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 PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT

BRIEF FOR RESPONDENT

TEAM 6
COUNSEL OF RECORD FOR RESPONDENT

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QUESTIONS PRESENTED

I. Under the Fifth Amendment's Takings Clause, (1) should this Court disregard *stare decisis* and overturn its decision in *Kelo v. City of New London*, and, if so (2) what constitutes a permissible taking for a "public use"?

II. Does the Takings Clause permit a judicially implied cause of action for just compensation against a state when a party is unable to plead under the required statutory remedy?

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

New Louisiana's Economic Development Act empowers the governor to revitalize the State's economy by contracting with businesses to attract tourism and create new jobs. R. at 1-2. After the New Louisiana legislature passed the Act, Governor Anne Chase contracted with Pinecrest, Inc. to build a luxury ski resort near the state capital. R. at 1-2. The ski resort is projected to attract wealthy tourists, create 3,470 new jobs, and dramatically increase tax revenue. R. at 2. The project will also benefit business owners as new employees move to the area, tourists visit the resort, and property values rise in the surrounding area. R. at 2. Additionally, fifteen percent of the tax revenue generated by the ski resort will go towards revitalizing and supporting the local community. R. at 2.

The 1,000 acres of land selected for the ski resort is owned by 100 different owners. R. at 2. The State may condemn property for this type of project because New Louisiana state law allows takings purely for economic development. R. at 2 (citing NL Code § 13:4911).

The ten holdout property owners own single-family houses or small farms. R. at 2. Some houses are in poor condition, and many require substantial improvements, further depressing local market value. R. at 3. The small farms have been struggling to produce marketable crops due to poor soil conditions, and many of the plots are overgrown, decreasing their value as farmland. R. at 2. Accordingly, ninety property owners agreed to sell their land to the State below market value. R. at 2.

II. PROCEDURAL HISTORY

Pinecrest was authorized to begin construction of the ski resort on the ninety purchased properties on March 13, 2023. R. at 3. That same day, New Louisiana initiated eminent domain

proceedings against the ten holdout properties and notified the property owners that state law does not provide a right to compensation. R. at 3. Under NL Code § 13:5109, "a statutory or executive waiver of sovereign immunity is required for a property owner to obtain just compensation from the State for a taking." R. at 2. Since New Louisiana has not waived immunity generally or specifically for this project, the property owners have no right to just compensation under state law. R. at 2. Typically, property owners may file a federal claim for just compensation under 42 U.S.C. § 1983, but the Petitioners concede they cannot successfully plead under that statute. R. at 10.

Without an available cause of action, Petitioners decided to bring suit against New Louisiana under the Fifth and Fourteenth Amendments for violating the Takings Clause, alleging that the taking was not for public use or, alternatively, that just compensation was required for the taking. R. at 3.

New Louisiana moved to dismiss both claims under Federal Rule of Civil Procedure 12(b)(6), which the District Court granted on June 28, 2023. R. at 3, 5, 8. On appeal, the Thirteenth Circuit affirmed, entering its judgment in favor of New Louisiana on March 13, 2024. R. at 10-11, 19. Petitioners filed a timely petition for a writ of certiorari, which this Court granted on August 17, 2024. R. at 20. This Court has jurisdiction under 28 U.S.C. § 1254(1).

SUMMARY OF THE ARGUMENT

With respect to the first issue, the Petitioners' argument that this Court should take the drastic step of overruling its own decision in *Kelo v. City of New London* is baseless and flies in the face of *stare decisis*. All five factors that this Court considers when deciding whether *stare decisis* applies—(1) the quality of the reasoning, (2) the workability of the rule, (3) consistency

with other related decisions, (4) developments since the decision was handed down, and (5) reliance on the decision—counsel in favor of upholding *Kelo*.

As to the first factor, *Kelo* is strongly reasoned because its rule permitting economic development as a takings justification is the logical extension of past decisions, starting with *Fallbrook Irrigation District. v. Bradley* in 1896, that employed a broad interpretation of the "public use" requirement. The rule in *Kelo* is appropriately deferential to state legislatures, placing it in stark contrast with cases that this Court found to be poorly reasoned due to their endorsement of judicial overreach into the legislative arena. As to the second factor, *Kelo* establishes a workable rule as the deference it establishes makes it easy to administer. As to the third factor, *Kelo* is entirely consistent with other related decisions, as the trend since *Bradley* has been to broaden the scope of what constitutes "public use." As to the fourth factor, there have been no substantial factual or legal developments since *Kelo* was decided in 2005 that render the holding inappropriate. Rather, takings jurisprudence has remained consistent and economic development remains a core governmental function. Finally, as to the fifth factor, courts have relied heavily on *Kelo* since 2005, upholding takings for economic development when the relevant state law does not provide heightened private property protections. Similarly, states, developers, and other stakeholders have relied heavily on the decision, undertaking substantial development projects made possible by *Kelo*. Since *Kelo* permits takings for economic development and cannot constitutionally be overruled, New Louisiana's development project is permissible.

With respect to the second issue, the Petitioners cannot state a claim for just compensation under any pre-existing cause of action, and their complaint must be dismissed accordingly under Federal Rule of Civil Procedure 12(b)(6). Suits for constitutional violations

must be brought under a statutory or common law cause of action. The Petitioners' argument that the Takings Clause constructs its own cause of action for just compensation to enforce against the states is futile. The Takings Clause does not, and should not, imply a cause of action against a State for just compensation. Holding otherwise would ignore forty years of this Court's precedent, arrogate preeminent legislative authority, and disregard a state's right of sovereign immunity under the Eleventh Amendment.

ARGUMENT

I. STANDARD OF REVIEW

Appellate courts review the grant of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) de novo. *See Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015). Additionally, "[d]istrict court determinations of questions of law, including those involving the Constitution are reviewed de novo." *United States v. Palmer*, 203 F.3d 55, 60 (1st Cir. 2000).

To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). When a case comes before this Court, it accepts as true all "well-pleaded factual allegations." *Iqbal*, 556 U.S. at 679. By contrast, "mere conclusions are not entitled to the assumption of truth" and must be disregarded. *Id*. At 664.

II. *KELO V. CITY OF NEW LONDON* SHOULD NOT BE OVERRULED, AND BECAUSE *KELO* PERMITS TAKINGS FOR ECONOMIC DEVELOPMENT, THIS PROJECT SATISFIES THE "PUBLIC USE" REQUIREMENT OF THE FIFTH AMENDMENT'S TAKINGS CLAUSE.

