No. 22-913

In The
Supreme Court of the United States

RICHARD DEVILLIER, ET AL.,

Petitioners,

v.

STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR *AMICI CURIAE* ILYA SOMIN AND CATO INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Ilya Somin is a professor of law at the Antonin Scalia Law School at George Mason University and the author of numerous works on takings and constitutional property rights, including THE GRASPING HAND: *KELO V. CITY OF NEW LONDON* AND THE LIMITS OF EMINENT DOMAIN (rev. ed. 2016). His *amicus* briefs and writings on takings law have been cited in decisions by the United States Supreme Court, lower federal courts, state supreme courts, and the Supreme Court of Israel.

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, files *amicus* briefs, conducts conferences, and produces the annual Cato Supreme Court Review. This case interests Cato because the right to just compensation when property is taken is fundamental.[1]

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties received timely notice of *amici*'s intent to file this brief as required by Rule 37.

SUMMARY OF ARGUMENT

In its important decision in *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), this Court reversed *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985)—a ruling that required takings plaintiffs with claims against state and local governments to first exhaust state-court remedies before seeking relief in federal court. The Court recognized that this state-litigation requirement created an impermissible "Catch-22" in which plaintiffs could not "go to federal court without going to state court first; but if [they went] to state court and los[t], [their] claim[s were] barred in federal court." *Knick*, 139 S. Ct. at 2167 (citing *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005) (holding that such state court judgments had preclusive effect in subsequent federal litigation)). As a result, the rule "relegate[d] the Takings Clause 'to the status of a poor relation' among the provisions of the Bill of Rights," which were otherwise "guaranteed a federal forum." *Knick*, 139 S. Ct. at 2169–70 (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994)).

In reversing *Williamson County*'s atextual exhaustion requirement, *Knick* established the important principle that takings plaintiffs are entitled to their day in federal court. Now, less than four years later, the Fifth Circuit has nullified that entitlement in a mere three-sentence per curiam decision that fails to even acknowledge *Knick* or *any* of this Court's Takings Clause precedents. By holding that Fifth Amendment takings claims against states are simultaneously

removable to federal court under 28 U.S.C. § 1441 and nonjusticiable in federal court due to the purported lack of a federal cause of action, the Fifth Circuit resurrected the precise sort of Catch-22 eliminated by this Court in *Knick* and has effectively barred takings claims against states from both state *and* federal court.

The decision below demonstrates at best a massive oversight of this Court's precedents and at worst an egregious resistance of them. The result is that millions of Americans are now deprived of a fundamental constitutional protection against tyranny by state governments. These significant ramifications of the Fifth Circuit's ruling render the question presented extremely important.

Moreover, the Fifth Circuit's ruling deepened a preexisting split on the question presented: the First, Fourth, Seventh, and D.C. Circuits, along with the courts of last resort in New Mexico, South Dakota, and Nebraska, have recognized that the Takings Clause is self-executing and thus provides a direct cause of action for just-compensation claims; the Ninth and now Fifth Circuits have reached the opposite conclusion, holding that a statutory cause of action is required to vindicate the Fifth Amendment right to just compensation.

This Court should grant certiorari to resolve this split of authority, curtail the Fifth Circuit's defiance of *Knick*, and restore a fundamental constitutional protection to millions of Americans. Even if the Court

declines plenary review, summary reversal is warranted to correct the patently erroneous decision below.

ARGUMENT

I. The Fifth Circuit's Badly Flawed Ruling Reinstates the Same Sort of Catch-22 Prohibited by This Court's Decision in *Knick v. Township of Scott*.

In *Knick*, this Court eliminated *Williamson County*'s atextual requirement that a takings plaintiff litigate an inverse-condemnation claim in state court before he files a takings claim against local and state governments in federal court. In so doing, the Court concluded that this exhaustion requirement could not be reconciled with the "self-executing nature" of the Takings Clause, which provides that "[a] property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it." *Knick*, 139 S. Ct. at 2167, 2171 (citing *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987)). To ensure "[f]idelity to the Takings Clause" and "restor[e] takings claims to the full-fledged constitutional status the Framers envisioned when they included the Clause among other protections in the Bill of Rights," the Court overruled *Williamson County. Knick*, 139 S. Ct. at 2170.

