No. 22-913

In the Supreme Court of the United States

RICHARD DEVILLIER, ET AL., PETITIONERS

v.

STATE OF TEXAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Ordinarily, when a private litigant seeks to vindicate a federal constitutional right by seeking damages in a federal court, he must identify a cause of action created by Congress. Most commonly, he may sue the "person" who "subjects, or causes [him] to be subjected" to a constitutional deprivation under 42 U.S.C. section 1983. Such a claim is not available, however, against a State because a sovereign State is not a "person" within the meaning of section 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). Yet petitioners sought to hold the State of Texas responsible when their property flooded during two natural disasters. The question presented is:

Whether the Fifth Amendment's Takings Clause, as incorporated against the States through the Fourteenth Amendment's Due Process Clause, impliedly creates a cause of action by which private parties may sue a State for monetary damages.

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INTRODUCTION

Petitioners blame the State of Texas for the fact that their homes and property flooded during two of the wettest storms ever to hit the State: Hurricane Harvey in August 2017 and Tropical Storm Imelda in September 2019. Pet. App. 4a–5a.[1] More than two years after Hurricane Harvey flooded east Texas, petitioners sued the State of Texas seeking compensation. The State sought dismissal on the grounds that (1) Congress has not provided a federal cause of action for Fifth Amendment takings claims against States; (2) the claims were barred by Texas's sovereign immunity from liability for damages, and (3) the claims were, as to Hurricane Harvey, untimely. Because the Fifth Circuit agreed with Texas on the first ground, it never reached the other two grounds upon which the State sought dismissal.

The petition does not warrant this Court's attention. It has been only four years since this Court overturned decades of precedent to allow takings claims to be pursued in federal court without first litigating in state court. *Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162, 2170 (2019). The state-court decisions on which petitioners rely for a split of authority (at 10–14) largely predate that decision. Even if that were not the case, this would be a poor vehicle to resolve any split because there are other dispositive grounds upon which petitioners' claims should be dismissed. Finally, the Fifth Circuit got it right: this Court has said that it is up to Congress to

[1] Andy Latto & Robbie Berg, *Tropical Storm Imelda* at 3, NATIONAL HURRICANE CENTER (2020) (naming Harvey the "wettest cyclone on record in the U.S." and Imelda the "7th wettest").

create causes of action, whether to vindicate constitutional rights or otherwise. And Congress has not provided a cause of action to enforce the Fourteenth Amendment or the Fifth Amendment's Takings Clause by seeking monetary compensation from States.

STATEMENT

I. Petitioners' Suit

According to the operative complaint, petitioners own property north of Interstate Highway 10 in east Texas. Pet. App. 4a.[2] Petitioners allege that during Hurricane Harvey and, later, Tropical Storm Imelda, a concrete barrier that was constructed to divide traffic on the east- and west-bound lanes on IH-10 acted as a dam, preventing flood waters from moving onto the southern lanes of IH-10. ROA.1170–71. Thus, they allege, the flood waters backed up north of the highway, resulting in "impoundment of rainwater runoff on [petitioners'] property for days." ROA.1174. This impoundment, petitioners allege, caused damage to their real and personal property. ROA.1174–75. For example, they allege "appliances, furniture, tools, machinery," and other personal property were damaged or destroyed by the water. ROA.1175.

Petitioners sued the State of Texas for inverse condemnation under the Fifth Amendment's and the Texas Constitution's respective takings clauses. U.S. Const. amend. V; Tex. Const. art. I § 17; *see* ROA.1165–67. The first of their now-consolidated lawsuits was filed on May 27, 2020, in state court. ROA.74–96. The State removed the case to the Southern District of Texas based

[2] Because the case comes before the Court in a motion-to-dismiss posture, the State assumes but does not concede the allegations in the operative complaint to be true.

on federal question jurisdiction under 28 U.S.C. section 1441(a) and supplemental jurisdiction under 28 U.S.C. section 1367(a). ROA.68–96. That case was subsequently consolidated with three other lawsuits that brought the same claims. ROA.1127–29; *see also* ROA.1940–74, ROA.2286–2391, ROA.2733–2839.

