No. 21-40750

In the United States Court of Appeals for the Fifth Circuit

RICHARD DEVILLIER; WENDY DEVILLIER; STEVEN DEVILLIER; RHONDA DEVILLIER; BARBARA DEVILLIER; ET AL,
Plaintiffs-Appellees,

v.

STATE OF TEXAS,
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Texas, Galveston Division

REPLY BRIEF FOR DEFENDANT-APPELLANT THE STATE OF TEXAS

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Introduction

Plaintiffs sued the State of Texas under both the United States and Texas Constitutions, and their state claims remain pending in the district court. So this permissive interlocutory appeal is not about whether plaintiffs can obtain just compensation for the alleged taking. It is instead about two matters of civil procedure that, because of the practicalities of litigation, arise infrequently: first, Texas's sovereign immunity *from liability* (when its immunity from suit has been waived) and, second, whether there is a private cause of action to sue a State for a taking under the Fifth Amendment.

Summary of Argument

Plaintiffs have not identified a waiver of Texas's sovereign immunity from liability for Fifth Amendment takings claims. Their first theory, plan-of-the-Convention waiver, is inapt. That doctrine addresses immunity from suit, not state-law immunity from liability. And even if it applied, plaintiffs could not establish that States waived their immunity from liability under the Fifth Amendment by joining the union. The Fifth Amendment was not adopted at the Convention, it was enacted by Congress in 1789; even then, it did not apply to the States until over a century later.

Neither can plaintiffs defend the district court's theory that the Texas Constitution waives sovereign immunity from liability for takings claims under the United States Constitution. Article I, section 17 of the Texas Constitution is an independent guarantee of just compensation. And while Texas courts have held that

it waives sovereign immunity for suits invoking its guarantee, plaintiffs do not identify any Texas case holding that it also waives sovereign immunity for suits invoking a federal constitutional right to compensation. Indeed, when Texas's Constitution was enacted in 1876, the federal takings clause did not apply to the States. Yet plaintiffs ask the Court to hold that Texans impliedly waived the State's sovereign immunity from liability for compensation under that provision. The Court should reject that theory.

Dismissal is also proper because plaintiffs cannot identify a cause of action that allows them to sue the State. The Fifth Amendment's just-compensation requirement applies to the States because it is considered a fundamental right protected by the due process clause of the Fourteenth Amendment. But causes of action to enforce the Fourteenth Amendment must be created by Congress, and Congress has not created a cause of action to sue States. And the undisputed existence of federal-question jurisdiction under 28 U.S.C. section 1331 does not help plaintiffs—section 1331 is a jurisdictional statute, not a cause of action.

Even if plaintiffs' federal takings claims could otherwise proceed, much of the alleged takings are barred by limitations because they occurred more than two years before the first group of plaintiffs filed suit. The usual rule is to apply the analogous state statute of limitations. For other implied causes of action under the Constitution, the analogous limitations period is Texas's two-year general personal injury statute. Similarly, if analogized to claims under article I, section 17 of the Texas Constitution, the limitations period would also be two years, not ten. That is because plaintiffs allege facts that constitute "damaging" under Texas law, not

"takings," and Texas-law claims for damage to property are subject to a two-year limitations period. Plaintiffs give no reason why the federal government's six-year limitations period for claims against itself is a more appropriate analogy.

ARGUMENT

I. Texas Has Not Waived Its Immunity from Liability under the Fifth Amendment's Takings Clause.

Under Texas law, "the State retains . . . immunity [from liability] even if its liability is not disputed." *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002). That is the very nature of sovereign immunity—it bars recovery notwithstanding the merits. So plaintiffs must identify a waiver of the State's immunity from liability for Fourteenth Amendment claims asserting a violation of the Fifth Amendment's takings clause. They cannot do so.