A. *Kelo* Should Not Be Overruled.

Given that the Petitioners ask this Court for a ruling that is wholly inconsistent with *Kelo*, their argument may only prevail if this Court were to take the drastic measure of overruling that decision. *See generally Kelo v. City of New London*, 545 U.S. 469 (2005). In light of the five-factor test that this Court looks to when considering whether to overturn itself, it should leave its holding in *Kelo* undisturbed.

Stare decisis is the default course of action "because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). In determining whether *stare decisis* should apply, this Court considers five factors: (1) the quality of the case's reasoning, (2) the workability of the rule it established, (3) its consistency with other related decisions, (4) developments since the decision was handed down, and (5) reliance on the decision. *Janus v. AFSCME, Council 31*, 585 U.S. 878, 917 (2018). An analysis of each of these factors in turn shows that they weigh heavily in favor of upholding *Kelo*.

i. Kelo *is strongly reasoned.*

The quality of the reasoning behind the rule in *Kelo* that "public use" extends to takings meant to promote economic development is strong. 545 U.S. at 485; *see also* U.S. CONST. amend. V ("[N]or shall private property be taken for public use without just compensation."). The rare instances in which this Court has found weaknesses in the reasoning of prior cases typically involved correcting past decisions in which this Court assumed an improper legislative role or lacked support from existing precedents. *See, e.g.*, *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 270 (2022); *Ramos v. Louisiana*, 590 U.S. 83, 84 (2020). In *Dobbs v. Jackson Women's Health Organization*, for example, the Court held that the quality of the

reasoning in *Roe v. Wade*, which established that the right of personal privacy includes a qualified right to an abortion, was weak because it "failed to ground its decision in text, history, or precedent" and "concocted an elaborate set of rules" with no clear connection to history or precedent. *Dobbs*, 597 U.S. at 270; *Roe v. Wade*, 410 U.S. 113, 154 (1973). In *Ramos v. Louisiana*, in which this Court overturned *Apodaca v. Oregon*'s holding that the Sixth Amendment does not require a unanimous jury verdict for a criminal conviction, this Court held that the quality of the reasoning in *Apodaca* was weak because it "[sat] uneasily with 120 years of preceding case law." *Ramos*, 590 U.S. at 84; *Apodaca v. Oregon*, 406 U.S. 404, 406 (1972). None of these criticisms can plausibly be levied against the reasoning in *Kelo*, which is firmly grounded in historical decisions dating back over a century and, far from constituting judicial overreach, exemplifies this Court's "longstanding policy of deference to legislative judgments" in the field of eminent domain. *Kelo*, 545 U.S. at 480.

The rule in *Kelo* that economic development satisfies the Fifth Amendment's "public use" requirement is based on sound reasoning. This Court justified its holding in part because starting in the mid-nineteenth century, courts began to broaden their interpretation of the "public use" requirement and move away from the strict "use by the public" standard that required literal use by the public rather than general public benefits. *Kelo*, 545 U.S. at 479 ("[T]his 'Court long ago rejected any literal requirement that condemned property be put into use for the general public.'" (quoting *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984))). In establishing its rule, the *Kelo* Court relied on the history of takings cases interpreting the public use requirement broadly. For example, in *Strickley v. Highland Boy Gold Mining Co.*, the Court upheld a Utah law that provided that eminent domain may be exercised against "roads, railroads, tramways, tunnels, ditches, flumes, pipes, and dumping places to facilitate the milling, smelting, or other

reduction of ores, or the working of mines." 200 U.S. 527, 530 (1906). Similarly, in *Berman v. Parker*, the Court held that a federal law enabling eminent domain to be used against blighted neighborhoods in the District of Columbia was constitutional under the traditional state police power. 348 U.S. 26, 32 (1954). These cases illustrate this Court's broadened interpretation of the "public use" requirement to include a wide swath of public purposes. Adhering to this longstanding practice, this Court properly noted in *Kelo* that "[p]romoting economic development is a traditional and long-accepted government function, and there is no principled way of distinguishing it from other public purposes the Court has recognized," such as combatting neighborhood blight (as in *Berman*) or promoting mining (as in *Strickley*). *Kelo*, 545 U.S. at 484 (citing *Strickley*, 200 U.S. at 527 and *Berman*, 348 U.S. at 33).

ii. Kelo *established a workable rule.*

The rule in *Kelo* allowing for economic development to satisfy the "public use" requirement of the Fifth Amendment's Takings Clause is highly workable. In fact, the lack of workability of the more stringent "use by the public" rule that pervaded until the end of the nineteenth century is precisely what led to the more relaxed standard that gave way to the *Kelo* rule. *See, e.g.*, *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 159-60 (1896) (noting that the prior rule was difficult to administer because "[i]t is obvious . . . that what is a public use frequently and largely depends upon the facts and circumstances surrounding the particular subject-matter in regard to which the character of the use is questioned"); *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30, 32 (1916) ("The inadequacy of use by the general public as a universal test is established."). As this Court noted in *Kelo*, "[n]ot only was the 'use by the public' test difficult to administer (*e.g.*, what proportion of the public need have access to the property? at what price?), but it proved to be impractical given the

diverse and always evolving needs of society." 545 U.S. at 479. Furthermore, as Judge Hayes highlighted in his concurrence in the court below, "*Kelo* creates a straightforward rule that provides flexibility for the government to serve the public good." R. at 12.

A deferential standard that allows for projects promoting economic development to satisfy the "public use" requirement is exactly the type of standard that this Court has considered to be "workable." This Court's analysis in *Janus* illuminates what an unworkable rule looks like. In overruling *Abood v. Detroit Board of Education*, this Court highlighted how the unworkability of *Abood*'s rule weighed against applying *stare decisis*. *Janus*, 585 U.S. at 881; *see generally Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). To illustrate this point, this Court noted that *Abood*'s rule, which required distinguishing between chargeable and nonchargeable union expenditures, was unworkable because such a "line" was "impossible to draw with precision." *Janus*, 585 U.S. at 881. Unlike the rule in *Abood*, the line between projects promoting economic development and projects not promoting economic development is easy to draw.

iii. Kelo *is entirely consistent with other related decisions.*

Kelo is highly consistent with the decisions that came before it. As stated previously, the trend since the end of the nineteenth century has been to broaden the scope of what constitutes "public use." This trend began with *Fallbrook Irrigation District v. Bradley*, in which this Court first interpreted public use to extend to legitimate public purposes. 164 U.S. at 158. In *Bradley*, this Court upheld a California law imposing a tax on property owners to fund the irrigation of arid lands, reasoning that the irrigation project served a public purpose. *Id.* at 116–22, 161–62. In so holding, the Court rejected the concept of a strict "use by the public" requirement. *Id.* at 159–60. This Court clarified what is at this point well-established—that "[i]t is not essential that the entire community, or even any considerable portion thereof, should directly enjoy or participate

in an improvement in order to constitute a public use." *Id.* at 161–62. By holding that general economic development may satisfy the "public use" requirement, *Kelo* affirms this point. 545 U.S. at 489–90.

