No. 21-30335

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ARIYAN, INCORPORATED, doing business as DISCOUNT CORNER; M. LANGENSTEIN & SONS, INCORPORATED; PRYTANIA LIQUOR STORE, INCORPORATED; WEST PRYTANIA, INCORPORATED, doing business as PRYTANIA MAIL SERVICE/BARBARA WEST; BRITISH ANTIQUES, L.L.C., BENNET POWELL; ARLEN BRUNSON; KRISTINA DUPRE; BRETT DUPRE; GAIL MARIE HATCHER; BETTY PRICE; et al,

Plaintiffs-Appellants,

v.

SEWERAGE & WATER BOARD OF NEW ORLEANS; GHASSAN KORBAN, In his Capacity as EXECUTIVE DIRECTOR OF SEWERAGE & WATER BOARD OF NEW ORLEANS,

Defendants-Appellees.

On appeal from the United States District Court
for the Eastern District of Louisiana
No. 2:21-cv-534, Hon. Martin L.C. Feldman, District Judge, presiding

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BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF PLAINTIFFS-APPELLANTS

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel certifies that the following listed persons and entities, in addition to those already listed in the parties' briefs, have an interest in the outcome of this case.

Amicus Curiae
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Jeffrey Redfern (Institute for Justice)
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Undersigned counsel further certifies, pursuant to Federal Rule of Appellate Procedure 26.1(a), that *amicus curiae* Institute for Justice is not a publicly held corporation, does not have any parent corporation, and that no publicly held corporation owns 10 percent or more of its stock.

Dated: August 23, 2021

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1991, the Institute for Justice (IJ) is a nonprofit, public-interest legal center dedicated to defending the essential foundations of a free society: private property rights, economic and educational liberty, and the free exchange of ideas. As part of that mission, IJ has litigated cases challenging the use of eminent domain to seize an individual's private property and give it to other private parties. Among the cases that IJ has litigated are *Kelo v. City of New London*, 545 U.S. 469 (2005), in which the Supreme Court infamously held that the U.S. Constitution allows government to take private property and give it to others for purposes of "economic development," and *City of Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006), in which the Ohio Supreme Court expressly rejected *Kelo* and held that the Ohio Constitution provides greater protection for private property than does the U.S. Constitution.

IJ continues to litigate important statutory and constitutional

[1] Pursuant to Fed. R. App. P. 29(a)(2), counsel for amicus states that counsel for all parties have consented to the filing of this brief. No party or party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than the amicus or their counsel—contributed money that was intended to fund preparing or submitting this brief.

questions in takings cases around the country, both as counsel for property owners and as amicus curiae. Recent IJ cases include a victory in the New Jersey Appellate Division as counsel of record, *see Casino Reinvestment Dev. Auth. v. Birnbaum*, 203 A.3d 939 (N.J. Super. Ct. App. Div. 2019) and an appearance as amicus curiae (where IJ was invited to participate in oral argument) in the Colorado Supreme Court. *See Carousel Farms Metro. Dist. v. Woodcrest Homes, Inc.*, 442 P.3d 402 (Colo. 2019). IJ also filed an amicus brief in *Violet Dock Port, Inc. v. Heaphy*, No. 19-30922, 2020 WL 9848394 (5th Cir. Dec. 29, 2020) a case recently before the Fifth Circuit that contained very similar facts to the case at hand. That case was settled before a decision was issued.

ARGUMENT

The Fifth Amendment's terms are plain: "nor shall private property be taken for public use without just compensation." Here, the state court held that Appellants' property has been damaged to the point of a government "taking" without just compensation. That holding is binding on the parties and not subject to further dispute. It is also undisputed that Appellants have not been compensated. That

establishes an ongoing violation of the Fifth Amendment that federal courts are empowered to remedy.

The district court's decision to the contrary is based on the notion that the Fifth Amendment's command of just compensation need not be contemporaneous with the taking. And since, in the district court's view, payment need not be contemporaneous, a government entity's "delay in paying" a condemnation judgment cannot give rise to a Fifth Amendment violation.