Once the lawsuits were consolidated in the Southern District of Texas, the State moved for judgment on the pleadings as to petitioners' Fifth Amendment takings claims (among others not relevant to the petition). ROA.1199–1219. The district court denied the State's motion but certified "that there is a controlling question of law as to which there is substantial ground for difference of opinion" and thus allowed an interlocutory appeal under 28 U.S.C. section 1292(b). Pet. App. 35a; *contra* Pet. 7–10 (suggesting the issue is squarely resolved by this Court's caselaw).

II. The State's Interlocutory Appeal

The Fifth Circuit granted the State's unopposed petition for permission to appeal on three questions. Pet. App. 36a–37a. Based solely on one of those issues—petitioners' lack of a cause of action to sue the State for damages—the Fifth Circuit vacated and remanded the decision of the district court. Pet. App. 2a–3a.

First, the State argued that petitioners lack a private cause of action to sue a State for compensation under the Fourteenth Amendment based on a Fifth Amendment taking. No one disputes that the Texas Supreme Court, which is a common-law court,[3] has recognized a cause of action for a taking under state law. Pet. App. 2a (citing,

[3] *Brown v. De La Cruz*, 156 S.W.3d 560, 563 n.14 (Tex. 2004) (recognizing "it is sometimes proper" for Texas' "common-law courts to create causes of action federal tribunals would not").

inter alia, *City of Baytown v. Schrock*, 645 S.W.3d 174, 178 (Tex. 2022)). But "[f]ederal courts, unlike state courts, are not general common law courts," *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 312 (1981), and the Fourteenth Amendment itself does not create a cause of action. Petitioners could not identify any statutory cause of action allowing them to sue a State to enforce the Fourteenth Amendment's guarantee of just compensation for a taking, as States are not "persons" within the meaning of 42 U.S.C. section 1983. *Will*, 491 U.S. at 71. Nor did petitioners argue there is an equitable or common-law cause of action that might allow them to sue for a taking. So the State argued that petitioners did not have a cause of action allowing them to bring suit for monetary compensation from the State of Texas. *See* Pet. App. 1a–3a.

Second, the State's permissive interlocutory appeal raised its sovereign immunity *from liability*. The State does not dispute that removal to federal court waives its sovereign immunity *from suit*. *See Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 624 (2002). But under Fifth Circuit precedent—which petitioners do not challenge in this Court—the State's removal did not waive sovereign immunity from *liability*, which is determined by reference to Texas law. *See Meyers ex rel. Benzing v. Texas*, 410 F.3d 236, 253 (5th Cir. 2005). The Fifth Circuit did not reach this second certified issue because it ruled for the State on the cause-of-action question.

Third, the State argued that petitioner' claims based on Hurricane Harvey were untimely. Because section 1983 has no express statute of limitations, the default rule in suits alleging a violation of federal rights is to "apply the most closely analogous statute of limitations

under state law." *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 158 (1983). In this instance, that was two years. Tex. Civ. Prac. & Rem. Code § 16.003(a). And that same two-year limitations period would apply in other implied-cause-of-action cases under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), or to takings claims under the Texas Constitution. Because Hurricane Harvey occurred in 2017, and the earliest of these consolidated claims was not filed until 2020, those claims were barred. Having reversed, the Fifth Circuit did not reach this issue either.

III. The Fifth Circuit's Decision

The Fifth Circuit panel agreed with the State on the first issue, holding "that the Fifth Amendment Takings Clause as applied to the [S]tates through the Fourteenth Amendment does not provide a right of action for takings claims against a state." Pet. App. 2a. The Fifth Circuit cited this Court's decision in *Hernandez v. Mesa*, 140 S.C 735 (2020), which says that "a federal court's authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress," *id.* at 742, along with *Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704 (9th Cir. 1992), which holds that "a takings plaintiff has 'no cause of action directly under the United States Constitution,'" Pet. App. 2a (quoting *Azul-Pacifico*, 973 F.2d at 705).

The Fifth Circuit denied rehearing en banc over the dissent of five judges. Supp. Pet. App. 43a. Judge Higginson, who was on the panel, explained its decision on the basis that "implying constitutional causes of action is 'a disfavored judicial activity,' and . . . implying such a cause of action here would infringe separation-of-powers principles." Supp. Pet. App. 51a (citation

omitted) (quoting *Egbert v. Boule*, 142 S. Ct. 1793, 1803 (2022)). He further noted that just "[t]hree terms ago," every Justice of this Court "agreed 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.'" Supp. Pet. App. 51a (quoting *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1328 n.12 (2020) (cleaned up)). And "[s]ince a cause of action against the federal government is not express in the Fifth Amendment, if such a cause of action exists, it must be judicially created." Supp. Pet. App. 53a (citations and internal quotation marks omitted).

