *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring) (citing *Cleburne v. Cleburne Living Center, Inc*. 473 U.S. 432, 446-

[5] In addition to *Kelo*, two other cases have expanded the meaning of "public use". *Berman*, 348 U.S. at 34–35 (holding takings that eliminate public harm as valid); *Midkiff*, 467 U.S. at 241–42 (holding takings that directly advance a public benefit as valid). To the extent that *Berman* and *Midkiff* are inconsistent with this holding, this Court should overturn the holdings there too.

447 (1985)). In *Kelo*, after a careful and extensive inquiry, the trial court found that benefiting Pfizer Inc. was not the primary motivation or effect of the development plan. *Id*. Even the dissenting justices on the Connecticut Supreme Court agreed that the development plan in *Kelo*, was intended to revitalize the local economy, not to serve the interests of any private party. *Kelo*, 545 U.S. at 492 (Kennedy, J., concurring). Thus, there was no evidence of an illegitimate purpose in *Kelo*.

No such inquiry exists, here. The Petitioners' claim has been dismissed at the pleading stage. R. at 1. But when considering all the pleaded facts in the light most favorable to the nonmovant's, the Petitioners, New Louisiana may have taken property with only incidental public benefits. Moreover, based on the facts plead, a reasonable inference can be made that New Louisiana was primarily motivated by benefiting Pinecrest Inc. R. at 1–3. At the very least, this case should be remanded to the district court to determine New Louisiana's primary motivation for the taking. *Contra Goldstein v. Pataki*, 516 F.3d 50, 62 (2d Cir. 2008) (refusing to remand because claimants conceded the projects rational connection to well-established public uses, like removal of blight). The Petitioners should be given an opportunity, as the property owners in *Kelo* were, to establish that the taking's purpose does not pass scrutiny under the Public Use Clause. Especially, here, given that there is an identifiable private party here.

Second, a state is forbidden from taking property from one private party for the benefit of another indefinable private party. *Kelo*, 545 U.S. at 477. In *Kelo*, the State did not pick out a single, particular transferee before committing funds. *Kelo,* 545 U.S. at 492 (Kennedy, J., concurring). Instead, the city reviewed a variety of development plans and chose a private developer from a group of applications. *Id*. In fact, most of the other beneficiaries of the project in *Kelo* were unknown to the city. *Id*. But, here, there is only one beneficiary. R. at 2. New Louisiana picked a

single, particular transferee (Pinecrest, Inc.) as the sole beneficiary of the development plan. *Id.* Unlike the *City* in Kelo, who created a development plan before choosing a developer and had multiple private beneficiaries as applicants, here, New Louisiana's development plan (a luxury ski resort) is not a real plan and there is identifiable private company. In other words, the only reason there is a development plan, here, is because the State contracted with the identifiable private developer. Therefore, New Louisiana cannot rely on *Kelo* to establish public use because the development plan is taking directly from one private party (the Petitioners) and transferring it to another identifiable private party (Pinecrest, Inc.).

Finally, a private taking for economic development should be executed with a "carefully considered" development plan. *Kelo*, 545 U.S. at 478. In *Kelo*, the majority opinion emphasized that an unusual exercise of government power exists when a taking for economic development occurs outside the confines of an integrated development plan. *Id.* at 477. The fact that the economic development plan in *Kelo* was to create multiple parcels of land was important to this Court's finding that the taking's purpose was economic rejuvenation for the city. *Id.* at 483; *see also Goldstein*, 516 F.3d at 64 (upholding a motion to dismiss because the claimants conceded that development plan will target long-blighted area, create publicly owned stadium, create public open space, increase quantity of affordable housing, and improve mass transit system).

A single luxury ski resort is not an integrated development plan. Here, the economic development plan that will supposedly revitalize and ensure long-lasting benefits for the people of New Louisiana by creating a single, luxury ski resort, as contrasted with the multi-fold complex in *Kelo* (creation of a hotel, shopping center, new residences, museum, office space, parking, and a renovated marina). *Kelo*, 545 U.S. at 474. Yet, even under such thorough economic plan, the citizens of the City of New London never saw a rejuvenated city. See David Collins, *Feral Cats*

Ignore Eminent Domain (Dec. 10, 2008), http://www.theday.com/article/20081210/DAYARC/312109860. Unfortunately, the same fate awaits the Petitioners here, given the weak and incomparable nature of the State's "plan".

Viewed objectively and without second-guessing the motivation of the legislative body, New Louisiana could not have rationally believed—a single luxury ski resort—would promote its objective to revitalize the economy. Petitioners should be allowed to demonstrate, at the district court level, that the taking is pretextual or merely has an incidental benefit to the public. Thus, this Court should remand for further proceedings.