Knick stands for the important principle that just-compensation claims enjoy the same status as other constitutional claims and that takings plaintiffs are thus entitled to their day in federal court. See Ilya Somin, Knick v. Township of Scott: *Ending a "Catch 22" that Barred Takings Cases from Federal Court*, 2018–19 CATO SUPREME CT. REV. 153, 157–71 (discussing this crucial aspect of *Knick* in detail). Yet, in a one-paragraph per curiam decision that doesn't so much as cite *Knick*, the Fifth Circuit directly defied this directive.

According to the cursory decision below, federal takings claims against states cannot be heard in federal court because Congress has not created a statutory cause of action for such claims. Pet. App. 2a. But despite this purported absence of a federal cause of action, the panel below permitted the case—which was originally filed in state court—to be removed to federal court under 28 U.S.C. § 1441(a) on the basis that plaintiffs' federal takings claims arose under federal law pursuant to 28 U.S.C. § 1331. Pet. Supp. App. 73a. As Judge Oldham explained in his dissent from denial of rehearing en banc, this holding "reduces the Takings Clause"—as applied to the states—"to nothing": if such a claim is filed in federal court, it must be dismissed with prejudice for a lack of a federal cause of action, and if the claim is brought in state court, it suffers the same fate, because when the State inevitably removes the case, "the federal court must assert jurisdiction and dismiss the claim with prejudice." Pet. Supp. App. 78a.

In other words, the Fifth Circuit has resurrected precisely the sort of Catch-22 that this Court eliminated in *Knick*. In fact, this one is worse. Under *Williamson County*, federal takings claims against states were effectively isolated from federal review. But under the Fifth Circuit's decision below, federal takings claims against states are effectively isolated from *any* judicial review—state *or* federal. At least takings plaintiffs in the former regime were generally provided a forum for their claims in state court, and an opportunity for eventual federal review via a petition for certiorari to this Court.[2] As Judge Oldham aptly noted in his dissental: A "certiorari petition provides relatively little protection for a federal takings claim, which is one reason [this Court] overturned *Williamson County*. But at least it was something." Pet. Supp. App. 78a. The Fifth Circuit's decision does not even leave takings plaintiffs with that.

The ruling below has thus likewise resurrected the double standard eliminated by this Court in *Knick*: takings claims against states are now deprived of judicial review in a way that is not true of any comparable constitutional rights claim. While plaintiffs are guaranteed a federal forum for vindicating states' violations of their rights to be free from unreasonable searches and seizures or to worship freely, for example,

[2] Some plaintiffs were not so fortunate. At least one circuit permitted the same sort of removal shenanigans blessed by the Fifth Circuit here. See *Warner v. City of Marathon*, 718 F. App'x 834, 838 (11th Cir. 2017) (dismissing takings claim removed under 28 U.S.C. § 1441 for failure to comply with *Williamson County*'s exhaustion requirement).

they are left without recourse when it comes to their constitutional right to just compensation for takings. In holding that plaintiffs cannot enforce this right in federal court absent a statutory cause of action, the Fifth Circuit has once more relegated the Takings Clause "'to the status of a poor relation' among the provisions of the Bill of Rights." *Knick*, 139 S. Ct. at 2169 (citation omitted).

To be sure, plaintiffs bringing claims under other provisions of the Bill of Rights are limited in their ability to recover damages against states. See *Edelman v. Jordan*, 415 U.S. 651, 674–77 (1974) (holding that 42 U.S.C. § 1983 does not provide a cause of action for damages against states). But that is because the provisions themselves do not provide for such a remedy. In contrast, the Takings Clause, as this Court has repeatedly recognized, is "self-executing . . . with respect to compensation." *Knick*, 139 S. Ct. at 2171 (quoting *First English*, 482 U.S. at 315). Put another way, the right guaranteed by the Takings Clause is not the right to be free from some government action—the right is to be free from government action *without just compensation*. Thus, denying takings plaintiffs a forum for seeking just compensation from states does not simply deny them a particular remedy for a violation of a constitutional right—it denies them the right itself, as applied to states. No other constitutional provision has been interpreted to grant states such an absolute exemption.