Judge Higginson further opined that a court would improperly "arrogate legislative power by implying a cause of action against the [S]tates in the Takings Clause of the Fifth Amendment as incorporated by the Due Process Clause of the Fourteenth Amendment." Pet. App. 56a (quotation marks omitted). This would be particularly improper here for four reasons: (1) "[a]n alternative remedial structure already exists in state inverse-condemnation law," (2) "Congress decided to provide a damages remedy [in section 1983] for takings claims against municipalities and certain local government units, but not states," (3) "[i]mplying a judicial remedy against states implicates federalism," and (4) the court could not "predict the systemwide consequences of recognizing a cause of action under the Fifth and Fourteenth Amendments for takings claims against states." Pet. App. 56a–57a (citations and internal quotation marks omitted).

Judge Higginbotham, who was also on the panel, also explained his reason for siding with Texas: for purposes of the Fifth Amendment, "[i]t is plain that 'self-

executing'" in *Knick*—a term repeatedly intoned throughout the petition (at i, 3, 5, 7. 8, 10, 11, 12, 13, 14, 15, 16)—"speaks only to the completeness of the claim itself, the point at which a takings claim is ready for *a* court." Supp. Pet. App. 46a. "The completeness of the claim is the sole usage of the term" and "[i]ts purpose" in *Knick* "was to retreat from the earlier *Williamson County* doctrine." Supp. Pet. App. 46a. As Judge Higginbotham recognized, because of the identity of the defendant, the claim at issue in *Knick* could be brought under section 1983, and thus, this Court "'ha[d] no occasion to consider [the Solicitor General's] novel [] argument' that state takings claims can be brought directly in federal court pursuant to 28 U.S.C. § 1331." Supp. Pet. App. 47a (alterations in original) (quoting *Knick*, 139 S. Ct. at 2174).

The dissenting judges concluded that this "appeal should've begun and ended with the State's decision to remove to federal court under 28 U.S.C. § 1441." Supp. Pet. App. 72a. *First*, without wrestling with the distinction between immunity from liability and immunity from suit, they contended that "the State's decision to remove obviously constitutes a waiver of its sovereign immunity." Supp. Pet. App. 72a. *Second*, the dissenters opined that because the State removed based on arising-under jurisdiction, there must be a corresponding federal cause of action—because "as a general matter, suits are removable under § 1441 *only* when federal law creates the cause of action." Supp. Pet. App. 73a. The dissenters reasoned this meant either that the district court was correct in refusing to dismiss petitioners' Fifth Amendment claims, or that the case should have been remanded to state court because there

is no arising-under jurisdiction. Supp. Pet. App. 75a.[4] The dissenters also worried that "the panel decision reduces the Takings Clause to nothing" because plaintiffs would have either no or very limited avenues to sue the State under the Fifth Amendment. Supp. Pet. App. 78a–79a.

REASONS TO DENY THE PETITION

I. The Question Presented Warrants Further Percolation in the Lower Courts.

Review of the question presented should be denied as premature. In seeking review, petitioners rely primarily (at 10–14) on a putative split between *state* courts of last resort and two federal circuits that are not typically aligned in such a split: the Fifth and Ninth. Petitioners concede (at 14–17) there is no federal circuit split concerning whether plaintiffs may bring a takings claim directly under the Fifth or Fourteenth Amendment against a State, and most federal courts have yet to weigh in on the question. The Court should allow further percolation before addressing this putative split for at least two reasons.