A. The "plan of the Convention" does not waive a State's immunity from liability.

Plaintiffs first attempt (at 21–25) to establish waiver based on the "plan-of-the-Convention" shorthand, which refers to "certain waivers of sovereign immunity to which all States implicitly consented at the founding." *PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244, 2258 (2021). As the Supreme Court recently explained, "a State may be sued [in federal court] if it has agreed to suit in the 'plan of the Convention,'" which is shorthand for "the structure of the original Constitution

itself." *Id.* (quoting *Alden v. Maine*, 527 U.S. 706, 728 (1999)). That doctrine does not help plaintiffs.[1]

1. The Supreme Court's "plan of the Convention" shorthand does not refer to immunity from liability. It refers to the States' sovereign immunity from suit, meaning the immunity sometimes referred to as "Eleventh Amendment immunity" or "structural immunity." *See id.* (referring to "States' immunity from suit"); *id.* at 2264 (Gorsuch, J., dissenting) (discussing the doctrinal differences between structural immunity and Eleventh Amendment immunity).[2] The shorthand has no relevance to sovereign immunity from liability, which is a creature of state law. *See Meyers ex rel. Benzing v. Texas*, 410 F.3d 236, 255 (5th Cir. 2005); *e.g.*, *Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 594 (Tex. 2001). Again, the State agrees that it waived its immunity from suit by removing to federal court. Because immunity from suit is not at issue, plan-of-the-Convention waiver is not relevant.

2. And even if plan-of-the-Convention waiver were relevant to Texas's state-law immunity from liability, plaintiffs' argument would fail. In determining whether the States implicitly surrendered their immunity in the plan of the Convention, the Supreme Court "look[s] first to evidence of the original understanding of the Constitution," including the "ratification debates and the events surrounding the

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[1] In addition to failing on its merits, this argument is forfeited because plaintiffs failed to raise it below. *See* ROA.528–58.

[2] The term "Eleventh Amendment immunity" "is convenient shorthand but something of a misnomer" because "the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." *Alden*, 527 U.S. at 713.

adoption of the Eleventh Amendment." *Alden*, 527 U.S. at 741. The record from the Constitution's drafting and ratification is devoid of any indication—much less "compelling evidence," *Blatchford v. Native Vill. of Noatak and Circle Vill.*, 501 U.S. 775, 781 (1991)—that the States agreed to subject themselves to liability in private suits brought under the Fifth Amendment's takings clause. Indeed, the Fifth Amendment was not part of the original Constitution as ratified by the States—that fact alone shows that plan-of-the-Convention waiver cannot exist here.

And history disproves plaintiffs' plan-of-the-Convention theory. English and colonial law generally did *not* require compensation for government takings of property; the federal Constitution's new just-compensation requirement was an innovation. *See* William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L. J. 694, 695 (1985) ("Eighteenth-century colonial legislatures regularly took private property without compensating the owner."); *id.* at 698 ("Uncompensated takings of private property occurred regularly in the revolutionary era. . . . None of the first state constitutions featured a just compensation requirement."); *id.* at 715 ("In the first years after ratification of the Constitution, opponents of compensation reminded the courts of the novelty of the idea that the state necessarily owed the individual payment when it took his property."). The Fifth Amendment's takings clause was not one of those demanded by any of the state ratifying conventions. *See id.* at 708–09. Rather, James Madison (seemingly of his own accord) included it in his draft for the Bill of Rights, and it was enacted by Congress with no debate and little amendment. *See id.* at 708–10, 713–14. It was not until decades later that the just-compensation requirement

"won general acceptance." *Id.* at 714. That belies plaintiffs' claim that the plan of the Convention includes a waiver of immunity from liability in claims seeking compensation for government takings.

Neither does later history support plaintiffs' plan-of-the-Convention theory. Texas joined the union in 1845. In then-recent memory, Chief Justice Marshall—holding that the Fifth Amendment's takings clause does not apply to the States—had explained that "[i]n their several constitutions, [the States] have imposed such restrictions on their respective governments, as their own wisdom suggested; such as they deemed most proper for themselves." *Barron v. City of Baltimore*, 32 U.S. 243, 247–48 (1833). It was not until 1897 that the just-compensation requirement of the Fifth Amendment was held to apply to the States through the Fourteenth Amendment. *See Chi., B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226 (1897). It cannot be said that Texas impliedly agreed to be liable for Fifth Amendment takings by virtue of joining the union in 1845.

Texas's first state constitution included protection from uncompensated takings: "[N]o person's property shall be taken or applied to public use, without adequate compensation being made, unless by the consent of such person." Tex. Const. of 1845, art. I, § 14, *reprinted in* Oliver Cromwell Hartley, *Digest of the Laws of Texas* 52 (1850). The present constitution added a guarantee of compensation for "damaged" property. *See Steele v. City of Houston*, 603 S.W.2d 786, 790 (Tex. 1980). In doing so, it treated article I, section 17, as an independent requirement that was, if anything, broader than the federal Constitution's takings clause. *See Gulf, C. & S.F. Ry. Co. v. Fuller*, 63 Tex. 467, 469 (1885) (explaining the clause was intended

"to meet and correct evils which had sometimes been thought to result to the property owner from a narrow and technical meaning sometimes put by courts upon the word 'taken' used in the former constitutions of this state and in the constitutions of the most of the other states").