That is wrong. A central purpose of the Takings Clause was to enshrine a rule that dates back to Magna Carta: that takings of private property must be paired with contemporaneous cash payments rather than unenforceable IOUs. Indeed, as recently as 2019, the Supreme Court of the United States confirmed in *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), that a property owner's injury begins the moment his property is taken and continues until it is remedied by the payment of just compensation.

But even before *Knick*, there was no question that a property owner whose property had been taken, but who (like Appellants) had no available state remedy to compel compensation, had a viable cause of

action under § 1983. The Supremacy Clause demands that this Court confirm the availability of a federal remedy here because otherwise states will be able to effectively immunize their officers and political subdivision from liability for violations of federal rights.

I. "Just compensation" has always meant contemporaneous cash payment—not a paper promise.

Following in the misguided footsteps of the district court decision in *Violet Dock Port*, the decision below held that Appellants have no Fifth Amendment claim because they have already received judgments in their favor and a mere "delay" in paying cannot give rise to a Fifth Amendment violation. *Violet Dock Port Inc., LLC v. Heaphy*, No. 19-11586, 2019 WL 6307945 (E.D. La. Nov. 25, 2019). According to the district court, courts have consistently distinguished between "a state's *taking* of property without just compensation and its temporary *retention* of just compensation." *Ariyan, Inc. v. Sewerage & Water Bd.,* No. 21-cv-534, 2021 WL 2483575, at *2 (E.D. La. June 9, 2021). But this holding and its predecessor in *Violet Dock Port* are aberrations directly contradicted by 800 years of precedent, dating back to Magna Carta.

The just-compensation requirement dates back at least to the signing of Magna Carta in 1215. Among the grievances of the barons who compelled King John to sign Magna Carta was the King's abuse of the royal prerogative of "purveyance." Purveyance was, as Blackstone explained, the right of the king to "bu[y] up provisions and other necessaries *** at an appraised valuation, in preference to all others, and even without consent of the owner." 1 William Blackstone, *Commentaries* *277. In other words, purveyance was a species of what we now call eminent domain. *See Little Rock Junction Ry. v. Woodruff*, 5 S.W. 792, 793 (Ark. 1887) ("[Eminent domain] bears a striking analogy to the king's ancient prerogative of purveyance, which was recognized and regulated by the twenty-eighth section of *magna charta*."). This prerogative was important to English kings because the royal court in John's time was "very frequently" "removed from one part of the kingdom to another." 1 Blackstone *277. The king's right to purchase provisions at market rates ensured "that the work of government should not be brought to a stand-still for want of supplies." William Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John, with an Historical Introduction* 330 (1914).

At the time of Magna Carta, there was no dispute that the king and his deputies were obligated to pay for the provisions they took. But controversy arose because "[p]ayment was often indefinitely delayed or made not in coin but in exchequer tallies." McKechnie at 330. Exchequer tallies were sticks used to memorialize royal debts owed to particular subjects. Marks would be made along the length of the stick to record the size of the debt, and then the stick would be split lengthwise. Each half of the stick would contain a portion of all of the lines, and because of irregularities in the wood, the sticks were difficult to forge. Each party would keep half of the stick; those halves later could be matched up to prove their authenticity. See Christine Desan, *Making Money: Coin, Currency, and the Coming of Capitalism* 175–85 (2014).

The problem with exchequer tallies was that they were less transferable than coins. It was difficult or impossible to prove to potential transferees that one half of a stick actually conformed to another half held by the Exchequer. So, in practice, exchequer tallies' primary use was to offset the creditor's future taxes. *Id.* In that regard, those exchequer tallies bear a striking resemblance to the paper

judgments issued by the Louisiana trial court in this case. Neither has any real value except to offset possible future debts to the condemnor.