Since this Court decided *Bradley* in 1896, "public use" has been equated with "public purpose" time and time again. In *Berman*, this Court held that the District of Columbia Redevelopment Act, which declared that it is "the policy of the United States to protect and promote the welfare of the inhabitants of [Washington, D.C.] by eliminating [blighted areas]" through eminent domain, was consistent with the "public use" requirement. 348 U.S. at 28. In *Midkiff*, this Court held that Hawaii's Land Reform Act of 1967, which created a land condemnation scheme whereby title in real property was taken from lessors and transferred to lessees in order to combat an oligopoly in land ownership, was consistent with the "public use" requirement. 467 U.S. at 245. Applying rational basis review to the state legislature's determination that a certain project satisfied the public purpose requirement, this Court noted that "any exercise of eminent domain that is rationally related to a conceivable public purpose" will satisfy the "public use" requirement. *Id.* at 241.

This Court's precedent necessitates *Kelo*'s broad interpretation of the "public use" requirement given that "public use" is "coterminous with the scope of a sovereign's police powers." *Midkiff*, 467 U.S. at 240. The state's police power is broad. As this Court stated in *Berman* when it upheld Congress's authority to exercise eminent domain over blighted neighborhoods in the District of Columbia, "[a]n attempt to define [the state police power's] reach or trace its outer limits is fruitless, for each case must turn on its own facts." 348 U.S. at 32. Because of the state's "broad and inclusive" power to police the general public welfare, "[t]he role of the judiciary in determining whether that power is being exercised for a public

purpose is an extremely narrow one." *Id.* at 32, 33; *see also Old Dominion Co. v. United States*, 269 U.S. 55, 66 (1925) (holding that in exercising its police power in furtherance of the "public use" requirement, the state is "entitled to deference until it is shown to involve an impossibility"). This Court has consistently recognized that judicial restraint is critical when it comes to interpreting what constitutes a public use, because "[a]ny departure from this judicial restraint would result in courts deciding on what is and is not a governmental function" and "invalidating legislation on the basis of their view on that question at the moment of decision." *United States ex rel. Tenn. Valley Auth. v. Welch*, 327 U.S. 546, 552 (1946). In other words, a deferential standard is necessary to avoid legislating from the bench in an arena that calls for significant deference to the legislature. *See Kelo*, 545 U.S. at 480 ("Without exception, our cases have defined [public purpose] broadly, reflecting our longstanding policy of deference to legislative judgments in this field.").

In light of the state's broad police powers and this Court's precedent that rational basis review applies to a legislature's determination of what serves a public purpose, the rule in *Kelo* is entirely consistent with related decisions. In fact, *Kelo* barely builds upon its precedent given the highly deferential standard that had already been established. *See, e.g. Midkiff*, 467 U.S. at 241 (applying rational basis review to a state's determination of what constitutes a public use); *Bradley*, 164 U.S. at 161–62 (rejecting strict "use by the public" requirement); *Berman*, 348 U.S. at 28 (holding that the goal of eliminating blight satisfied the public use requirement). Since rational basis review applies to a legislature's determination of what constitutes a public purpose, it logically follows that the goal of economic development satisfies that highly deferential requirement. In that sense, *Kelo* merely affirmed this Court's prior cases, rather than establishing a new rule altogether. *See Kelo*, 545 U.S. at 470 (stating that the promotion of economic

development "is a traditional and long-accepted governmental function" that is not materially distinct from "the other public purposes the Court has recognized"). Thus, overturning *Kelo* would not merely overturn one case from two decades ago, but rather an entire line of cases dating back almost a century-and-a-half. *See, e.g.*, *Bradley*, 164 U.S. at 161 (interpreting, in 1896, that "public use" extends to any "public purpose"); *Berman*, 348 U.S. at 32 (holding, in 1954, that the role of the judiciary in determining what constitutes a public purpose is "extremely narrow"); *Midkiff*, 467 U.S. at 244 (reiterating, in 1984, this Court's longstanding rejection of any literal "use by the public" requirement). This Court was correct in its statement that "over a century of our case law interpreting [the "public use" provision] dictates an affirmative answer" to the question of whether takings for the purpose of economic development are proper under the Fifth Amendment. *Kelo*, 545 U.S. at 490.

iv. There have been no substantial developments to warrant overruling Kelo.

When analyzing the fourth factor under *Janus*, this Court looks to whether there have been "intervening legal or factual developments" that render the prior holding inappropriate. *See, e.g.*, *Dobbs*, 597 U.S. at 215. *Kelo* was decided two decades ago. In the time since then, there have not been substantial legal or factual developments that counsel in favor of taking the drastic measure of overturning precedent.

When this Court decided *Janus*, thereby overturning *Abood* and its holding that public-sector agency-shop provisions do not violate the First Amendment, it highlighted how "[d]evelopments since *Abood*, both factual and legal, have 'eroded' the decision's 'underpinnings' and left it an outlier among the Court's First Amendment cases." *Janus*, 585 U.S. at 881 (quoting *Harris v. Quinn*, 573 U.S. 616, 638 (2014); *Abood*, 431 U.S. at 209. This Court in *Janus* pointed out numerous factual developments that counseled in favor of overruling its prior holding in *Abood*, such as the fact that "experience has shown" the *Abood* Court was

"incorrect" to assume "the principle of exclusive representation in the public sector is dependent on a union or agency shop." *Janus*, 585 U.S. at 881 (quoting *Quinn*, 573 U.S. at 638). This Court also noted that it decided *Abood* when "public-sector unionism was a relatively new phenomenon," whereas now, "public-sector union membership has surpassed that in the private sector." *Id.* at 881–82. Additionally, this Court pointed out intervening legal developments, such as the fact that First Amendment cases typically require "exacting scrutiny, if not a more demanding standard," in contrast to the lower standard used in *Abood*. *Id.* at 882.

Contrary to the employment law context in which the Court decided *Janus* and overruled *Abood*, nothing in the realm of economic development or takings jurisprudence has similarly "eroded" the "underpinnings" of this Court's holding in *Kelo*. *Janus*, 585 U.S. at 881 (quoting *United States v. Gaudin*, 515 U.S. 506, 521 (1995)). The Petitioners, in asking this Court to overturn *Kelo*, have presented no evidence that economic development is somehow no longer an essential government function. Indeed, attempting to do so would be futile. Promoting economic development is, and always has been, a core government function. *See Kelo*, 545 U.S. at 470. Far from being rendered an "outlier" among this Court's eminent domain cases, there have been no factual or legal developments since *Kelo* that alter its consistency with related cases. *Janus*, 585 U.S. at 881. The true outlier would be a case in which this Court adopted the Petitioners' request to overturn precedent that is well-established, well-grounded, and consistent with the current factual and legal context.

v. The legal system and society writ large rely heavily on Kelo.