First, the present split is illusory as there is a fundamental difference between the state and federal courts on the question of whether to recognize an implied private right of action. To be clear, the State does not

[4] The dissent did not explain how to reconcile that theory with the principle that a plaintiff's claim need not be meritorious in order to establish jurisdiction, which exists so long as the plaintiff presents a "colorable claim 'arising under' the Constitution or laws of the United States." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 513 (2006) (citing *Bell v. Hood*, 327 U.S. 678, 681–85 (1946)). "[T]he absence of a cause of action is a merits problem, not a jurisdictional one," as the dissent observed. Supp. Pet. App. 69a (citing, *inter alia*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998)).

dispute that the Fifth Amendment's just-compensation requirement applies to the States through the Fourteenth Amendment. *See Chi., B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 238 (1897). But recognizing that the substantive right is incorporated against the States does not answer whether that includes a cause of action for damages. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 n.63 (2020). And this Court has repeatedly recognized that "[r]aising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals." *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (citing *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 365 (1991) (Scalia, J., concurring)); *see also, e.g.*, *City of Milwaukee*, 451 U.S. at 312 (citing *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812)). State courts like those on the opposite side of the putative split are just such common-law courts. *See, e.g.*, *Nat'l Tr. for Historic Pres. v. City of Albuquerque*, 874 P.2d 798, 801 (N.M. 1994). Because courts on one side of the split have the ability to recognize their own causes of action, and courts on the other do not, there is no square split on whether the Constitution itself provides a cause of action. And, and discussed below (at 22–24), petitioners have never argued that there is a state-law cause of action they can use to sue the State under the Fourteenth Amendment for a taking.

Second, there has been very little time for lower courts to consider the relevant issue of whether the Constitution creates a cause of action that may be pursued in federal court. After all, this Court allowed takings claims to be brought in federal court in the first

instance only four years ago. *See Knick*, 139 S. Ct. at 2170. Previously, takings plaintiffs pursued their takings claims in state court before bringing suit in federal court for a taking under the federal Constitution. Nearly all of the state-court decisions upon which petitioners rely (at 10-14) predate *Knick* and thus could not have taken it into account. And Judge Higginson's opinion is the only one of which the State is aware in which a federal judge addresses the interaction between *Knick* and this Court's implied-private-right-of-action jurisprudence in any detail. Additional time for these ideas to be explored by other courts of appeals would aid in this Court's eventual review should the Court decide the question presented merits its consideration in an appropriate case.

II. As There Are Alternative Grounds to Dismiss Petitioners' Claims, This Is A Poor Vehicle to Resolve the Question Presented.

This case is not an appropriate case in which to review the question presented. *Contra* Pet. 18–19. Although the Fifth Circuit determined that this case should be dismissed because of the lack of a cause of action, at least two other grounds exist to dismiss some or all of plaintiffs' claims: sovereign immunity from liability (which bars all of plaintiffs' claims) and the statute of limitations (which bars the claims based on damage caused by Hurricane Harvey). These additional dispositive issues undermine petitioners' claimed urgency (at 17–18): regardless of this Court's ruling on their cause of action, their Fifth Amendment takings claims will fail. That is not a worthwhile use of this Court's or the parties' resources.

A. Although Texas has waived immunity from suit, its immunity from liability precludes relief on plaintiffs' claims.

To start, under Fifth Circuit precedent that petitioners do not challenge, Texas's sovereign immunity *from liability* provides an independent ground to dismiss plaintiffs' claims. To be clear, the State has never disputed that removal of the case waived its sovereign immunity *from suit*—an issue on which petitioners and the dissent spill much ink. Pet. 2–3, 6; Supp. App. Pet. App. 72a. Indeed, it is blackletter law that "removal is a form of voluntary invocation of a federal court's jurisdiction sufficient to waive the State's otherwise valid objection to litigation of a matter . . . in a federal forum." *Lapides*, 535 U.S. at 624. That is not, however, the question.

Although removal to federal court may waive objections to proceeding in federal court, several circuits, including the Fifth Circuit, hold removal does not waive state sovereign immunity to *liability*. *See, e.g.*, *Trant v. Oklahoma*, 754 F.3d 1158, 1172 (10th Cir. 2014); *Stroud v. McIntosh*, 722 F.3d 1294, 1301 (11th Cir. 2013); *Lombardo v. Pa., Dep't of Pub. Welfare*, 540 F.3d 190, 198 (3d Cir. 2008); *Meyers*, 410 F.3d at 255. As explained in an article cited favorably in Fifth Circuit precedent:

> [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.