II. THE TAKINGS CLAUSE IS SELF-EXECUTING WHEN THERE IS NO STATE OR FEDERAL CAUSE OF ACTION FOR JUST COMPENSATION.

A claim for just compensation is sui generis or unique. Indeed, all takings by the government require the payment of just compensation. *Kelo*, 545 U.S. at 508 (Thomas, J., dissenting). This is a bedrock principle established by the Framers. *Id*. (citing 1 Commentaries on the Laws of England 134–35 (1765)); 2 J. Kent, Commentaries on American Law 275 (1827); For the National Property Gazette, (Mar. 27, 1792), in 14 Papers of James Madison 266, 267 (R. Rutland et al. eds. 1983) (no property "shall be taken even for public use without indemnification to the owner"). Yet, the Petitioners stand before this Court with no state or federal cause of action to bring forth a remedy explicit in the text of the Federal Constitution. R. at 8; *see* U.S. Const. amend. V. ("nor shall private property be taken for public use, *without just compensation*").

Earlier this year, this Court in *DeVillier v. Texas* refused to answer the question of whether the Just Compensation Clause is self-executing. 601 U.S. 285, 292 (2024) (sidestepping the issue because the property owners had an available remedy under state law). But here, the Petitioners

have no available remedy under both state and federal law. Although this Court declined to assume that states will not honor the Constitution, either by declining to waive state immunity or failing to provide a state cause of action. *Id.* at 293. The State of New Louisiana *is* refusing to honor the Federal Constitution by failing to waive their immunity and failing to provide a state cause of action.

A constitutional provision can be self-executing. So long as it provides a sufficient rule by which the right given may be enjoyed and protected. *Davis* v. *Burke*, 179 U.S. 399, 403 (1900). The Just Compensation Clause does just that. Explicitly in its text, the Fifth Amendment provides just compensation as the mechanism to protect citizens from government takings. U.S. Const. amend. V. This Court has repeatedly recognized that the Takings Clause remedy is inherent in its text. *Jacobs v. United States*, 290 U.S. 13, 16 (1933) (holds that just compensation remedy "guaranteed by" and "founded upon" Constitution's plain text). But if the Takings Clause is not self-executing, then a property owner has no protection against a state who refuses to waive its immunity. Therefore, this Court should reaffirm the widely held belief that the Just Compensation Clause is self-executing.

A. The Just Compensation Clause Is Self-Executing Because The Remedy Is Explicit In The Text Of The Fifth Amendment.

The Court's precedent is clear: when the government takes property, there is nothing that can relieve the duty to provide just compensation. *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 321 (1987); *see also Tahoe-Sierra Pres Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) (distinguishing regulatory and constitutional takings because latter requires a categorical duty to compensate property owner). As this Court has recognized, the absence of a case—specifically relying on the Takings Clause for a cause of

action—does not itself prove that the Just Compensation Clause is not self-executing. *DeVillier*, 601 U.S. at 292. Especially since, this Court's precedent has confirmed repeatedly the self-executing nature of the Fifth Amendment.

The right to recover just compensation is guaranteed by the Constitution. *Jacobs,* 290 U.S. at 16. In *Jacobs*, the United States constructed a dam which caused an overflow into the claimant's land. *Id at 15*. On appeal, the issue was whether claimant was entitled to the interest that accrued from the date of the taking. The Fifth Circuit Court of Appeals, distinguished claimant's action from a condemnation proceeding and held that the suit was founded upon an implied contract, meaning payment of interest was not allowed. *Id.* at 16. This Court reversed. The Court found that a partial taking of the land existed, which meant that the government was bound to make just compensation under the Fifth Amendment. *Id.* In its reasoning, this Court rejected the idea that claimants were not entitled to just compensation because the government did not start a condemnation proceeding. *Id*. The form of the remedy did not matter to this Court, so long as the claimant was provided the remedy required under the Constitution. *Id*. This Court, here, should apply the same reasoning against states like New Louisiana—who refuse to waive their immunity, and thereby violate the Constitution.

Regardless of whether there is a physical or regulatory taking, the state is required to compensate the owner. *See Monongahela Navigation Co. v. United States*, 148 U.S. 312, 337 (1893) (explaining that right to compensation is so inseparably connected with government's power to take private property). New Louisiana should also be required to compensate for its taking. Under a fair interpretation of the protections afforded by the Takings Clause, the Petitioners should also be entitled to just compensation. *See Id.* at 325 (holding that full and just equivalent shall be provided to individual who surrenders something more than other members of public).