Kelo is a landmark property case and has been the governing law for nearly two decades. The extent of the reliance on *Kelo* cannot be understated, both in the legal context as well as the land development context. *See* R. at 13 (Hayes, J., concurring) ("Redevelopment projects take

years, require negotiations and planning with multiple parties, and cost millions of dollars. Without *Kelo*, these plans could come to a halt and communities could suffer because one property owner refuses to sell."). This Court appears to agree: as recently as three years ago, it refused an invitation to overturn the decision. *See Eychaner v. City of Chicago*, 141 S. Ct. 2422, 2422 (2021) (*cert. denied*). It is not clear how the Petitioners can argue that their facts compel any different outcome.

In the nineteen years since this Court decided *Kelo*, the decision has been relied upon by countless district and appellate courts at both the state and federal level. Furthermore, in those instances where state courts have *not* followed *Kelo*, the reasoning was that some state constitutions afford greater private property protections than the federal Constitution and the *Kelo* rule. *See, e.g.*, *Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829, 849 (Iowa 2019) ("[B]ecause we do not follow the *Kelo* majority under the Iowa Constitution, we find that trickle-down benefits of economic development are not enough to constitute a public use."); *Bd. of Cnty. Comm'rs of Muskogee Cnty. v. Lowery*, 136 P.3d 639, 647 (Okla. 2006) (holding that under the Oklahoma Constitution, economic development alone is not a public purpose to justify the exercise of eminent domain); *Norwood v. Horney*, 853 N.E.2d 1115, 1140-41 (Ohio 2006) (holding that economic benefits alone are insufficient to satisfy the public purpose requirement under the Ohio Constitution). *Kelo* made clear that states are free to impose, either statutorily or constitutionally, public purpose standards that are stricter than what is required under federal law. 545 U.S. at 489 (emphasizing that "nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power" and observing that "many States already impose 'public use' requirements that are stricter than the federal baseline"). However, such is not the case in New Louisiana, which has expressed a clear intent to allow economic

development to satisfy its public use requirements. R. at 2 (noting that New Louisiana law "allows takings purely for economic development") (citing NL Code § 13:4911).

Rather, New Louisiana has expressly decided to join those other jurisdictions that follow the *Kelo* rule allowing economic development to be a sufficient justification to exercise eminent domain. *See, e.g.*, *Goldstein v. Pataki*, 516 F.3d 50, 61 (2d Cir. 2008) (applying the *Kelo* rule regarding economic development to a development project in New York); *Western Seafood Co. v. United States*, 202 Fed. App'x 670, 674 (5th Cir. 2006) (upholding a taking by the city of Freeport, Texas under *Kelo* when the development plan's purpose was "to revitalize a flagging local economy); *Whittaker v. Cnty. of Lawrence*, 674 F.Supp 2d 668, 703 (W.D. Pa. 2009) (applying *Kelo* to uphold a development project in Pennsylvania when the rationale was to improve an "economically undesirable" area). Therefore, to overturn *Kelo* would be to also offend and disrupt the reliance interests of these many jurisdictions who, like New Louisiana, have explicitly chosen *not* to impose stricter requirements than what this Court required in *Kelo.*

B. Under *Kelo*, This Taking is Valid Because "Public Use" Extends to Takings Where the Public Purpose Conferred an Economic Benefit.

Given that *Kelo* cannot be overturned and must remain the governing law, it is necessary to analyze whether the taking in question satisfies the rule in *Kelo*. *Kelo*'s core holding is that the "public use" requirement of the Fifth Amendment's Takings Clause is satisfied when the taking serves an economic development purpose. 545 U.S. at 485. Again, courts have not required "use by the public" to satisfy the "public use" requirement since "the close of the 19th century" when this Court began to "embrac[e] the broader and natural interpretation of public use as 'public purpose.'" *Id.* at 480 (citing *Bradley*, 164 U.S. at 158–64). In *Kelo*, this Court established a rule that logically follows from the broad interpretation of public use that governed for over a

century: that economic development is a valid public purpose in the context of eminent domain. *Id.* at 484.

As applied, the Economic Development Act serves the exact public purpose that *Kelo* endorsed: economic development. The specific land at issue in this case will be used to confer an economic benefit upon New Louisiana, bringing this case squarely within the purview of *Kelo*. R. at 5. The Pinecrest development "is projected to drastically increase the tax revenue of the area, increase the surrounding properties' value, increase tourism revenue, and provide thousands of jobs." *Id.* Furthermore, the forecasted economic development is not limited to only certain portions of the community. Even if it were, however, it would still be sufficient to satisfy the *Kelo* rule, since *Kelo* makes clear that the economic benefits in question need not be spread equally across all stakeholders. *See* 545 U.S. at 482 (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984)). Rather, the development project "is anticipated to benefit business owners due to new employees moving to the area, new tourists visiting the resort, and property values increasing in the surrounding areas." *Id.* at 2. Because fifteen percent of the tax revenue from the ski resort will be allocated to support the Petitioners' surrounding community, the economic benefits will be widespread. *Id.*

Thus, the relief Petitioners seek is entirely inconsistent with *Kelo*, as well as this Court's historical precedent dating back to the end of the nineteenth century which endorsed a broad interpretation of "public use" as "public purpose." *See, e.g.*, *Bradley*, 164 U.S. at 161 (embracing "public purpose" as the threshold for what constitutes "public use"); *Berman*, 348 U.S. at 32 (highlighting that the "narrow" role of the judiciary in eminent domain cases is "determining whether [the state's power] is being exercised for a public purpose"); *Midkiff*, 467 U.S. at 241 ("[W]here the exercise of the eminent domain power is rationally related to a conceivable public

purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause."). This Court should decline the Petitioners' invitation to disturb this longstanding precedent.

III. THE FIFTH AMENDMENT'S TAKINGS CLAUSE DOES NOT, AND SHOULD NOT, IMPLY A CAUSE OF ACTION AGAINST A STATE FOR JUST COMPENSATION.