This state exemption defies not only this Court's decision in *Knick*, but decades of this Court's takings

precedents. Indeed, this Court "has consistently applied the Takings Clause to the states, and in so doing recognized, at least tacitly, the right of a citizen to sue the state under the Takings Clause for just compensation." *Manning v. Mining & Minerals Div. of the Energy, Minerals & Nat. Res. Dep't*, 144 P.3d 87, 90 (N.M. 2006) (citing *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 306–09 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606, 614–15 (2001); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027–30 (1992)). The single-paragraph decision below grapples with none of these decisions.

Two of the judges on the panel below filed concurring opinions to the denial of rehearing en banc, in which they defend the panel decision in more detail than the ruling itself did. Judge Higginbotham argues that the reasoning of *Knick* applies only to cases brought under 42 U.S.C. § 1983. Pet. Supp. App. 46a–47a. But *Knick* itself squarely forecloses such a limited reading. There, this Court rejected the Township's characterization of the state-litigation requirement as a § 1983 specific rule, noting that "the *Williamson County* opinion, which did not even quote §1983[,] . . . applied with equal force to takings by the Federal Government, not covered by §1983." *Knick*, 139 S. Ct. at 2175 n.6 (citing *Williamson County*, 473 U.S. at 195).

Judge Higginbotham also advances various arguments to the effect that it is desirable to confine most takings cases to state courts because of the latter's special expertise in property law issues. Pet. Supp. App. 48a–50a. These types of arguments, which were offered

at length by the dissent in *Knick*, 139 S. Ct. at 2187–89 (Kagan, J., dissenting), have already been rejected by this Court once. And for good reason. "[M]any other constitutional rights cases also routinely involve issues on which state judges might have superior expertise." Somin, 2018–19 CATO SUPREME CT. REV. at 164–66 (collecting examples); Ilya Somin, *Federalism and Property Rights*, 2011 U. CHI. LEGAL F. 53, 80–84 (same). "Outside the context of the Takings Clause, few argue that this possibility justifies relegating constitutional claims to state courts." Somin, 2018–19 CATO SUPREME CT. REV. at 164.

Judge Higginson, for his part, seeks support for the panel's ruling in dictum from this Court's decision in *Maine Community Health Options v. United States*, 140 S. Ct. 1308 (2020), in which the Court stated that "the Constitution did not 'expressly create [] a right of action [] when it mandated just compensation for Government takings of private property for public use.'" *Id.* at 1328 n.12. But that case, unlike this one, involved a statutory right of action (namely, a Tucker Act claim against the federal government). See *id.* at 1331. For that very reason, the Court expressly declined to decide whether plaintiffs could bring their claims under the Takings Clause itself absent a statutory cause of action. *Id.* at 1331 n.15. In contrast, when this Court was faced with a takings claim lacking a statutory cause of action in *First English*, it determined that the Takings Clause provided an independent cause of action. See 482 U.S. at 315–16. Nothing in the dictum of footnote 12 of the Court's decision in *Maine*

Community Health Options could reasonably be construed as abrogating or overruling that earlier decision.

Nevertheless, relying on the erroneous notion that the only available cause of action for just compensation claims must be "judicially created," Judge Higginson argues that, even if the Takings Clause, generally, was incorporated against state governments, any implied "damages remedy" for "just compensation" was not. Pet. Supp. App. 53a–55a. But Judge Higginson cites no historical support for this position. Indeed, there is no evidence that the Fourteenth Amendment somehow incorporated only part of the Takings Clause against the states but excluded the express entitlement to just compensation. Such a bifurcated approach would essentially gut this Fifth Amendment right, which is not a right to be free from takings, but a right to free from takings "*without just compensation*." U.S. Const. Amend. V. (emphasis added).

The Fifth Amendment does indeed create a direct cause of action against state governments, no less than other provisions of the Bill of Rights do. Nothing in the text or history of the Constitution suggests otherwise. See Somin, 2018–19 CATO SUPREME CT. REV. at 160–62. "Indeed, historical evidence indicates that protecting constitutional property rights against abuses by state governments was one of the main reasons the Bill of Rights was 'incorporated' against the states in the first place." *Id.* at 161 (collecting sources).

The Fifth Circuit's erroneous decision is not merely atextual and ahistorical—it stands in direct defiance of this Court's recent decision in *Knick*. Certiorari is thus warranted to prevent the important principles of *Knick*—not to mention the Takings Clause as applied to states—from becoming a dead letter in the Fifth Circuit.