Texas understood that its own just-compensation requirement was independent of the federal constitutional guarantee. And, indeed, *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), severed any link between the Fifth Amendment's just-compensation guarantee and similar state-law rights. *Id.* at 2171. "The availability of" compensation under state law "cannot infringe or restrict the property owner's federal constitutional claim," the Court explained. *Id.* In reaching that holding, the Court carefully distinguished between the Fifth Amendment's guarantee and separate "state law right[s]" to just compensation. *Id.*

Second, the Supreme Court's plan-of-the-Convention precedent looks to Congressional practice to determine whether state sovereign immunity is implicitly waived. "[E]arly congressional practice" "provides 'contemporaneous and weighty evidence of the Constitution's meaning.'" *Alden*, 527 U.S. at 743-44 (quoting *Printz v. United States*, 521 U.S. 898, 905 (1997)). Here, early congressional practice is devoid of any indication that the States consented to private-party takings suits in the plan of the Convention. In general, it reveals that "statutes purporting to authorize private suits against nonconsenting States . . . [were] all but absent from our historical experience." *Id.* at 744. Indeed, Congress did not even authorize private suits seeking compensation for takings by the *federal* government—to which the Fifth Amendment had always applied—until it enacted the Tucker Act in 1887.

Before that, a property owner seeking compensation might be able to invoke a statutory waiver of sovereign immunity for a claim alleging breach of contract, but only if the circumstances supported an implied contract.[3] If not, sovereign immunity prevented a suit against the federal government, so the claimant would be able to recover only by alleging *ultra vires* action by the individual federal official in possession of the property. *Id.*

Finally, plan-of-the-Convention analysis asks "whether a congressional power to subject nonconsenting States to private suits in their own courts is consistent with the structure of the Constitution." *Alden*, 527 U.S. at 748. That consideration has no bearing here, but it underscores that plan-of-the-Convention shorthand is irrelevant to the immunity-from-liability issue in this case. Immunity from liability, unlike immunity from suit, is not forum-dependent. And in any event, plaintiffs make no argument that the Constitution as amended in 1789 and again in 1868—much less as originally ratified—requires that States give up their state-law immunity from liability for claims under the Fifth Amendment.

3. The Supreme Court has identified just four narrow areas where the States surrendered their immunity from suit by ratifying the Constitution: (1) "in the context of bankruptcy proceedings," *PennEast*, 141 S. Ct. at 2258 (citing *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 379(2006)); (2) "suits by other States," *id.* (citing *South Dakota v. North Carolina*, 192 U.S. 286, 318 (1904)); (3) "suits by the Federal

[3] *See* Aditya Bamzai & David M. Goldman, *The Takings Clause, the Tucker Act, and* Knick v. Township of Scott, Yale J. of Regulation: Notice & Comment (October 9, 2018).

Government," *id.* (citing *United States v. Texas*, 143 U.S. 621, 646 (1892)); and (4) suits involving "the exercise of federal eminent domain power," *id.* at 2259. Plaintiffs do not identify a single case holding that the States waived sovereign immunity as to Fifth Amendment claims by joining the union in 1789, a time when the Fifth Amendment did not apply to the States at all. Nor do they identify a single case supporting the idea that States waived their immunity from liability—which is a creature of state law—by joining the union. Their plan-of-the-Convention theory fails.

B. The Texas Constitution's takings clause does not waive Texas's immunity from liability under the Fifth Amendment's takings clause.

Plaintiffs next attempt to defend the District Court's novel reading of the Texas Constitution's takings clause. *See* ROA.1284. They contend (at 26) that because the Texas Constitution waives immunity from suit and from liability for the compensation required by article I, section 17, "the State has waived its immunity for the acts or omissions which give rise to that liability," and therefore is not immune from liability under the Fifth Amendment's takings clause. That argument fails.

1. Whether Texas has waived its immunity from liability is a matter of Texas law, not federal law. *See Meyers*, 410 F.3d at 254–55. That means plaintiffs must establish that the Texas Supreme Court, if presented with the question at issue here, would hold that article I, section 17 of the Texas Constitution waives the State's

immunity from liability for claims brought under the United States Constitution. They cannot make such a showing.