A. Constitutional Rights Require a Cause of Action to Seek Private Enforcement for Legal Remedies.

The Petitioners' claim for just compensation must be dismissed under Federal Rule of Civil Procedure 12(b)(6) because they cannot plead under any pre-existing common law or statutory cause of action for just compensation. *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."). The Petitioners ask this Court to depart from one of the "bedrock principles" of the American judiciary: that "Constitutional rights do not typically come with a built-in cause of action to allow for private enforcement in courts." *See, e.g., Devillier v. Texas,* 601 U.S. 285, 292 (2024); *see also Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 69 (2001) (holding that this Court's precedent suggests the "bedrock principles of separation of powers foreclose[s] judicial imposition of a new . . . liability."). Instead, it is understood that "constitutional rights are . . . asserted offensively pursuant to an independent cause of action designed for that purpose." *Devillier,* 601 U.S. at 292. A cause of action should not be "implied simply for want of any other means for challenging a constitutional deprivation." *Malesko*, 534 U.S. at 69. Further, it is not determinative whether creating a "remedy would . . . offer the prospect of relief for injuries that must now go unredressed." *Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988). Despite what the Petitioners may urge to the contrary, "[t]he absence of statutory relief for a constitutional violation . . . does not by any means necessarily imply that courts should award money damages." *See id*. at 421. As long as "the plaintiff had an avenue for

some redress," a judicially implied cause of action is "foreclosed." *Id*. at 425–27. Because New Louisiana offers its takings plaintiffs an avenue for redress for the actions of "*every* person who, under color of" the authority of the State "subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of *any*" Constitutional rights, an implied cause of action would be duplicative and thus would be foreclosed. 42 U.S.C. § 1983 (emphasis added).

This Court has only recognized an implied cause of action under the Takings Clause for equitable relief in the form of "obtaining easements or imposing zoning regulations." *Devillier,* 601 U.S at 292. However, "the mere fact that the Takings Clause provided the substantive rule of decision for the *equitable* claims in those cases does not establish that it creates a cause of action for damages, a remedy that is *legal* . . . in nature." *Id.* (emphasis added). As the District Court properly observed, "all cases seeking just compensation in federal court have been brought under other sources of law." R. at 7 (citing *Devillier*, 601 U.S. at 228).

In *Knick v. Township of Scott*, this Court found that the Civil Rights Act of 1871 only "guarantee[s] a federal forum" for takings plaintiffs against their local government through a cause of action under § 1983. 588 U.S. 180, 185 (2019). Regardless of the "post-taking" actions the state offers, the property owners must be able to "bring constitutional claims under § 1983 without first" exhausting state remedies. *Id*. at 194. Otherwise stated, the constitutional guarantee of a federal forum against a state is satisfied by providing takings plaintiffs the ability to bring a claim under § 1983. Because they are only guaranteed a federal venue through § 1983, a takings plaintiff's right to just compensation is not violated simply because the facts do not support a § 1983 action. So long as § 1983 exists to guarantee a federal venue, the right to just compensation is not infringed when it cannot be used successfully.

While the *Knicks* Court did find the Takings Clause to be "self-executing" with respect to a *claim* for just compensation, this finding has no bearing on the self-executing nature of the Takings Clause to provide a *remedy at law* for just compensation. *Id*. at 192. Therefore, as was pertinent to the facts in *Knicks*, the state government's "post-taking actions" to provide compensation did not mean that the plaintiffs had no Takings claim; regardless of what the State government did after the taking, the plaintiffs still had an actionable claim under the Fifth Amendment. *Id*. Although the Petitioners may cling to the "self-executing" language found in *Knicks* to bolster their point here, the contextual analysis of the language does nothing for their argument that the Fifth Amendment is self-executing so as to provide a cause of action. Crucially, the *Knicks* Court nonetheless found the plaintiffs must still bring their claim against their "local government . . . under § 1983." *Id*. at 192–94.

The required remedial structure for takings plaintiffs against a state has already been set by this Court in *Knicks* in the form of a § 1983 claim, and the Petitioners had unrestricted opportunity to plead under it. Therefore, it does not follow that the Petitioners' right to just compensation is infringed simply because they failed to state a claim under the corresponding statutory provision. *Schweiker*, 487 U.S. at 421 (finding "[t]he absence of statutory relief for a constitutional violation . . . does not by any means necessarily imply that courts should award money damages."). It is curious, then, why the petitioners call on this Court to unnecessarily and inappropriately tailor a cause of action for just compensation to fit their unique circumstances, when this Court made clear that it "would decline to discover *any* implied causes of action in the Constitution." *Egbert v. Boule*, 596 U.S. 482, 502 (2022) (emphasis added) (noting that as of 2022, this Court "declined 11 times to imply" a cause of action "for other alleged constitutional violations").

B. This Court Cannot Be Compelled to Engage in the "Disfavored Judicial Activity" of Creating a New Cause of Action for the Petitioners Without Curtailing Legislative Authority.

This Court cannot imply a cause of action for just compensation under the Takings Clause without engaging in "disfavored judicial activity" that is found to completely "arrogat[e] legislative power." *See, e.g., Ziglar v. Abbasi,* 582 U.S. 120, 135 (2017) ("[R]ecognizing implied causes of action . . . is now disfavored judicial activity."); *see also Hernández v. Mesa*, 589 U.S. 93, 100 (2020) ("But when a court recognizes an implied claim for damages on the ground that doing so furthers the 'purpose' of the law, the court risks arrogating legislative power. No law 'pursues its purposes at all costs.'" (quoting *Am. Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 234 (2013))). This Court has not wavered from the position that "political power cannot be thus ousted of its jurisdiction and the judiciary set in its place." *Louisiana v. Jumel*, 107 U.S. 711, 727–28 (1883). Creating a cause of action implicates a "range of policy considerations . . . at least as broad as the range . . . a legislature would consider." *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 407 (1971) (Harlan, J., concurring). Some of these considerations include "economic and governmental concerns," and potential "impact[s] on governmental operations systemwide." *Abbasi*, 582 U.S. at 134, 136. Because these interests are reserved for the legislature to weigh, this Court has properly found that "creating a cause of action is a legislative endeavor," and is thus off limits for the courts. *See, e.g*., *Schweiker*, 487 U.S. at 423; *see also Egbert*, 596 U.S. at 491.

It has been forty years since this Court found it possible to imply a cause of action under limited circumstances in the Fourth, Fifth, and Eighth Amendments. *See Bivens*, 403 U.S. at 397 (creating a cause of action under the Fourth Amendment's protection against unreasonable searches and seizures for excessive force during arrest); *Davis v. Passman*, 442 U.S. 228, 242 (1979) (creating a cause of action under the Fifth Amendment's due process clause for sex

discrimination by a federal employer); *Carlson v. Green*, 446 U.S. 14, 25 (1980) (creating a cause of action under the Eighth Amendment's prohibition of cruel and unusual punishment for inadequate treatment during incarceration); *see also Egbert*, 596 U.S. at 490–91, 500 (citing to the three cases as *Bivens* claims). However, this Court now "'appreciate[s] more fully the tension between' judicially created causes of action and 'the Constitution's separation of legislative and judicial power.'" *Egbert*, 596 U.S. at 491 (quoting *Hernández*, 589 U.S. at 100). This Court's current understanding is that it is "a significant step under separation-of-power principles for a court to determine that it has the authority . . . to create and enforce a cause of action for damages . . . in order to remedy a constitutional violation." *Abbasi*, 582 U.S. at 133. As a result, courts can no longer "assume[] common-law powers to create causes of action." *Malesko*, 534 U.S. at 75 (Scalia, J., concurring).