Put another way, in Fifth Circuit precedent that petitioners do not challenge, removal says a great deal about where a case may be litigated—but nothing about whether the State can be held liable for monetary damages. *Meyers*, 410 F.3d at 255. The State's immunity from liability is a question of state law because "the Constitution permits and protects a state's right to relinquish its immunity from suit while retaining its immunity from liability, or vice versa." *Id.*

Under Texas law, "[s]overeign immunity encompasses two principles: immunity from suit and immunity from liability." *Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 594 (Tex. 2001). "Immunity from suit bars a suit against the State unless the Legislature expressly gives consent," and "[i]mmunity from liability protects the State from judgments even if the Legislature has expressly given consent to sue." *Id.*; *see also San Jacinto River Auth. v. Medina*, 627 S.W.3d 618, 622 (Tex. 2021) ("Sovereign and governmental immunity protect the state and its political subdivisions, respectively, from suit and liability absent the state's express waiver.").

Texas has immunity from liability in any suit seeking "to control state action," including through a claim for money damages. *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 856 (Tex. 2002) ("Where the purpose of a proceeding against state officials is to control action of the State or subject it to liability, the suit is against the State and cannot be maintained without the consent of the Legislature.") (citing, *inter*

alia, *Griffin v. Hawn*, 341 S.W.2d 151, 152 (Tex. 1960)). Petitioners' takings claims seek to control the State by compelling it to pay them monetary damages. *See Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006); *cf. City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 715 (1999) (takings claims are traditional actions at law seeking to recover damages). Such a claim is barred by the State's immunity from liability under Fifth Circuit precedent. *See Meyers*, 410 F.3d at 255.

Because petitioner does not challenge the Fifth Circuit's rule respecting Texas's immunity from *liability*, this is a poor vehicle to address the question presented: even if the Fifth Circuit was incorrect that petitioners lack a cause of action directly under the Fourteenth Amendment, review will not benefit petitioners whose claims will ultimately fail.

B. Petitioners' claims based on Hurricane Harvey are time-barred.

This is also a poor vehicle to address the question presented because the bulk of the monetary-compensation claims are time-barred. Where a federal claim is not subject to an express statute of limitations, the default rule is to "apply the most closely analogous statute of limitations under state law." *DelCostello*, 462 U.S. at 158; *see also id.* at 158 n.12 (applying a state statute of limitations is the "rule of thumb"). In section 1983 and *Bivens* suits, federal courts apply the forum State's statute of limitations for general personal injury claims. *See Brown v. Nationsbank Corp.*, 188 F.3d 579, 590 (5th Cir. 1999). In Texas, the applicable limitations period is two years. *See id.*; *see King-White v. Humble Indep. Sch. Dist.*, 803 F.3d 754, 759 (5th Cir. 2015).

The same result would obtain under the Texas Constitution's Takings Clause, where claims alleging facts like petitioners' would also be subject to a two-year limitations period. *See Allodial Ltd. P'ship v. N. Tex. Tollway Auth.*, 176 S.W.3d 680, 684 (Tex. App.—Dallas 2005, pet. denied) (citing Tex. Civ. Prac. & Rem. Code § 16.003(a)). A two-year statute of limitations applies to claims alleging *damage* to real property, which includes diminution in its value, and to all claims based on personal property. *See Tucker v. City of Corpus Christi*, 622 S.W.3d 404, 408 (Tex. App.—Corpus Christi 2020, pet. denied); *Allodial*, 176 S.W.3d at 684. That is what petitioners allege. ROA.1174–75. But petitioners asked the district court to instead apply the ten-year prescriptive period for adverse possession under Texas law. ROA.1232. True, Texas courts apply that limitations period to inverse condemnation claims based on "an actual physical invasion or an appropriation of the land," but under Texas law, flooding is not "an actual physical invasion or an appropriation of the land." *Allodial*, 176 S.W.3d at 684. So even petitioners' state-law takings claims under the Texas Constitution—which remain live in this case—will be subject to a two-year limitations period.

Under a two-year statute of limitations, any claims arising from damages caused by Hurricane Harvey are time-barred. Hurricane Harvey occurred in August 2017. ROA.1172–73. Although this petition arises from the consolidation of four different complaints brought by 77 plaintiffs, Pet. App. 5a–6a, the earliest was filed on May 27, 2020—more than six months after the limitations period lapsed, ROA.74–96. As a result, only those plaintiffs who relied on damages from Tropical Storm Imelda could recover—even if they could find a

way around the State's immunity, and the Court could find a cause of action in the Fourteenth Amendment.

