

United States Court of Appeals  
for the Fifth Circuit

United States Court of Appeals  
Fifth Circuit

**FILED**

November 23, 2022

Lyle W. Cayce  
Clerk

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No. 21-40750

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RICHARD DEVILLIER; WENDY DEVILLIER; STEVEN DEVILLIER;  
RHONDA DEVILLIER; BARBARA DEVILLIER; ET AL,

*Plaintiffs—Appellees,*

*versus*

STATE OF TEXAS,

*Defendant—Appellant.*

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Appeal from the United States District Court  
for the Southern District of Texas  
No. 3:20-CV-223

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Before HIGGINBOTHAM, SOUTHWICK, and HIGGINSON, *Circuit  
Judges.*

PER CURIAM:

The State of Texas appeals the district court's decision that Plaintiffs' federal Taking Clause claims against the State may proceed in federal court. Because we hold that the Fifth Amendment Takings Clause as applied to the states through the Fourteenth Amendment does not provide a right of action

for takings claims against a state,<sup>1</sup> we VACATE the district court’s decision for want of jurisdiction and REMAND with instructions to return this case to the state courts. The Supreme Court of Texas recognizes takings claims under the federal and state constitutions,<sup>2</sup> with differing remedies and constraints turning on the character and nature of the taking;<sup>3</sup> nothing in this description of Texas law is intended to replace its role as the sole determinant of Texas state law.<sup>4</sup> As such, this Court lacks jurisdiction to review these claims.<sup>5</sup>

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<sup>1</sup> See *Hernandez v. Mesa*, 140 S. Ct. 735, 742 (2020) (“[A] federal court’s authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress.”); *Azul–Pacífico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992) (holding that a takings plaintiff has “no cause of action directly under the United States Constitution”), *cert. denied*, 506 U.S. 1081 (1993).

<sup>2</sup> See *City of Baytown v. Schrock*, 645 S.W.3d 174, 178 (Tex. 2022) (“Under our [federal and state] constitutions, waiver occurs when the government refuses to acknowledge its intentional taking of private property for public use. A suit based on this waiver is known as an ‘inverse condemnation’ claim.”); see also *Gutersloh v. Texas*, No. 93-8729, 25 F.3d 1044, 994 WL 261047, \*1 (5th Cir. 1994) (unpublished per curiam) (“[The State] . . . admits, the courts of the State of Texas are open to inverse condemnation damage claims against state agencies on the basis of the Fifth Amendment, as applied to the states through the Fourteenth Amendment, as well as on the basis of the Texas Constitution and laws.”).

<sup>3</sup> See *Allodial Ltd. P’ship v. N. Tex. Tollway Auth.*, 176 S.W.3d 680, 683–84 (Tex. App.—Dallas 2005, pet. denied) (noting that Texas courts apply a two-year limitations period to takings claims for “damaged” property and a ten-year limitations period to takings claims for “taken” property).

<sup>4</sup> See, e.g., *San Jacinto River Auth. v. Medina*, 627 S.W.3d 618, 623 (Tex. 2021), *reh’g denied* (Sept. 3, 2021) (“[T]he owner of private property may bring a common-law action for inverse condemnation.”).

<sup>5</sup> *Mitchell v. Advanced HCS, L.L.C.*, 28 F.4th 580, 588 (5th Cir. 2022) (noting that federal-question jurisdiction will lie over state-law claims only if “resolving a federal issue is necessary to resolution of the state-law claim” (quoting *Lamar Co., L.L.C. v. Miss. Transp. Comm’n*, 976 F.3d 524, 529 (5th Cir. 2020))).

***United States Court of Appeals***

FIFTH CIRCUIT  
OFFICE OF THE CLERK

LYLE W. CAYCE  
CLERK

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NEW ORLEANS, LA 70130

November 23, 2022

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing  
or Rehearing En Banc

No. 21-40750 Devillier v. State of Texas  
USDC No. 3:20-CV-223  
USDC No. 3:20-CV-379  
USDC No. 3:21-CV-104  
USDC No. 4:21-CV-1521

Enclosed is a copy of the court's decision. The court has entered judgment under **FED. R. APP. P. 36**. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

**FED. R. APP. P. 39** through **41**, and **5TH CIR. R. 35**, **39**, and **41** govern costs, rehearings, and mandates. **5TH CIR. R. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following **FED. R. APP. P. 40** and **5TH CIR. R. 35** for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. **5TH CIR. R. 41** provides that a motion for a stay of mandate under **FED. R. APP. P. 41** will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under **FED. R. APP. P. 41**. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari.** Additionally, you **MUST** confirm that

this information was given to your client, within the body of your motion to withdraw as counsel.

The judgment entered provides that each party bear its own costs on appeal.

Sincerely,

LYLE W. CAYCE, Clerk

A handwritten signature in cursive script, appearing to read "Lyle W. Cayce".

By: \_\_\_\_\_  
Nancy F. Dolly, Deputy Clerk

Enclosure(s)

Mr. Daniel Henry Charest  
Mr. Charles William Irvine  
Ms. Natalie Deyo Thompson  
Mr. Emery Lawrence Vincent  
Mr. Benjamin D. Wilson