Although the three *Bivens* claims primarily concern "deterring the unconstitutional acts of individual officers," the consistent caution this Court has expressed when asked to imply causes of action under *Bivens* cautions against implying causes of action in *any* context. *Egbert* 596 U.S. at 490–93 (listing the primary concerns this Court has used to refuse to imply another cause of action under the Constitution). Whether labeled a *Bivens* claim or not, the cause of action the Petitioners ask this Court to imply carries with it the same inherent risks to the current state of the separation of powers. *Id*. If anything, judicial recognition of an implied cause of action against a state for monetary liability poses substantially *more* danger to the separation of powers than the equivalent action against individual officers. *See Alden v. Maine*, 527 U.S. 706, 750 (1999) (noting that even a *congressional* "power to authorize suits in state court to levy upon the treasuries of the States . . . could create staggering burdens" and "a severe and notorious danger to the States and their resources."). For instance, this Court already declined to trigger

the unique dangers of implying causes of action against an official body, such as a state, rather than its individual officers because of the "potentially enormous financial burden" the imposed liability would cause. *FDIC v. Meyer*, 510 U.S. 471, 484–86 (1994) (refusing to recognize an implied cause of action against a federal agency for an alleged Fifth Amendment violation because the legislature is better equipped to contemplate fiscal policy and expand "[g]overnment liability"). Therefore, *Bivens* warnings should be heeded in this context.

According to this Court's *Bivens* jurisprudence, when confronted with a request to create a new cause of action, "the most important question is who should decide whether to provide for a damages remedy, Congress or the Courts?" *Hernández*, 589 U.S. at 114. If the "judiciary is at least arguably less equipped . . . to 'weigh the costs and benefits of allowing a damages action to proceed,'" no cause of action may be judicially implied. *See, e.g.*, *Egbert*, 596 U.S. at 492 (quoting *Abbasi,* 582 U.S. at 136). Crucially, when "Congress already has provided 'an alternative remedial structure,'" an implied cause of action is precluded. *Egbert*, 596 U.S. at 493 (quoting *Abbasi*, 582 U.S. at 137).

From a historical perspective, "compensation claims against the government were handled by the legislative branch . . . long before they were assigned to the courts." Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 WASH. L. REV. 1067, 1105 (2001). Property owners alleging a taking had *no* compensation remedy available at law. *Knick*, 588 U.S. at 199. Instead, the legislature would create a "special owner-initiated procedure for obtaining compensation" at its discretion when authorizing "government action that took private property." *Id*. Property owners then began bringing claims for just compensation under a common law trespass action, and even then, would only raise the issue of their right to compensation to rebut the government's claim that its taking was authorized. *Id*. Even if the trespass action was

successful, there was "no way at common law to obtain money damages for a permanent taking." *Id*. Indeed, it was not until Congress passed the Tucker Act in 1887 that property owners had a "reasonable, certain, and adequate provision for obtaining compensation" in federal court. Seamon, *supra*, at 1136-37. Congress followed with its enactment of 42 U.S.C. § 1983 to complete its intended remedial structure:

> Just as someone whose property has been taken by the Federal Government has a claim 'founded upon the Constitution' that he may bring under the Tucker Act, someone whose property has been taken by a local government has a claim under § 1983 for a 'deprivation of a right . . . secured by the Constitution' that he may bring upon the taking in federal court.

Knick, 588 U.S. at 194 (quoting the Tucker Act, 28 U.S.C. § 1491, and 42 U.S.C. § 1983). As the District Court persuasively found, the coupling of the Tucker Act and § 1983 signals that Congress not only understands that constitutional rights do not provide their own causes of action, but that they intended the two provisions to work jointly to resolve as many constitutional deprivations as the federalist structure permits. *See* R. at 8; *see also, e.g.*, *Malesko*, 534 U.S. at 69 (finding that the constitutional separation of powers does not permit a remedying of every single alleged constitutional violation the judiciary confronts, so a cause of action cannot be "implied simply for want of any other means for challenging a constitutional deprivation").

Ultimately, the legislature deserves "utmost deference" to its historical and constitutional "preeminent authority" in creating causes of action. *Egbert*, 596 U.S. at 492. If Congress's "central purpose" in enacting § 1983 was "to provide *compensatory relief* to those deprived of their federal rights by state actors," then any judicially implied cause of action to compel compensatory relief under the Takings Clause is duplicative and completely disregards pre-existing legislative authority. *Felder v. Casey*, 487 U.S. 131, 141 (1988) (emphasis added).

Congress intentionally drafted § 1983 in broad, sweeping terms "to authorize an action for *any* constitutional violation." Jean C. Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 CALIF. L. REV. 1242, 1251 (1979) (emphasis added). In fact, this language works just as Congress intended, as § 1983 has since "allowed plaintiffs to recover damages for a wide range of constitutional violations." *Id*. 1242–43. Deference to Congress's satisfaction with § 1983 compels the Court to refrain from creating "an alternative remedial structure" against the State of New Louisiana, because Congress already enacted § 1983 to "protect the people from unconstitutional action under state law." *Mitchum v. Foster,* 407 U.S. 225, 241 (1972).

Even deference to "congressional inaction" is required as inaction suggests "Congress has [already] provided what it considers adequate remedial mechanisms." *Schweiker*, 487 U.S. at 423. As applied, Congress's subsequent inaction after enacting §1983 suggests its satisfaction with the cohesive remedial structure of the Tucker Act and § 1983. *See Knick*, 588 U.S. at 194 (noting how the Tucker Act and § 1983 work jointly). In exercising "utmost deference," this Court has no need or authority to imply a cause of action when Congress has already done so to its satisfaction. *Schweiker*, 487 U.S. at 423.