Plaintiffs do not identify a single Texas case holding that the State's immunity from liability is waived for Fifth Amendment takings claims, as opposed to claims under the Texas Constitution's takings clause. Under Texas law, "a statute that waives the State's immunity must do so beyond doubt," and courts "generally resolve ambiguities by retaining immunity." *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697 (Tex. 2003); *cf. Lane v. Pena*, 518 U.S. 187, 192 (1996) ("a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign"). Plaintiffs say (at 25) that "[n]o 'magic words' waive immunity," but the Texas Supreme Court has emphasized that a waiver of immunity absent "magic words" is vanishingly rare. *See Wichita Falls*, 106 S.W.3d at 697. Plaintiffs cannot meet their burden to show that article I, section 17 of the Texas Constitution—which was enacted in 1876, long before the Fifth Amendment had any application to the States—nevertheless waives sovereign immunity for Fifth Amendment takings claims.

The best plaintiffs can do is quote (at 26–28) Texas decisions that seemingly assumed article I, section 17's waiver of sovereign immunity covers Fifth Amendment takings claims. For example, plaintiffs rely (at 27) on *Texas Parks & Wildlife Department v. Sawyer Trust*, 354 S.W.3d 384 (Tex. 2011), in which the Texas Supreme Court said sovereign immunity "does not shield the State from claims based on unconstitutional takings of property" without distinguishing federal takings claims from state-law takings claims. *Id.* at 390. That dicta does not help

plaintiffs. In *Sawyer Trust*, no one argued for a distinction between the plaintiff's Texas and federal takings claims, and "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)); *see also Certified EMS, Inc. v. Potts*, 355 S.W.3d 683, 699 (Tex. App.—Houston [1st Dist.] 2011), *aff'd*, 392 S.W.3d 625 (Tex. 2013). Moreover, the Texas Supreme Court went on to hold that the plaintiff's allegations did not involve a taking at all, *see Sawyer Tr.*, 354 S.W.3d at 391–92, so the court did not need to consider the difference between article I, section 17 and the Fifth Amendment as a source of liability. That is a textbook example of dicta.

The other cases plaintiffs cite (at 27–28) are equally unavailing. The State has readily acknowledged (at 13) that Texas courts sometimes adjudicate Fifth Amendment takings claims without reference to the State's immunity from liability. Immunity from liability is an affirmative defense that can be waived; unlike immunity from suit, it does not implicate the court's jurisdiction. *See Rosenberg Dev. Corp. v. Imperial Performing Arts, Inc.*, 571 S.W.3d 738, 746 (Tex. 2019); *Kinnear v. Tex. Comm'n on Human Rights ex rel. Hale*, 14 S.W.3d 299, 300 (Tex. 2000) (per curiam) (holding a state agency could not claim sovereign immunity from liability where it had failed to plead it as an affirmative defense). That the State has at times chosen not to invoke its immunity does not mean that immunity is lacking. *See Printz*, 521 U.S. at 905; *cf. Alden*, 527 U.S. at 737 (noting that at times "it may have appeared"

that "Congress' power to abrogate [a state's] immunity from suit . . . was not limited by the Constitution at all").

Plaintiffs also point (at 26) to an inapposite decision, *Black v. North Panola School District*, 461 F.3d 584 (5th Cir. 2006), in which this Court held that claims under 42 U.S.C. section 1983 were barred as *res judicata* because they could have been raised in the plaintiff's earlier lawsuit in Mississippi court. *Id.* at 595. Plaintiff's selective quotation misapprehends the decision. *Black* was partly an *Erie* guess about Mississippi law, *see id.* at 595–96, and partly a straightforward application of the principle that "under § 5 of the Fourteenth Amendment, states cannot prohibit individuals from bringing private suits in state court under § 1983," *id.* at 593 (citing *Alden*, 527 U.S. at 756). An *Erie* guess about Mississippi law does not support plaintiffs' novel interpretation of Texas law, which—as the State has explained (at 10–11)—holds that waivers of immunity for state-law causes of action do not encompass waiver for even parallel federal causes of action. And the uncontroverted principle that Congress can abrogate the States' sovereign immunity by exercising its section 5 enforcement powers—as it did in enacting section 1983—does not help plaintiffs either. Congress has not exercised its enforcement powers to permit suits alleging takings claims against a State. *Black* does not support plaintiffs' argument.