II. The Question Presented Is Important Because It Will Determine the Fundamental Property Rights of Millions.

It is difficult to imagine an issue of greater importance than the widescale judicial nullification of a fundamental constitutional right, which is precisely what the Fifth Circuit has wrought here. As a result of the unreasoned ruling below, the governments of three states with approximately 36 million residents will be free to seize private property and then refuse to pay compensation, without fear of having their actions challenged in either state or federal court.

Even in the extremely unlikely event that these states decide not to take full advantage of the decision below by removing all federal takings claims against them to federal court, the foreclosure of a federal forum alone has substantial practical ramifications. Indeed, the right to bring takings claims in federal court is a vital tool to avoid potential bias in state courts. See Somin, 2018–19 CATO SUPREME CT. REV. at 155. This is especially true in states like Louisiana, Mississippi, and Texas, where judges are elected by popular vote

and are therefore likely to maintain close ties to the political actors adopting the very regulations being challenged by takings plaintiffs. See *id.* at 182; see also Ilya Somin, Stop the Beach Renourishment *and the Problem of Judicial Takings*, 6 DUKE J. CONST. L. & POL'Y 91, 99–110 (2011).

Moreover, in Louisiana, the right to bring takings claims in federal court is not just a vital tool—it is the *only* tool for property owners to vindicate their fundamental constitutional rights. This is because Louisiana does not provide a state-law remedy for uncompensated takings. See *Ariyan, Inc. v. Sewerage & Water Bd. of New Orleans*, 29 F.4th 226 (5th Cir. 2022), *cert. denied*, 143 S. Ct. 353 (2022).

These devastating and significant ramifications of the Fifth Circuit's ruling render the question presented one of substantial import and deserving of this Court's review.

III. This Court's Plenary Review Is Warranted to Resolve a Circuit Split Deepened by the Fifth Circuit's Decision Below.

Beyond defying *Knick* and nullifying millions of Americans' fundamental property rights, the Fifth Circuit's decision also deepens an existing split among the federal Courts of Appeals and state courts of last resort. By granting plenary review of the petition here, this Court can both resolve the split and provide much-needed guidance to lower courts on these important constitutional issues.

In holding that the Fifth Amendment "does not provide a right of action for takings claims against a state," Pet. App. 2a, the Fifth Circuit joined the Ninth in rejecting the self-executing nature of the Takings Clause. Indeed, the cursory per curiam opinion below cites *Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704 (9th Cir. 1992), for support. In that case, the Ninth Circuit held that takings plaintiffs "ha[ve] no cause of action directly under the United States Constitution" and that any litigant "complaining of a violation of a constitutional right must utilize 42 U.S.C. § 1983." *Id.* at 705. The Ninth Circuit thus nullified the Takings Clause as applied to the states and did so in a very short opinion that offers almost no analysis supporting its position. In the decision below, the Fifth Circuit now repeats this error.

These two decisions stand in sharp conflict with the four federal circuits that have held that the self-executing Takings Clause supplies its own cause of action, independent of legislative intervention. The Seventh Circuit, for example, has noted that the "just compensation requirement of the Takings Clause places takings in a class by themselves because, unlike other constitutional deprivations, the Takings Clause provides both the cause of action and the remedy." *Wisconsin Cent. Ltd. v. Pub. Serv. Comm'n of Wisconsin*, 95 F.3d 1359, 1368 (7th Cir. 1996) (citing *First English*, 482 U.S. at 316 & n.9). The Fourth Circuit and D.C. Circuit have recognized the same. See *Mann v. Haigh*, 120 F.3d 34, 37 (4th Cir. 1997) (describing how the Takings Clause represents a situation "in which the

Constitution itself authorizes suit against the federal government" (citing *First English*, 482 U.S. at 316 n.9)); *McKesson Corp. v. Islamic Republic of Iran*, 539 F.3d 485, 490 (D.C. Cir. 2008) (noting that the Supreme Court has "infer[red] a cause of action" from the Takings Clause (citing, *inter alia*, *First English*, 482 U.S. at 316 & n.9)). The Fourth Circuit has even gone so far as to expressly recognize this circuit split. See *Law. v. Hilton Head Pub. Serv. Dist. No. 1*, 220 F.3d 298, 302 n.4 (4th Cir. 2000) ("Other courts, however, have held, in apparent conflict with *First English*, that a violation of the Takings Clause can only be redressed through a claim under § 1983." (citing, *inter alia*, *Azul-Pacifico, Inc.*, 973 F.2d at 705)).