Because some or all of petitioners' federal takings claims fail regardless of the answer to the question presented, this case is a poor vehicle for considering whether petitioners have a cause of action to sue a State for a taking under the Fourteenth Amendment. A case where the petitioners ultimately will not obtain relief is a poor investment for this Court's limited resources and the resources of the parties.

III. The Fifth Circuit Correctly Refused to Read A Private Cause of Action Into the Fifth Amendment.

Finally, review should be denied because the Fifth Circuit—and, before it, the Ninth—got it right: no statute allows petitioners to seek damages from the State, and there is "no cause of action directly under the United States Constitution" to sue for a taking. *Azul-Pacifico*, 973 F.2d at 705. The petition cites no other cause of action—it is undisputed Congress has not enacted one that can be used to sue States—and petitioners have never relied upon the causes of action proposed by the judges who dissented from denial of rehearing en banc. As a result, those alternative theories are not before the Court and cannot be used to impeach the reasoning of the Fifth Circuit panel.

A. The ruling below follows this Court's precedent regarding implied rights of action.

Although this Court used to be more open to recognizing causes of action in a common-law manner, today, "a federal court's authority to recognize a damages remedy [against a State] must rest at bottom on a statute enacted by Congress." *Hernandez*, 140 S. Ct.

at 742; *accord Sandoval*, 532 U.S. at 286. Petitioners do not attempt shoehorn their claim into any statute. For good reason. The closest provision is section 1983, but all agree that section 1983 does not create a cause of action against States, which are not "persons" within the meaning of that provision. *Will*, 491 U.S. at 71.

This analysis does not change because petitioners raise a constitutional claim. To the contrary, this Court recently explained that the Fifth Amendment does *not* contain any express cause of action to sue the federal government for a taking. *See Maine Cmty. Health Options*, 140 S. Ct. at 1328 n.12; *id.* at 1334 & n.3 (Alito, J., dissenting). Given that the Fifth Amendment originally applied only to the federal government, *Chi., B. & Q.R. Co.*, 166 U.S. at 238, it would be strange for the Fifth Amendment to create a claim against the States that it did not create against the federal government. And, as Judge Higginson explained, a judicially created cause of action to sue the federal government under the Fifth Amendment is not obviously part of the constitutional requirement that was incorporated against the States through the Fourteenth Amendment's Due Process Clause. Supp. Pet. App. 53a–54a. So any cause of action to sue the States under the Fifth and Fourteenth Amendments would have to be an independent judicial creation. Supp. Pet. App. 5a–54a (Higginson, J.).

This Court's modern jurisprudence regarding the federal separation of powers does not allow for the judicial creation of a cause of action to sue a State on a takings theory. Under what this Court has described as an "*ancien regime*," it was considered "'the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose'

expressed by a statute." *Sandoval*, 532 U.S. at 287 (citing *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964)). Today, by contrast, "in all but the most unusual circumstances, prescribing a cause of action" to enforce the Fourteenth Amendment "is a job for Congress, not the courts." *Egbert*, 142 S. Ct. at 1800. The Fifth Amendment Takings Clause is not that unusual circumstance. To the contrary, *Knick* unequivocally stated that takings claims are governed by the same "general rule[s]" as "any other claim grounded in the Bill of Rights." *Knick*, 139 S. Ct. at 2172–73. Because as Judge Higginbotham explained, Congress has not chosen to create a cause of action against States, Supp. Pet. App. 50a, the Fifth Circuit was entirely correct to respect that choice.

B. Neither petitioners nor the dissenters identify authority to the contrary.

Petitioners' primary contention is that precedent has described the Fifth Amendment's Takings Clause as "self-executing." But there is nothing magical to that term when it comes to recognizing a cause of action where none has been authorized by Congress. And neither the cases relied upon in the petition or identified by the dissenting judges says otherwise.

1. To start, recognizing that a legal provision is self-executing does not mean that it creates a private cause of action. To call a legal document "self-executing" is to state that is "effective immediately without the need of any type of implementing action." *See Self-executing*, Black's Law Dictionary (11th ed. 2019). For example, a self-executing treaty "operates of itself without the aid of any legislative provision" by contrast to a treaty that "can only be enforced pursuant to legislation to carry [it] into effect." *Medellin v. Texas*, 552 U.S. 491, 505 (2008) (cleaned up); *see also, e.g.*, *Bond v. United States*, 572

U.S. 844, 875 n.6 (2014) (Scalia, J., concurring). "The Fifth Amendment privilege against compelled self-incrimination is not self-executing"; it must be properly and timely invoked. *Roberts v. United States*, 445 U.S. 552, 559 (1980). As a result, a statement that the Fifth Amendment Takings Clause *is* self-executing means that it is positive law of its own force without further action.