The requirement of legislative deference must be heightened, then, when presented with not only a federal legislature's authority to create a cause of action, but a state legislature's authority to determine how it will effectuate its constitutional mandates. Deference to a state legislature is required by the federalist structure, as states are "bound by obligations imposed by the Constitution and by federal statutes to comport with the constitutional design." *Alden*, 527 U.S. at 755. This Court has expressed it is "unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States." *Id.* The assumption of a State's "good faith" to enforce its constitutional responsibilities compels deference to a State's

"preeminent authority" to form its corresponding remedial structures to resolve allegations of constitutional deprivations. *Id*.; *see also Egbert* at 492 (finding causes of action to be within the "preeminent authority" of the legislature in "most every case"). This Court has long since recognized that "the balance between competing interests," such as the right to just compensation and state sovereign immunity, "*must* be reached after deliberation by the political process established by the citizens of the State, not by judicial decree . . . and [then] invoked by the private citizen." *Alden*, 527 U.S. at 751 (emphasis added). Specifically, this Court holds "[a] State is entitled to order the processes of its own governance," including "the responsibility for directing the payment of debts." *Id*. at 752.

As to the State's authority to enforce the Takings Clause, "the Constitution does not embody any specific procedure or form of remedy that the States must adopt" to provide just compensation. *See San Diego Gas & Elec. Co. v. City of San Diego,* 450 U.S. 621, 660 (1981) (Brennan, J., dissenting); *see also, e.g*., *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U.S. 239, 252 (1905) ("[I]t is for the State, primarily and exclusively, to prescribe a mode in which [private property] may be condemned and taken."). Therefore, because New Louisiana's decision to administer its private claims for just compensation solely under § 1983 is constitutional, it must stand in the interest of "utmost deference," and it must preclude authority for this Court to create a duplicative cause of action. *Egbert*, 596 U.S. at 492; *see also*, *Knick*, 588 U.S. at 185 (holding that takings plaintiffs are only guaranteed a cause of action for just compensation in a federal forum under § 1983).

Even if this Court finds it is not required to defer to a state legislature when deciding to imply a cause of action for just compensation, it is necessarily constrained by the separation of powers to exercise deference to the federal legislature. *Egbert*, 596 U.S. at 492. Whether this

Court defers solely to the federal legislature or also to the states, either form of deference yields the same result: a court may not imply a cause of action against a state for just compensation under the Takings Clause.

C. An Implied Cause of Action for Just Compensation Against the States Renders the Eleventh Amendment Powerless.

This Court cannot imply a cause of action against a state for just compensation without curtailing its guaranteed sovereign immunity under the Eleventh Amendment. The Eleventh Amendment precludes "any suit . . . commenced or prosecuted against one of the United States." U.S. CONST. amend. XI. This Court wisely holds that this protection extends to preclude an action against a state in federal court and in its own state courts. *Hans v. Louisiana*, 134 U.S. 1, 15–16 (1999) (holding that state sovereign immunity prohibits actions by citizens against their own state); *Alden*, 527 U.S. at 754 (holding that state sovereign immunity bars suits against a state in its own courts, and that Congress may not use its Article I authority to abrogate or waive this immunity). More specifically, this Court holds that "[p]rivate suits against nonconsenting States – especially suits for money damages – may threaten the financial integrity of the State." *Alden*, 527 U.S. at 750. Allowing the federal judiciary to "authorize suits [that] levy upon the treasuries of the States for compensatory damages" would create a "national power" and "leverage over States that is not contemplated by our constitutional design." *Id.* at 750-51. Abrogation of the Eleventh Amendment for the sake of private takings suits for compensation runs contrary to the very purpose of state immunity, which is "at its core, [to] protect[] the sovereign from being called upon to court to honor its monetary obligations." Seamon, *supra*, at 1109. When the protection of state immunity is disregarded, the dire result is "the course of [state] public affairs . . . subject to and controlled by the mandates of judicial tribunals without [the state's] consent." In re *Ayers*, 123 U.S 443, 505 (1887).

This Court recognizes limited instances in which the Eleventh Amendment does *not* bar private suits against the State: (1) an express waiver of immunity by the State; (2) the *Ex Parte Young* exception for a plaintiff seeking injunctive relief against state officers, 209 U.S. 123, 155–56 (1908); (3) Plan of the Convention suits and; (4) a constitutionally permissible exercise of Congress's Section Five power of the Fourteenth Amendment. *See* U.S. CONST. amend. XIV, § 5 ("Congress shall have power to enforce, by appropriate legislation, the provisions of this article."). Here, (1) New Louisiana's sovereign immunity is waived under § 1983, R. at 8; (2) the Petitioners are only seeking an implied cause of action for *compensatory* relief, R. at 4, 5–6; (3) an action for just compensation does not qualify as a Plan of the Convention suit; and (4) Congress already exercised its Section Five power in its enactment of § 1983. Therefore, for this Court to otherwise authorize an implied cause of action against New Louisiana would result in an impermissible judicial abrogation of the "sovereign immunity States enjoy in . . . court, under the Eleventh Amendment." *Reich v. Collins*, 513 U.S. 106, 110 (1994).

At the outset, this Court should not be persuaded by arguments that the states waived their sovereign immunity against just compensation claims when the Fifth Amendment was contemplated and agreed to at the Constitutional Convention. While this Court has found sovereign immunity waived when "the states agreed to be liable for such suits in the plan of the Convention," suits for just compensation do not fit the bill. *See, e.g.*, Julia Grant, Note, *A Clash of Constitutional Covenants: Reconciling State Sovereign Immunity and Just Compensation*, 109 VA. L. REV. 1143, 1169 (2023); *see also*, *Alden*, 527 U.S. at 755–56 ("States have consented, moreover, to some suits pursuant to the plan of the Convention. . . . In ratifying the Constitution, the States consented to suits brought *by other States or by the Federal Government*;" however,

"the fear of *private suits* against nonconsenting States was the central reason given by the founders who chose to preserve States' sovereign immunity.") (emphasis added).

This Court only recognizes so-called Plan of the Convention suits when the issue being litigated "strongly suggests a complete delegation of authority to the Federal Government." *Torres v. Texas Dep't of Pub. Safety*, 597 U.S. 580, 590 (2022) (holding that states consented in the plan of the Convention to waive sovereign immunity for issues of national military policy). However, the powers of the Takings Clause, including the exercise of eminent domain, have never been "expressly denied to the States," or "uniquely federal interests," such that sovereignty had to have been waived at the Convention. *Boyle v. United Techs. Corp*., 487 U.S. 500, 504–05 (1988); *see, e.g.*, *Madisonville Traction Co.,* 196 U.S. at 252 ("[I]t is for the State, primarily and exclusively, to prescribe a mode in which [private property] may be condemned and taken."). Moreso, "the fear of private suits against nonconsenting States was the central reason given by the founders who chose to preserve the States' sovereign immunity." *Alden*, 527 U.S. at 706. If fear of private suits against nonconsenting states was a founding principle of sovereign immunity at the founding, it cannot also be true that the states waived sovereign immunity for private suits to seek just compensation at the Convention.