Thus, it should not matter to this Court which cause of action is employed by a claimant because the remedy, underlying any action for compensation, is derived from the Fifth Amendment.

The majority below, distinguishes a claim for just compensation from the "*Bivens* claims": Fourth, Fifth, and Eighth Amendments that are self-executing.[6] R. at 6; see *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971) (holding that claimant can bring Fourth Amendment claim for excessive force during arrest); *Carlson v. Green*, 446 U.S. 14, 25 (1980) (holding that claimant can bring a Fifth Amendment claim for inadequate care in prison); *Burke*, 179 U.S at 242 (holding that claimant can bring Eighth Amendment claim for sex discrimination in federal employment). But this comparison is misplaced.

The damages remedy for a taking is explicit in the text of the constitution. U.S. Const., amend. V. While the damages remedy for *Bivens* claims are all implied. *Hernandez v. Mesa*, 589 U.S. 93, 101 (2020). In fact, this Court moved away from expanding the *Bivens claims* because it was worried that the balance of interests may be upset if the Court assumes common-law powers to create a cause of action for a damages remedy implied by a provision "that makes no reference to that remedy". *Id.* at 100. But the takings clause is special. Unlike implied constitutional torts, a claim for just compensation raises no separation of power concerns because it not a judicial creation of a remedy. Rather the just compensation remedy is explicit in the text of the Constitution. U.S. Const., amend. V.

This Court should not force constitutional text into modern "cause of action" jurisprudence to hold that the Fifth Amendment guarantees just compensation. This Court has never expected the Constitution to include the same level of detail as statutes. See *McCulloch* v. *Maryland*, 17

[6] This Court has narrowed the *Bivens* claims to the three aforementioned amendments. *Egbert v. Boule*, 596 U.S. 482, 490–491 (2022).

U.S. 316, 407 (1819). Nor would the Framers generation have thought of the "cause of action" debate raised by this case. *See Id*. ("[W]e must never forget that it is a *constitution* we are expounding."). The express remedy for just compensation eliminates the need for an express or implied right of action to litigate. U.S. Const. amend. V (conferring a right to every individual to be free from government takings without just compensation).

This Court in *Knick*, declined to hold that a property owner could not bring a federal claim for just compensation simply because an available state remedy existed. *Knick v. Twp of Scott*, 588 U.S. 180, 191 (2019). As this Court explained, it is the existence of the Fifth Amendment right that allows the owner to proceed directly to federal court. *Id.* at 192. But there is no available compensation remedy here. R. at 8. Thus, it is much more important that this Court finally resolve the issue of a self-executing remedy in favor of Petitioners. Otherwise, finding in favor of Respondent, would effectively nullify a fundamental constitutional protection for millions of Americans. Therefore, this Court should hold that the just compensation Clause is self-executing.

B. History, Tradition And Purpose All Establish A Right To Just Compensation Regardless Of The Procedural Mechanism Used.

The particular procedure employed to receive just compensation has never been of importance to this Court. *Dohany v. Rogers*, 281 U.S. 362, 366 (1930) (finding that claimant' entitlement to just compensation is guaranteed by the Fourteenth Amendment). Legislation was never required to bring a just compensation claim. History says so. The first courts to recognize that a constitutional guarantee of just compensation came with a cause of action were state courts interpreting state constitutions. *Knick,* 588 U.S. at 199. When no statutory procedures were available, aggrieved property owners could enforce state takings clauses by bringing common law trespass suits. *Id*. at 197–98. As such, injunctive relief to stop government takings have predated

both the Tucker Act and Section 1983. *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (requiring just compensation under the Fifth Amendment, in lien action, because taking of property by government implicates obligation to pay just compensation).

Antebellum courts[7] had no means of compensating a property owner for his loss and had no way to redress the violation of an owner's Fifth Amendment rights other than ordering the government to give him back his property. *Knick,* 588 U.S. at 200. It was not until the 1870s, that state courts began to recognize implied rights of action for damages under the state equivalents of the Takings Clause. *Id*. Congress followed this trend and enabled property owners to obtain compensation for takings by federal agents when it passed the Tucker Act. *Knick,* 588 U.S. at 180.

This Court joined the state courts by holding that the compensation remedy is explicitly required by the Takings Clause. *First English*, 482 U.S. at 316. The claimants in *First English* sought equitable relief with an inverse condemnation action against the state. *Id*. at 308. There, this Court held that just compensation is required for the period of time during which regulations deny a landowner all use of his land. *Id*. at 318. Here, while there is no regulation, there was a physical taking of Petitioners' property. Thus, it makes no sense to authorize claims for equitable relief but not for textually mandated just compensation.