But, as Judge Higginson discussed, "self-executing" does not mean that there is automatically a private cause of action for damages if the clause is violated. *See* Supp. Pet. App. 59a–63a. After all, the Supremacy Clause is self-executing on courts, but it does not create a cause of action. *Alexander*, 532 U.S. at 286–87. And the Fourth Amendment applies of its own force to federal officials, but someone complaining his Fourth Amendment rights have been violated still cannot sue a federal official for damages unless his claim fits within the narrow parameters of recognized *Bivens* actions. *See, e.g.*, *Hernandez*, 140 S. Ct. at 739.

2. Petitioners' authority is not to the contrary. Petitioners understandably place great reliance (at 9) on *Knick*, but no one disputed that Congress had created a cause of action allowing the *Knick* plaintiffs to sue. 139 S. Ct. at 2168. After all, the *Knick* defendant was a local government, not a State, and consequently the plaintiff could invoke section 1983, *id.* at 2168—which petitioners may not, *Will*, 491 U.S. at 71. Thus, when this Court referred to the "self-executing Fifth Amendment," 139 S. Ct. at 2171, it was not discussing the cause of action but when the injury occurred. That is, the Court was saying that the plaintiff did not need to wait until compensation had been denied in state proceedings before filing suit in federal court under section 1983. 139 S. Ct. at 2172–73. That does not mean the Fifth

Amendment or Fourteenth Amendment creates a cause of action.

Petitioners' other authorities are similarly inapposite. *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987)—which was also a suit against a local government subject to section 1983 liability—addressed the measure of relief, not whether the plaintiff had identified a viable cause of action. *Id.* at 310. When the Court noted that "claims for just compensation are grounded in the Constitution itself," *id.* at 315, it did so to explain its holding that the government owes compensation even for temporary takings, *see id.* at 318–19. The Court said nothing about what cause of action a property owner could use to obtain that compensation.

Likewise, *Jacobs v. United States*, 290 U.S. 13 (1933), addressed the amount of compensation required by the Fifth Amendment in a suit against the United States. *See id.* at 16. There was no question of the cause of action. Thus, when this Court explained that the suits at issue were "founded on the Constitution of the United States," it did so in holding only that "[t]he fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim." *Id.* at 16.

Contrary to petitioners' reliance on *Jacobs*, the Court did not address the availability of a cause of action against the federal government directly under the Fifth Amendment for nearly another century. As discussed above (at 6), when the Court did so recently, it recognized that there is no express cause of action to be found in the Constitution. *Maine Cmty. Health Options*, 140 S. Ct. at 1328 n.12. And none of petitioners' later authority shows that the Fifth Circuit erred in applying

the same rule in interpreting the same constitutional provision as applied against the States.

3. The historical authorities cited by the dissent from denial of rehearing—authorities upon which petitioners never before relied—do no better in rebutting the Fifth Circuit's conclusion. *First*, the dissent cites pre-incorporation cases in which federal courts adjudicated "takings-related claims" against States or state officials. Supp. Pet. App. 83a–84a. The dissent was careful to describe these as examples of "takings-*related* claims," as many are not takings cases. In *Fletcher v. Peck*, 10 U.S. 87 (1810), for example, this Court held that a Georgia law, which dealt with land conveyances by the State, was invalid under the Contracts Clause. *Id.* at 138–39 (discussing U.S. Const. art. I, § 10); *see* Supp. Pet. App. 84a. It is hard to see how a case about a different constitutional provision has anything to say about whether there is a cause of action to enforce the Fifth Amendment's Takings Clause. And to the extent the examples do involve takings claims, they could at most have involved *state* just-compensation guarantees, because the federal just-compensation right did not then apply to the States. As a result, they say nothing about whether there is a private cause of action to enforce a right that did not apply.