Perhaps more obvious is that states could not have consented to suits for just compensation at the Convention because the Fifth Amendment was not incorporated against the states until after the ratification of the Fourteenth Amendment. *Chicago Burlington & Quincy Ry. v. Chicago*, 166 U.S. 226, 239 (1897). At the founding, states only contemplated *federal* liability to supply just compensation to property owners. Indeed, the consensus "around the time of incorporation [was] that states could not be sued for just compensation." *See* Grant, *supra*, at 1169. Even assuming that (1) an implied cause of action against the federal government

originally existed under the Takings Clause[1] and (2) that implied cause of action was incorporated against the States under the Fourteenth Amendment, "the enforcement of that right [to just compensation] against a state is contingent on the Due Process clause" of the Fourteenth Amendment. *Devillier v. Texas*, 63 F.4th 416, 422 (5th Cir. 2023) (Higginson, J., concurring) (citing *Malloy v. Hogan*, 378 U.S. 1, 10 (1964) (holding that the Takings Clause is "enforced against the States under the Fourteenth Amendment according to the same standards that protect . . . against federal encroachment" and due process)); *see also* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law.). Certainly, this Court need not manipulate the Constitution two times over to supply the Petitioners in this case with a cause of action simply because they could not plead under § 1983.

This Court recognizes that enforcement of the right to just compensation as a remedy is limited by state sovereign immunity. "The Constitution mandates the availability of effective remedies for takings . . . and accordingly requires courts to provide those remedies 'the sovereign immunity States traditionally enjoy notwithstanding.'" RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 379 (4th ed. 1996) (quoting *Reich*, 513 U.S. at 110). As to the apparent tension between the Eleventh Amendment and the right to just compensation, the Courts of Appeal agree: "every court of appeals to have faced" the question of whether the Takings Clause implies a cause of action against the states "has expressly or implicitly held that the Eleventh Amendment bars Fifth Amendment . . . claims brought in federal court." *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 955 (9th Cir.

[1] This Court held "the Constitution did not expressly create a right of action when it mandated just compensation for Government takings of private property." Me. Cmty. Health Options v. United States, 590 U.S. 296, 335 n.12 (2020) [hereinafter *Maine Community*]. Also relevant in *Maine Community* is this Court's clear distinction between a "private right" and a "private remedy": saying Congress must clearly provide for both to "authorize[] a claim against the Government." *Id*.

2008).[2] The Courts of Appeal find that the constitutional mandate for takings remedies does not reach "the sovereign immunity States traditionally enjoy," such that a federal cause of action is required when the state offers nothing for takings plaintiffs to seek remedy. Grant, *supra*, at 1150; *see also, Jachetta v. United States*, 653 F.3d 898, 909 (9th Cir. 2011) (adding on to *Schweitzer*, finding if the State court provides no remedy, the Eleventh Amendment should not bar an action in federal court).

The consensus among the Courts of Appeal is not inconsistent with *Knick*'s guarantee of a federal forum for just compensation under § 1983. *Knick* makes clear that a takings plaintiff cannot be required to exhaust state remedies before seeking a claim for just compensation in federal court under § 1983. 588 U.S. at 184–85. The Courts of Appeal similarly find that the takings plaintiff must be able to proceed to federal court under § 1983 if state remedies are found to be inadequate. *See, e.g.*, *Jachetta*, 653 F.3d at 909.

Reconciling the current limitations under the Courts of Appeals' consensus and this Court's holding in *Knick* renders an implied cause of action unnecessary here: New Louisiana's sole waiver of sovereign immunity under § 1983 satisfies its constitutional mandate to provide a "reasonable, certain, and adequate provision for obtaining compensation." *Presault v. ICC*, 494

[2] *See* Frein v. Pa. State Police, 47 F.4th 247, 257 (3d Cir. 2022) (holding "the Takings Clause, as incorporated against the states, did not alter the states' traditional immunity from federal suits"); Hutto v. S.C. Ret. Sys., 773 F.3d 536, 552 (4th Cir. 2014) ("[W]e conclude that the Eleventh Amendment bars Fifth Amendment taking claims against states in federal court," unless the state offers an alternative remedy); John G. & Marie Stella Kenedy Mem'l Found. v. Mauro, 21 F.3d 667, 674 (5th Cir. 1994) (holding the "Fifth Amendment inverse condemnation claim brought directly against the State of Texas [was] barred by the Eleventh Amendment."); DLX, Inc. v. Kentucky, 381 F.3d 511, 526-28 (6th Cir. 2004) (holding the State "enjoys sovereign immunity in federal courts from [a] federal takings claim"); *Schweitzer*, 523 F.3d at 955–56 (holding "the Eleventh Amendment bars reverse condemnation action brought in federal court"); Williams v. Utah Dep't of Corr., 928 F.3d 1209, 1213 (10th Cir. 2019) (holding a takings claim for just compensation may only be brought in the state court); Robinson v. Ga. Dep't of Transp., 966 F.2d 637, 638, 640–42 (11th Cir. 1992) (holding the Eleventh Amendment barred plaintiffs' claim under "the Fifth and Fourteenth Amendments for a taking of their property").

U.S. 1, 12 (1990) (finding "[a]ll that is required is the *existence* of," rather than the ability to successfully *utilize*, "a reasonable, certain, adequate provision for obtaining compensation at the time of the taking") (emphasis added). According to the Courts of Appeal, New Louisiana is only required to subject itself to suit in a federal forum if there are no adequate state remedies. *See, e.g.*, *Jachetta*, 653 F.3d at 909. Even if New Louisiana does not provide adequate state remedies, it has waived immunity in a federal forum under § 1983, satisfying the Courts of Appeal standard. According to this Court's holding in *Knick*, takings plaintiffs must be able to utilize § 1983 to obtain their guaranteed federal forum, and the record does not suggest New Louisiana has precluded their takings plaintiffs from doing so.

Ultimately, New Louisiana satisfies its constitutional requirements "notwithstanding sovereign immunity," and the only way this Court would be able to imply a cause of action would be to completely disregard the Eleventh Amendment. Just because the Petitioners' facts do not support a § 1983 action does not mean that an unsupported § 1983 claim requires the federal judiciary to completely abrogate state immunity. Indeed, if the Petitioners cannot simply allege a New Louisiana state official "deprive[d] [them] of any rights, privileges, or immunities," it is doubtful they have a cognizable claim for just compensation at all. 42 U.S.C. § 1983.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that this Court affirm the ruling of the Thirteenth Circuit and hold that *Kelo v. City of New London* should not be overturned, and that the Fifth Amendment's Takings Clause is not self-executing to imply a cause of action.

Respectfully submitted,

/s/ Team 6

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Dated: October 21, 2024