**UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF TEXAS**
**GALVESTON DIVISION**

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| RICHARD & WENDY DEVILLIER, et al., on behalf of themselves and all others Similarly situated, Plaintiffs, | § | Civil Action No. 3:20-cv-00223 |
| | § | Jury Trial Demanded |
| v. | § | |
| THE STATE OF TEXAS, Defendant. | § | |

**PLAINTIFFS' MOTION TO LIFT STAY AND FOR LEAVE TO FILE SECOND AMENDED MASTER COMPLAINT AND SUPPLEMENT TO MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiffs Richard Devillier, et al., on behalf of themselves and all others similarly situated, request this Court lift the administrative stay currently in place and for entry of an order directing the clerk to file their Second Amended Master Complaint in the form attached as Exhibit A hereto, as well as their Supplement to Motion for Partial Summary Judgment in the form attached as Exhibit B.

## Argument

### A. The Time Has Come To Lift The Stay.

1. On October 3, 2023, this Court entered an order (ECF 153) directing that this matter was to be "stayed and administratively closed until the United States Supreme Court issues its opinion in this case."

2. On April 16, 2024, the United States Supreme Court issued its opinion in this case, vacating the decision of the Fifth Circuit Court of Appeals in *Devillier v. Texas*, 53 F.3d 904 (5th Cir. 2023), and remanding the case "for further proceedings consistent with this

opinion." *DeVillier v. Texas*, 601 U.S. 285, 293 (2024). As the condition precedent to lifting the stay has occurred, Plaintiffs request that now be done.

**B. Plaintiffs' Second Amended Master Complaint Should Be Filed.**

3. Plaintiffs also request an order directing the clerk to file their Second Amended Master Complaint in the form attached as Exhibit A hereto. Under Fed. R. Civ. P. 15(a)(2), amendment of the current complaint requires either (a) the State's written consent or (b) leave of Court—which the Rule notes should be freely given "when justice so requires." Both justice and good cause support granting Plaintiff's request. *Marathon Fin. Ins., Inc., RRG v. Ford Motor Co.*, 591 F.3d 458, 470 (5th Cir. 2009) (noting good cause standard applicable to modification of Rule 16 scheduling order).

4. As the Supreme Court decision noted, the State of Texas does not dispute the nature of Plaintiffs' substantive right to just compensation; the only question presented concerned "the procedural vehicle by which a property owner may seek to vindicate that right." *DeVillier*, 601 U.S. at 291. Given a concession by the State during oral argument (on which the Supreme Court relied in rendering its ruling), that Texas state courts accept and adjudicate a state common law cause of action by which a party may bring an inverse condemnation claim to enforce the guarantee of just compensation under the Takings Clause of the Fifth Amendment to the U.S. Constitution.[1] *DeVillier*, 601 U.S. at 293. Furthermore,

[1] *See also* Tr. of Oral Arg. 40 (Texas Solicitor General Nielson: "We have a cause of action for federal takings claims. Petitioners simply refuse to use it."); *id.* (acknowledging plaintiffs could pursue a state common law cause of action under the Takings Clause in this case, but "[t]he problem is they haven't pleaded the claim."); *id.* at 59-60 (Texas state common law recognizes a cause of action under both the state and federal constitutions); *id.* at 63-64 (Justice Sotomayor: "I don't know what you're fighting because you're telling me that Texas lets them have a cause of action under the Fifth Amendment."

the State agreed that, to the extent such a claim had not been pleaded in this case, on remand the State would not oppose a pleading amendment to that effect by Plaintiffs:

> And, although Texas asserted that proceeding under the state-law cause of action would require an amendment to the complaint, it also assured the Court that it would not oppose any attempt by DeVillier and the other petitioners to seek one. . . . On remand, DeVillier and the other property owners should be permitted to pursue their claims under the Takings Clause through the cause of action available under Texas law.

*Id.* at 293 (citing Transcript of Oral Argument at 41, 61, 64).

Plaintiffs therefore request an order lifting the administrative stay currently in place and directing the District Clerk to file their Second Amended Master Complaint in the form attached as Exhibit A hereto – a document that differs from plaintiffs' First Amended Master Complaint (ECF 43) solely by its addition of "Count 6," a Texas state common law cause of action to enforce their rights under the Takings Clause of the U.S. Constitution.[2]

**C. Plaintiffs' Partial Summary Judgment Supplement Should Be Filed.**

5. In addition, Plaintiffs request leave to file, and ask for an order directing the District Clerk to file, their Supplement to Motion for Partial Summary Judgment in the form attached as Exhibit B. *See Spence v. Nelson*, 603 F. App'x 250, 253 (5th Cir. 2015) (opinion in second appeal noting district court had ordered the filing of "a supplemental motion for summary judgment addressing the [previously] remanded issues and claims").