2. Plaintiffs' attempt to establish a waiver are marred by two evident misunderstandings of the State's assertion of immunity. First, plaintiffs say (at 28) that immunity from liability should not "be resolved differently in a state versus a federal court." Plaintiffs raise similar arguments elsewhere (*e.g.*, at 16–18, 20), seemingly misunderstanding the State's argument to rest on an assertion of

immunity that it could not have asserted in State court. To be clear, that is not the State's argument. As explained in an article cited favorably by this Court in *Meyers*:

> [R]emoval of a case by a state defendant should be understood to waive the [State's] special privilege from being sued in federal court, and to permit the federal court to hear any claim against the [state] that might have been heard in the state court from which the case was removed. It should not, however, waive the defendant's immunity from any claims from which it would have been immune in state court.

Jonathan R. Siegel, *Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment*, 52 Duke L.J. 1167, 1235 (2003); *see Meyers*, 410 F.3d at 254–55. The State's assertion of immunity from liability does not depend on whether the case is heard in federal court or state court. Rather, the State can invoke the same immunity from liability in federal court that it could have invoked in State court.

Second, plaintiffs misunderstand the significance of this Court's decision in *Canada Hockey, L.L.C. v. Texas A&M University Athletic Department*, No. 20-20503, 2022 WL 445172 (5th Cir. Feb. 14, 2022) (unpublished). This Court rejected an argument that the Texas Constitution waives Texas's immunity *from suit* for federal takings claims, *id.* at *9, as the State recognized in its opening brief (at 12). The case is significant because *if* the Texas Constitution waives immunity from liability under the Fifth Amendment by virtue of its waiver of immunity from liability under its own takings clause, as the district court concluded, the same logic would say that the Texas Constitution *also* waives immunity *from suit* for Fifth Amendment claims. This Court rejected the second proposition in *Canada Hockey*. For the same reasons, it should reject plaintiffs' argument here.

II. Plaintiffs Lack a Cause of Action to Sue the State of Texas.

Even if the court undisputedly has jurisdiction, as is the case here, a claimant seeking relief needs a cause of action. Plaintiffs do not have one. And their arguments reveal a fundamental misunderstanding of the distinction between a law's substantive reach, the existence of a private cause of action, and whether or not a court has jurisdiction to adjudicate a claim.

A. Plaintiffs cannot use the Fifth Amendment as a cause of action.

"[P]rivate rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001); *see also Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856–57 (2017). Yet Plaintiffs' argument rests on the premise that they can use the Fifth Amendment itself to satisfy their cause-of-action requirement. They cannot.

1. They begin by saying (at 8) that "the Takings Clause" is "applicable to the States through the Fourteenth Amendment." That does not get them any closer to a cause of action. To be sure, the State does not dispute that "the due process of law enjoined by the fourteenth amendment requires compensation to be made or adequately secured to the owner of private property taken for public use under the authority of a state." *Chicago, B. & Q.*, 166 U.S. at 235. In other words, just compensation for takings is a fundamental right that the due process clause of the Fourteenth Amendment requires the states to honor. *See McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (explaining that due process incorporates rights that are "fundamental to our scheme of ordered liberty" (emphasis omitted)); *id.* at 760 (discussing the takings clause).

But the State *does* dispute that plaintiffs have a cause of action to seek damages in court for an alleged violation of the federal takings clause by the State. The Fourteenth Amendment does not create its own cause of action. *See Katzenbach v. Morgan*, 384 U.S. 641, 649 (1966); *Ex parte Virginia*, 100 U.S. 339, 345 (1879). Instead, it empowers Congress to create causes of action pursuant to its section 5 remedial authority. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976); *see also Bd. of Tr. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (discussing Congress's section 5 power to "authorize private individuals to recover money damages against the States"). And although Congress has created a great many causes of action to enforce the due process guarantees of the Fourteenth Amendment—chief among them 42 U.S.C. section 1983—Congress has not created a cause of action available against the States to enforce the takings clause. So even if the Fifth Amendment created a cause of action to sue the United States—an issue the Court need not decide—it does not follow that plaintiffs can sue a State. Plaintiffs offer no response.