Moreover, the duty to pay for a taking is imposed by the Fifth and Fourteenth Amendment, not statutes. *Manning v. Mining & Minerals Div.,* 140 N.M. 528, 533 (2006) (citing *First English*, 482 U.S. at 321). The district court below emphasized that Congress believed there needs to be a separate cause of action because claims for just compensation, before the Tucker Act and Section

[7] American courts operating before the Civil War; known for protecting property rights without compensation mechanisms, regulation of dangerous weapons to maintain public order and other strict construction of laws. *See Knick v. Twp.*, 588 U.S. at 200; *Johnson v. United States*, 576 U.S. 591, 615 (2015).

1983, were brought by specific acts of Congress. R. at 8. But this Court has long understood that the Judiciary, not Congress, ensures an appropriate remedy for a taking. *Monongahela*, 148 U.S. at 327 (holding that question of compensation is judicial because Constitution explicitly requires that just compensation be paid); *see also* D. Benjamin Barros, *The Police Power and the Takings Clause,* 58 U. Miami L. Rev. 471, 512–13 (2004) (Fifth Amendment drafted by James Madison with intent to protect individual property rights because such protection cannot be adequately protected by political process).

In fact, the Tucker Act does not provide a cause of action. *Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 594 n.22 (1949) (explaining that Tucker Act simply opens courts to claimants "already possessed of a cause of action"). Rather, the Act waives federal immunity so that claimants can bring just compensation claims against federal agents. 28 U.S.C. §§ 1346(a), 1491. In such cases, this Court continues to find that the source of the claim is the text of the Constitution. *See First English*, 482 U.S. at 316 (emphasizing that compensation remedy is required by Constitution). Thus, a claim for just compensation rests on the Fifth Amendment.

Even if the claim is brought under the Tucker Act because of a taking by a federal agent. *Knick*, 588 U.S. at 190–91. Even if the property owner can bring a claim under a statutory compensation remedy. The source of all just compensation claim remains the same. *Id.* (finding that Fifth Amendment gives power to bring cause of action under Tucker Act). Therefore, just compensation rests upon the Fifth Amendment because the form of the remedy does not qualify the right. *Jacobs*, 290 U.S. at 16 (1933).

Also, it is counterintuitive to require further governmental action given the very reason for the Fifth Amendment—to check against abusive governmental power. *Manning,* 140 N.M. at 538. The self-executing nature of the Takings Clause's remedy is what discourages legislative

interference with private property rights. *Seaboard Air Line Railway Co.* v. *United States*, 261 U.S. 299, 304 (1923) (emphasizing just compensation is provided by Constitution and right "cannot be taken away by statute").

For example, the Second Circuit relied on *Jacobs* to distinguish the Takings Clause from other constitutional provisions on the ground that a duty to pay for a taking existed even in the absence of specific statutory authorization for suits to enforce the right to just compensation. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 409 F.2d 718, 723 (2d Cir. 1969), *rev'd* on other grounds, *Bivens*, 403 U.S. 388. But this Court emphasized that when federally protected rights have been invaded, the courts should adjust their remedies so as to provide the necessary relief. *Bivens*, 403 U.S. at 392. So should this Court, here. New Louisiana should not be allowed to violate the Fifth Amendment by refusing to pay just compensation for its taking.

Indeed, it is established practice for this Court to restrain individual state officers from doing what the Fourteenth Amendment forbids a state to do. *Bell v. Hood*, 327 U.S. 678, 684 (1946). Dating back to 1933, this Court allowed property owners to bring a claim directly under the Fifth Amendment when property was taken by the United States without just compensation. *Jacobs*, 290 U.S. at 16. Today, the Petitioners are simply asking this Court to hold state actors to the same standard. Regardless of whether the state chooses to waive its immunity.

The self-executing nature of the Just Compensation Clause reflects its purpose—to ensure that an individual is compensated when he or she is forced to bear a public burden that "in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49. The Framers recognized the fundamental nature of the right to be compensated. *Chic. Burlington*, 166 U.S. at 239 (recognizing that Takings Clause was first constitutional provision to be incorporated

against states); *see also Manning*, 140 N.M. at 538 (emphasizing that Framers of Constitution explicitly referred to remedies only twice in Constitution, one being Just Compensation provision). A self-executing claim of right is the only way to adhere to the significance the Framers placed on property rights. Thus, based on the history, tradition and purpose of the Fifth Amendment, this Court should find that the Just Compensation clause is self-executing.