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Solicitor General Nielson: "Yes, Your Honor."). Transcript of argument available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-913_l6gn.pdf.

[2] In respect of the direct-action Fifth Amendment claim Plaintiffs asserted (Count 2), that remains intact. The opinion from the Fifth Circuit, which held the Fifth Amendment claim invalid, has been vacated. And only this Court's ruling (finding the claim valid) exists. The addition of the new claim (Count 6 (for a Texas state common law cause of action to enforce Plaintiffs' rights under the Takings Clause of the U.S. Constitution)) conforms the pleadings to the record.

6. The Supplemental Motion seeks summary adjudication that the State is liable to Plaintiffs on Counts 2 and 6 of their Second Amended Complaint for violation of the State's obligation to pay just compensation for the taking of Plaintiffs' property pursuant to the rights they hold under the Takings Clause of the Fifth Amendment to the U.S. Constitution.[3]

7. A Supplemental Motion as to liability under both Counts 2 and 6 is appropriate because both claims are before this Court and because the claims do not differ from Plaintiffs' state constitutional claim (for which a partial summary judgment is also pending – ECF 109), except for the question of "intent" which is addressed in the supplement. And even that intent-driven distinction—urged by the State—has fallen away in recent Texas jurisprudence as explained in accompanying filings.

**D. No Justification Exists To Continue The Delay Of This Case.**

8. When the State sought leave to file an interlocutory appeal of the denial of its motion to dismiss, Plaintiffs agreed to not oppose that effort only if these proceedings remained unaffected. The State accepted the condition and pursued its appeal. And that process has played out with both Count 2 remaining valid and with the addition of Count 6.

9. Meanwhile, consistent with the parties' agreement and the Rule 16 pretrial order agreed to by the parties, discovery proceeded and was closed and the parties briefed class certification and partial summary judgment regarding the merits of this case—two questions ripe for determination. During an interlocutory appeal "the district court may still proceed

[3] Nor does the insertion of Count 6 change the facts or analysis in any way that might upset the summary judgment adjudication. Substantively, Count 2 and Count 6 are identical, as they both address Plaintiffs' Fifth Amendment rights. The only difference is whether the claim is brought directly under the U.S. Constitution or the common law of Texas. But that does not change the factual issues or legal analysis one iota. As such, there is no basis to reopen the case in any regard.

with matters not involved in the appeal." *Davis v. Matagorda Cty.*, 2019 U.S. Dist. LEXIS 72839, *3 (S.D. Tex., Apr. 30, 2019) (quoting *Alice L. v. Dusek*, 492 F.3d 563, 564-65 (5th Cir. 2007)).

10. Nothing in, nor any effect of, the Supreme Court's decision warrants a continued moratorium on adjudicating the merits of this matter. Review of this Court's prior order is "confined to the particular order appeals from." *Hernandez v. Results Staffing, Inc.*, 907 F.3d 354, 363 (5th Cir. 2018) (cleaned up) (quoting *United States v. Stanley*, 483 U.S. 669, 677 (1987)). The additional claim now advanced as "Count 6" was not the subject of the interlocutory order appealed from and its prosecution cannot be addressed by any subsequent ruling regarding that order.

11. Nor can adjudication of Count 6 even be impacted by any ruling regarding the prior order. Neither of the two issues addressed in the prior order (jurisdiction over and a sovereign immunity defense against a claim arising directly under the Fifth Amendment Takings Clause) affect Count 6. This Court has jurisdiction over the claim under 28 U.S.C. § 1367. And the Texas Supreme Court has recognized that the State's immunity from suits under either the state or federal constitution has waived. *City of Baytown v. Schrock*, 645 S.W.3d 174, 176 & n.1 (Tex. 2022) (citing both state and federal constitutional takings claims and noting "Our Constitution***s*** require the government to compensate property owners when it takes their property for public use. This constitutional right waives the government's immunity from lawsuits—immunity that otherwise often insulates the public treasury from claims for damages.") (emphasis added). Simply put, no "controlling legal question" raised by the prior order can affect or shape adjudication of Count 6, so no reason exists to delay this action further.

## Conclusion

It has now been seven years since the first time Plaintiffs suffered the flooding caused by the State's knowing and intentional detention of storm water runoff on their properties to protect citizens downstream of Interstate Highway 10—and almost five years since it did so again. The time has come for Plaintiffs to have their day in court. Plaintiffs therefore request entry of an order directing the clerk to file their Second Amended Master Complaint in the form attached as Exhibit A hereto, as well as their Supplement to Motion for Partial Summary Judgment in the form attached as Exhibit B.

Dated: August 8, 2024

Respectfully submitted,

*/s/ Daniel H. Charest*

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**CERTIFICATE OF SERVICE**

I certify that that on August 8, 2024, this document was filed electronically via the Court's CM/ECF system, causing electronic service upon all counsel of record.

*/s/ Daniel H. Charest*
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