2. Plaintiffs instead point (at 10–11) to Supreme Court precedent describing the Fifth Amendment's takings clause as "self-executing." That does not mean the clause creates its own cause of action, much less that it creates a cause of action available against States under the Fourteenth Amendment. A "self-executing" instrument is one that is "effective immediately without the need of any type of implementing action." Black's Law Dictionary (11th ed. 2019). In this context, to call the clause "self-executing" is to state that the just-compensation remedy is positive law of its own force. *See First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 315 (1987) (discussing "the self-executing

character of the constitutional provision with respect to compensation" (internal quotation marks omitted); *cf. Jacobs v. United States*, 290 U.S. 13, 16 (1933) (explaining that "[s]tatutory recognition was not necessary" because the right to compensation from the United States "rested upon the Fifth Amendment"). Calling the takings clause "self-executing" does not establish that plaintiffs have a cause of action to sue Texas.

When the Supreme Court described the takings clause as "self-executing" in *Knick*, 139 S. Ct. at 2171, it was not addressing the plaintiff's cause of action. The *Knick* plaintiff, after all, invoked section 1983 to sue a municipal government, and the propriety of that cause of action was undisputed. *See id.* at 2168. Rather, the Court referred to the "self-executing Fifth Amendment" in holding that the obligation to pay arose directly upon the taking, so the plaintiff did not need to wait until compensation had been denied in state proceedings before filing suit in federal court under section 1983. *Id.* at 2172–73. That refers to the reality that the States are bound by the just compensation requirement even without implementing it in state law.

Similarly, *First English* addressed the relief required in takings claims, not whether the plaintiff had identified a viable cause of action. 482 U.S. at 310. The question of relief is "analytically distinct" from the existence of a cause of action allowing a litigant to sue. *Davis v. Passman*, 442 U.S. 228, 239 (1979). The question presented in *First English* was whether "the Fifth Amendment . . . require[s] compensation as a remedy for 'temporary' regulatory takings—those regulatory takings which are ultimately invalidated by the courts." 482 U.S. at 310. When the

Court explained that "claims for just compensation are grounded in the Constitution itself," *id.* at 315, it was in service of a holding that the government owes compensation even for temporary takings, *see id.* at 318–19; it said nothing about what cause of action a property owner could use to obtain that compensation.[4] *Jacobs v. United States*, 290 U.S. 13 (1933), likewise addressed the amount of compensation required by the Fifth Amendment in a suit against the United States. *See id.* at 16. Such cases do not stand for the proposition that a plaintiff has a cause of action to sue the federal government, much less the states, directly under the Fifth Amendment. *See Cooper Indus.*, 543 U.S. at 170.

3. Indeed, *Knick* explained that takings claims are governed by the same "general rule[s]" as "any other claim grounded in the Bill of Rights." 139 S. Ct. at 2172–73. And "in all but the most unusual circumstances, prescribing a cause of action is a job for Congress, not the courts." *Egbert v. Boule*, No. 21-147, 2022 WL 2056291, at *3 (U.S. June 8, 2022). Congress elected to create a cause of action to sue for damages based on violations of federal rights, *see* 42 U.S.C. § 1983, but it did not extend that cause of action to suits against the States themselves. The general rule is to respect Congress's choice, even if that leaves claimants without all the relief they might wish. *See Boule*, 2022 WL 2056291, at *3, *8–9.

[4] Indeed, "the complaint . . . invoked only the California Constitution," but the Supreme Court concluded the federal constitutional challenge was preserved because the Fifth Amendment argument was raised and passed on in the California appellate courts. *First English*, 482 U.S. at 313 n.8.

Plaintiffs' approach could have significant consequences. Reading the Fifth Amendment to provide a cause of action to enforce the requirements of the Fourteenth Amendment would make that enforcement mechanism "congressionally unalterable." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 325 (2015). That would be in serious tension with precedent recognizing the Congress has "preeminent authority," *Boule*, 2022 WL 2056291, at *5, to determine when and how to authorize private suits to enforce the Bill of Rights. *See Hernandez v. Mesa*, 140 S. Ct. 735, 741–42 (2020).[5]

B. 28 U.S.C. section 1331 grants federal-question jurisdiction to the federal courts, not a cause of action to plaintiffs.