Second, the dissent cited post-incorporation cases brought against local governments. Supp. Pet. App. 84a. These cases share the same problems as most of those relied upon by petitioners: local governments then, as now, could be sued under the statutory cause of action found in section 1983, which has been in existence since 1871. *E.g.*, *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 689–90 (1978) (citing *Northwestern Fertilizing Co. v. Hyde Park*, 18 F. Cas. 393, 394 (No.

10,336) (CC ND Ill. 1873)). It is immaterial that the cited decisions did not cite section 1983. "Questions 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)). Decisions in which the parties did not dispute the plaintiffs' cause of action are not precedent for the proposition that there is an implied cause of action to be found in the Fifth or Fourteenth Amendments. And even if they were, "at most, these cases support an inference that a cause of action exists against local governments." Supp. Pet. App. 58a. Because Congress *has* created a cause of action for such suits, they are no infringement on Congress's authority to determine how to enforce the Fourteenth Amendment. But this case is not brought against a local government.

C. The potential causes of action raised in the dissent from denial of rehearing en banc were not raised below, so they are not properly before this Court.

Finally, the Fifth Circuit dissent from denial of rehearing en banc suggested two possible causes of action under which plaintiffs might proceed. Supp. Pet. App. 75a, 83a–84a. "In our adversarial system of adjudication, [courts] follow the principle of party presentation." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). Under this principle, "in both civil and criminal cases, in the first instance and on appeal," courts "rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Id.* (discussing *Greenlaw*

v. United States, 554 U.S. 237 (2008)). Because petitioners failed to plead or argue those causes of action below, it is no surprise that the Fifth Circuit panel did not address them. *Id.* They are not properly before this Court now. *See Yee v. City of Escondido, Cal.*, 503 U.S. 519, 533 (1992); *Carlson v. Green,* 446 U.S. 14, 17, n. 2 (1980).

In any event, neither of the dissent's suggestions helps petitioners. *First*, the dissent suggested that petitioners might be able to proceed under the equitable cause of action recognized in *Ex Parte Young*. Supp. Pet App. 75a (citing *Ex Parte Young*, 209 U.S. 123 (1908)). But Petitioners have not sued a state official; they sued "The State of Texas." Pet. App. 5a–6a. It is blackletter law that *Ex Parte Young* creates a "narrow exception grounded in traditional equity practice—one that allows certain private parties to seek judicial orders in federal court preventing *state executive officials* from enforcing state laws that are contrary to federal law." *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 532 (2021) (emphasis added). Moreover, even if petitioners could identify a proper defendant, their complaint seeks money damages, ROA.1172–75, ROA.1197, which are categorically unavailable under *Ex parte Young*. *Edelman v. Jordan*, 415 U.S. 651, 677 (1974).

Second, the dissent raised the prospect of proceeding based on what it described as one of the "whole host of takings-related claims" that courts entertained at the founding "under various causes of action," which the dissent understood to be "borrow[ed] common-law causes of action from the States where [federal courts] sat." Supp. Pet. App. 83a–84a. Assuming the dissent's historical account is accurate, petitioners are not pro se litigants, and "our system is designed around the

premise that parties represented by competent counsel know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *Sineneng-Smith*, 140 S. Ct. at 1579 (cleaned up). Petitioners evidently did not think this type of obscure and ill-defined "takings-related claim[]," Supp. Pet. App. 83a, was in their best interest because they neither pleaded such a cause of action before the district court, nor pressed one in the court of appeals.

The decision not to pursue such a claim was entirely rational: again, petitioners want recompense for their flooding-related losses. *See* ROA.1197. English and colonial law generally did not require compensation for government takings of property, William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 695, 698 (1985); the federal Constitution's just-compensation requirement was a "novelty" that occasioned considerable comment "[i]n the first years after ratification," *id.* at 715. It appears that James Madison included a compensation requirement in his draft for the Bill of Rights of his own accord, and the provision 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; *see* Aditya Bamzai & David M. Goldman, *The Takings Clause, the Tucker Act, and Knick v. Township of Scott*, YALE J. OF REGULATION: NOTICE & COMMENT (Oct. 9, 2018). This history renders the existence of a common-law cause of action for takings at the Founding more dubious than the dissent suggests. And in any event, petitioners' demand for certiorari, like their briefing

below, depends on the argument that they can bring suit "directly under the Takings Clause." *E.g.*, Pet. at 10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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