Most recently, the First Circuit has distinguished just-compensation claims from claims for money damages for other constitutional violations, and its analysis bears directly on the question presented. Most notably, the First Circuit rejected the Government's attempt to analogize takings claims to both *Bivens* suits and § 1983 actions, explaining that "a claim under the Takings Clause is different in kind from [such] actions" because "[n]either *Bivens* nor section 1983 rest on a provision of the Constitution that mandates a specific remedy in the same way the Takings Clause mandates just compensation; nor do *Bivens* or section 1983 prescribe the quantum of compensation required in the event of a violation." *In re Fin. Oversight & Mgmt. Bd.*, 41 F.4th 29, 46 (1st Cir. 2022), *cert. denied*, 143 S. Ct. 774 (2023). The First Circuit's analysis stands in stark contrast to the panel's decision below. Although the

panel cited virtually no authority for its holding, it did cite a *Bivens* case for the inapposite proposition that "a federal court's authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress." Pet. App. 2a (quoting *Hernandez v. Mesa*, 140 S. Ct. 735, 742 (2020)).

Finally, the decision below and the Ninth Circuit's decision in *Azul-Pacifico* conflict with several decisions from state courts of last resort. For example, in *Manning v. Mining & Minerals Division of the Energy, Minerals & Natural Resources Department*, 144 P.3d 87 (N.M. 2006), the New Mexico Supreme Court agreed with the First, Fourth, Seventh, and D.C. Circuits "that the Takings Clause creates a cause of action against a state," because it is "self-executing." *Id*. at 95, 97; see also *id.* at 96 n.6. It thus held that "[r]equiring further governmental action when it is the government that has effected the taking is contrary to the very reason for the Fifth Amendment: a check against abusive governmental power." *Id.* at 97. Similarly, the South Dakota Supreme Court has also "[r]ecognize[d] the Just Compensation Clause as a self-executing constitutional provision" under which "the remedy does not depend on statutory facilitation." *SDDS, Inc. v. State*, 650 N.W.2d 1, 9 (2002); see also *Henderson v. City of Columbus*, 827 N.W.2d 486, 493 (Neb. 2013); Pet. 11–12 (discussing other state court decisions).

This split of authority is entrenched, enduring, and ripe for this Court's review. Indeed, this Court's intervention is necessary to provide guidance to the lower courts on these important issues. The Court

should therefore grant certiorari and resolve the split in favor of the majority position, which properly applies the constitutional text and this Court's precedents in recognizing that the self-executing Takings Clause provides a direct cause of action for just-compensation claims.

IV. In the Alternative, Summary Reversal Is Warranted to Correct the Patently Erroneous Decision Below.

Even if the Court declines to take this case up on plenary review, it should at least grant certiorari to summarily reverse the badly flawed ruling below. See, *e.g.*, *Dunn v. Reeves*, 141 S. Ct. 2405, 2407 (2021) (summarily reversing an Eleventh Circuit decision that "went astray" from this Court's precedents); *Box v. Planned Parenthood of Indiana and Kentucky, Inc.*, 139 S. Ct. 1780, 1782 (2019) (summarily reversing a Seventh Circuit decision that "clearly erred" in failing to acknowledge and apply a relevant precedent of this Court); *CNH Industrial N.V. v. Reese*, 138 S. Ct. 761, 763 (2018) (summarily reversing a decision of the Sixth Circuit because its "analysis [could]not be squared" with a recent precedent of this Court).

By allowing removal of plaintiffs' federal takings claims under § 1441 only to dismiss them on the merits for the purported lack of a federal cause of action, the Fifth Circuit has created yet another Catch-22 for takings plaintiffs and lowered the Takings Clause once more "'to the status of a poor relation' among the

provisions of the Bill of Rights." *Knick*, 139 S. Ct. at 2169–70 (quoting *Dolan*, 512 U.S. at 392). Such flagrant disregard for this Court's decision in *Knick* cannot be permitted to stand. Nor should the 36 million people residing within the Fifth Circuit's jurisdiction be stripped of their fundamental property rights because of an uncorrected—and unreasoned—erroneous decision. This Court's intervention is necessary and should not be delayed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

May 10, 2023

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