Plaintiffs next insist (at 12–16) that their cause of action problem is solved because there is federal-question jurisdiction under 28 U.S.C. section 1331. That argument is nonsensical. There is no dispute that section 1331 supplies federal jurisdiction—indeed, the State itself invoked that jurisdiction when it removed this case from state court, ROA.70. But a court's jurisdiction is not the same thing as a

[5] In addition to suits under section 1983, federal constitutional rights are often asserted in equity because "federal courts may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law." *Armstrong*, 575 U.S. at 326 (citing, *inter alia*, *Ex parte Young*, 209 U.S. 123, 150–51 (1908)). Such suits are "the creation of courts of equity." *Id.* at 327. A suit in equity would not help plaintiffs because they seek damages (compensation for the alleged taking), which is the classic remedy at law, not an equitable remedy. *See Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993). But in any event, plaintiffs do not contend they have a cause of action under that theory, so any such claim is forfeited. *See Ctr. for Biological Diversity v. United States Envt'l Prot. Agency*, 937 F.3d 533, 542 & n.4 (5th Cir. 2019).

claimant's cause of action, and "[s]ection 1331 'does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources which satisfy its limiting provisions.'" *Shrimpers & Fisherman of RGV v. Tex. Comm'n on Env't Quality*, 968 F.3d 419, 426–27 (5th Cir. 2020) (Oldham, J., concurring) (quoting *Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 249 (1951)); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 92–93 (1998) (holding that the existence of a cause of action is not a jurisdictional question).

Plaintiffs' mistake seems to flow from a fundamental misunderstanding of the State's argument. They say (at 12) that "[t]he State argues that the only means by which Appellees can bring their self-executing takings clause claims is under 42 U.S.C. § 1983" and suggest (at 13–14) that the State relies on section 1983 to establish jurisdiction in federal court. To be clear, that is not the State's argument. Section 1983 is not a jurisdictional statute, and the State does not contend section 1983 is necessary for the federal courts to have jurisdiction.

Section 1983 is, however, significant for two separate reasons, both of which are unrelated to jurisdiction. First, section 1983 is significant because it shows that Congress knows how to create a cause of action for the enforcement of federal constitutional rights. Congress exercised its Fourteenth Amendment section 5 remedial power by enacting section 1983, which provides a cause of action against a "person" who violates a claimant's federal constitutional rights. 42 U.S.C. § 1983. But "person" does not include a state. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). As the State has explained, Congress's choice matters. *See supra* at 15.

Second, section 1983 it is significant because it lurks in the background of most of the takings precedent discussed in the parties' briefing. For example, *Mosher v. City of Phoenix*, 287 U.S. 29 (1932), which plaintiffs cite (at 12–13) for the undisputed proposition that takings claims invoke federal-question jurisdiction, was a suit against a municipality brought under section 1983. And, as discussed above, *Knick* was the same. That explains why such cases do not discuss the nature of the plaintiffs' cause of action; it is uncontested that section 1983 is available as a cause of action.

Nor does the federal forum affect whether plaintiffs have identified a cause of action, as they contend (at 16–18). Contrary to plaintiffs' argument (at 17), plaintiffs lacked a cause of action for their federal takings claims in state court, too. Conversely, if section 1983 or some other cause of action were available, plaintiffs could have invoked it in state court. *See Nevada v. Hicks*, 533 U.S. 353, 366–67 (2001) (explaining that state courts of general jurisdiction "can adjudicate cases invoking federal statutes, such as § 1983"). But just as the federal forum does not dispense with the State's sovereign immunity from liability, *see supra* at 12–13, it does not change plaintiffs' obligation to identify a cause of action. They would have that obligation even if the suit remained in Texas court.[6]

[6] Texas courts refer to "a common-law action for inverse condemnation" under the Texas Constitution. *San Jacinto River Auth. v. Medina*, 627 S.W.3d 618, 623 (Tex. 2021); *cf. United States v. Clarke*, 445 U.S. 253, 257 (1980) (discussing inverse condemnation under Alaska law). The State does not dispute that this common-law cause of action is available for plaintiffs' claims under article I, section 17 of the

III. The Statute of Limitations Bars Plaintiffs Claims Arising from Hurricane Harvey.

A. When it comes to the statute of limitations, plaintiffs continue to misunderstand the State's argument and its relationship to section 1983. Again, the State does not contend that section 1983 applies here. Contrary to plaintiffs' characterization (at 18), the State's argument does not depend on plaintiffs suing under section 1983, which everyone agrees they cannot do.