C. A State's Immunity Should Not Preclude A Property Owner From A Textually Mandated Constitutional Remedy.

The Eleventh Amendment bars federal courts from hearing claims against a state, its agencies, and agents. *74 Pinehurst LLC v. New York*, 59 F.4th 557, 570 (2d Cir. 2023). However, when a taking occurs by a state agent, Section 1983 allows a property owner to sue the state in federal court for just compensation. *Knick*, 588 U.S. at 189. Of course, this is only if the state decides to waive its Eleventh Amendment immunity. U.S. Const. amend. XI.

But a state's refusal to waive immunity should not deprive the property owner of his or her Fifth Amendment right to compensation under the Constitution. If a citizen, whose property has been taken by the federal agent, has recourse under the Tucker Act. *Knick*, 588 U.S. at 194. And if a citizen, whose property has been taken by a state and waived its immunity, has a claim under Section 1983. *Id*. Then, the Petitioners, whose property has been taken by a state that has not waived immunity, should also be allowed to bring a claim directly under the Fifth Amendment. This is the only way to ensure the equal protection that the Constitution provides for every citizen in the United States—not just individuals who live in states that are generous enough to waive their immunity.

A right and a remedy textually rooted in the Constitution supersedes state constitutional sovereign immunity. *Manning,* 140 N.M. at 534. In *Manning*, the Supreme Court of New Mexico,

addressed whether a state's Eleventh Amendment immunity can shield from claims based on the Takings Clause. *Id*. at 530. There, the claimant's argued that New Mexico had effectively taken their property without just compensation because the State made it impossible to mine. *Id*. at 529. The court there found that the just compensation claim stemmed directly from the text of the Constitution through the Fifth and Fourteenth Amendments. *Id*. at 534. The Supreme Court of New Mexico acknowledged that sovereign immunity may shield states from liability under certain Article I obligations created by Congress. *Id*. But, the court held that the balance of power shifts when the obligations arise from the Constitution itself. *Id*. So should this Court.

Indeed, finding otherwise would make Section 1983 meaningless. The central objective of Section 1983—to protect every citizen whose constitutional rights are violated by state authorities—fails if this Court does not allow property owners to bring a just compensation claim against a state that refuses to waive its immunity. *Burnett v. Grattan*, 468 U.S. 42, 55 (1984). Importantly, no other jurisdiction, federal or state, has held that the Takings Clause claims are barred by state constitutional sovereign immunity. *Manning*, 140 N.M. at 535.

In adopting the Fourteenth Amendment, the States were required to surrender a portion of their sovereignty that had been preserved to them by the original Constitution. *Alden v. Maine*, 527 U.S. 706, 756 (1999). By imposing explicit limits on the powers of the States, the Fourteenth Amendment altered the balance of state and federal power struck by the Constitution. *Id.* (quoting *Seminole Tribe v. Florida*, 517 U.S. 44, 59 (1996)). This Court should do the same and hold that the Takings Clause creates an individual right to the remedy of just compensation.

D. Alternatively, This Court Should Remand For Further Proceedings Because Just Compensation is Not Available for the State's Taking.

If this Court holds that the Petitioners have no self-executing claim for just compensation, then this Court should remand for further proceedings. On remand, the district court below should enjoin the New Louisiana's eminent domain proceedings because Petitioners have no adequate provision for obtaining just compensation. A government's taking will be enjoined if there is no means of obtaining just compensation. *Knick*, 588 U.S. at 201. An equitable remedy, like injunctive relief, is available if just compensation is not provided. *See Pharm. Rsch. & Mfrs. of Am. v. Williams*, 64 F.4th 932, 946 (8th Cir. 2023) (holding that claimant is entitled to equitable relief when inverse condemnation act does not provide adequate remedy). Although today, equitable relief is generally unavailable because federal and nearly all state governments provide just compensation remedies to property owners who have suffered a taking. *Knick*, 588 U.S. at 201.

But not in this case. Here, the State of New Louisiana has found a loophole to deprive citizens of the United States just compensation. The State offers no state cause of action to bring just compensation after a state taking. R. at 10–11; *see also Manning*, 140 N.M. at 531. (emphasizing that state *must* provide reasonable, certain, and adequate provision for obtaining compensation). New Louisiana's taking for its development plan should be enjoined because the Petitioners have no way of obtaining just compensation from the State. Thus, at the very least, this Court should remand for further proceedings.

CONCLUSION

This Court should REVERSE the judgment of the Unites States Court of Appeal for the Thirteenth Circuit.

Respectfully submitted,

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