Rather, as the State has explained (at 19–24), *any* implied cause of action must borrow a statute of limitations from analogous law, and the closest analogue here is Texas's two-year general personal injury limitations period. The State has explained (at 22–25) that under Texas law an article I, section 17 takings claims is governed by a different statute of limitations depending on whether it involves permanent, physical possession of the property or, in contrast, damage to, but not possession of, the property. Under Texas law, "[t]he taking, the damaging, or the destruction of property are often treated . . . as synonyms, but the terms are different and have different historical origins." *Steele*, 603 S.W.2d at 789. "Property that is taken is transferred from one owner to another," *id.*, while "[t]he government's duty to

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Texas Constitution. Plaintiffs do not contend this state common-law cause of action is available to enforce the Fourteenth Amendment's just-compensation requirement, so any such argument is forfeited. *See Rollins v. Home Depot USA*, 8 F.4th 393, 398 (5th Cir. 2021).

Indeed, some Texas courts have assumed the common-law inverse condemnation action is available to allege a violation of the Fifth Amendment's takings clause. *See, e.g.*, *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 476 (Tex. 2012). But, as explained above, that assumption is not precedential. *See supra* at 11.

compensate for damaging property for public use . . . [is] not dependent upon the transfer of property rights," *id.* at 790.

Plaintiffs say (at 18) this distinction does not matter because their federal claim is for a "taking," not "for 'damages.'" To be sure, their federal claim is framed as a "taking," as opposed to a "damaging," because the Fifth Amendment refers only to takings—federal precedent does not distinguish between the two concepts. But plaintiffs' factual allegations state a claim for "damaging" real property under Texas law, not a claim for "taking" it. *See* ROA.1175. Plaintiffs do not explain how compensation for (1) necessary repairs on their real and personal property, (2) diminution in their real property's value, and (3) "damage, destruction, and loss of personal property," ROA.1175, could be a "taking" claim, as opposed to a "damaging" claim, under Texas law. If the Texas Constitution is to be treated as a waiver of the State's immunity from liability, that waiver must be limited by its own terms. That includes the distinction between taking and damaging, which comes with an impact on the limitations period.

Plaintiffs instead ask the Court (at 18–19) to apply the limitations period for takings claims against the United States. *See* 28 U.S.C. § 2501. But the State has explained (at 20–21) that the default practice is to apply a state limitations period for claims against a State. Plaintiffs do not say how applying the analogous state-law limitations period "would be inconsistent with the underlying policies of the federal statute," *Occidental Life Ins. Co. v. E.E.O.C.*, 432 U.S. 355, 367 (1977), so as to justify borrowing a federal statutory limitations period instead.

B. Finally, plaintiffs contend (at 19) that their claims did not "necessarily" accrue "on the date they were flooded during [Hurricane] Harvey." That theory does not survive the plausibility test. At least when brought against the United States, for example, "a claim alleging a Fifth Amendment taking accrues when the act that constitutes the taking occurs." *Ingrum v. United States*, 560 F.3d 1311, 1314 (Fed. Cir. 2009); *see also The George Family Tr. ex rel. George v. United States*, 91 Fed. Cl. 177, 190 (2009) (discussing accrual of takings claims based on flooding).[7] Plaintiffs allege a taking based on floodwaters from Hurricane Harvey that backed up north of the highway, resulting in "impoundment of rainwater runoff on Plaintiffs' property for days[.]" ROA.1174. That "impoundment," or flooding, is the alleged taking, so plaintiffs' claims accrued when the impoundment occurred.

Because the lead case was filed on May 27, 2020, *see* ROA.74–96, any claim that accrued prior to May 27, 2018, is outside the limitations period. It is a matter of public record that Hurricane Harvey hit East Texas for a four-day period beginning on August 24, 2017—over nine months outside the limitations period. Plaintiffs allege water was "impounded" on their property for a matter of "days." ROA.1174. It is not plausible that the alleged flooding actually continued for over nine months. And plaintiffs offer no theory by which their claims could have accrued at any later date. That suggestion must be rejected as implausible on the face of the pleadings.

[7] The State assumes for purpose of this appeal that the same accrual rule would apply here.

Conclusion

The Court should reverse and remand with instructions to dismiss plaintiffs' Fifth Amendment inverse condemnation claims, to dismiss plaintiffs' inverse condemnation claims based on flooding during Hurricane Harvey in 2017, and for further proceedings on plaintiffs' remaining claims.

Respectfully submitted.

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Certificate of Service

On June 17, 2022, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,496 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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