King John's barons were so dissatisfied with this state of affairs that they included several clauses in Magna Carta specifically addressing the issue of purveyance. Most notably, Clause 28 provided (in translation) that "[n]o constable or other bailiff of ours shall take corn or other provisions from any one ***without immediately tendering money therefor***, unless he can have postponement thereof by permission of the seller." (emphasis added). The purpose of this clause was not to establish that the King had to pay for what he took. Even King John didn't dispute that. It was to establish that he had to pay cold, hard cash—IOUs wouldn't cut it—and he had to pay immediately. It is no exaggeration to say that the district court's opinion, by holding that "just compensation" need be no more than an unenforceable promise to pay at some point in the future, would turn back the clock over 800 years.

This basic principle of just compensation has been reaffirmed countless times in the centuries since. Magna Carta was reissued in England four times—by Henry III in 1216, 1217 and 1225, and by

Edward I in 1297. A.E. Dick Howard, *Magna Carta: Text and Commentary* 24 (1964). And Magna Carta was confirmed by parliaments at least fifty more times by 1422. J.C. Holt, *The Ancient Constitution in Medieval England,* in *The Roots of Liberty: Magna Carta, Ancient Constitution, and the Anglo-American Tradition of Rule of Law* 55 (Ellis Sandoz ed., 1993).

American courts over the centuries also affirmed their commitment to Magna Carta's just-compensation principle, even before independence and the incorporation of the Fifth Amendment against the states. *See, e.g.*, *Hooper v. Burgess* (Md. Provincial Ct. 1670), *reprinted in 57 Archives of Maryland, Proceedings of the Provincial Court 1666-1670*, at 571, 574 (J. Hall Pleasants ed., 1940) (holding that an uncompensated seizure of cattle was "Contrary to the Act of Parliamt [sic] of Magna Charta" and awarding the plaintiff compensation of "Forty Five Thousand Nyne Hundred & Fifty poundes of Tobaccoe"); *Bowman v. Middleton*, 1 S.C.L. (1 Bay) 252 (S.C. Ct. Common Pleas 1792) (declaring that it would be "against common right, as well as against Magna Charta, to take away the freehold of one man, and vest it in another . . . without any compensation"); *Gardner v.*

Village of Newburgh, 2 Johns. Ch. 162, 166 (N.Y. Ch. 1816) (striking down a law that failed to provide for just compensation as inconsistent with the "ancient and fundamental maxim of common right to be found in *Magna Charta*" and holding that compensation must be made "previous[]" to the taking); *Young v. McKenzie*, 3 Ga. 31, 41–45 (1847) (holding that the just-compensation principle dates to Magna Carta and is an inherent limit on the power of all governments, regardless of whether their constitutions contain an explicit just-compensation clause). The just-compensation principle—which includes the requirement of immediate cash payment—is one of the oldest and most firmly established rights protected by the Constitution.

II. The Supreme Court in *Knick* confirmed that the Fifth Amendment requires immediate compensation when property is taken.

In 2019, the Supreme Court explained that the Fifth Amendment means precisely what it says: "'[N]or shall private property be taken for public use, without just compensation.' It does not say: 'Nor shall private property be taken for public use, without an available procedure that will result in compensation.'" *Knick*, 139 S. Ct. at 2170. Still less does the Fifth Amendment say what the district court below implicitly

held: "nor shall private property be taken for public use, without a totally unenforceable promise of future payment."

The Court in *Knick* went even further by explicitly clarifying when just compensation is due. Echoing Magna Carta, the court held that "a property owner has a Fifth Amendment entitlement to compensation as soon as the government takes his property without paying for it." *Id.* Yet the decision below inexplicably rejects *Knick* by holding that "a state's temporary delay in paying a state-court judgment does not give rise to a constitutional violation." *Ariyan*, 2021 WL 2483575, at *2.

But that analysis gets the question backwards. The Fifth Amendment injury is not caused by the condemnor's delay in paying the judgment. The Fifth Amendment injury is caused by the condemnor's *taking of Appellant's property*.[2] The taking is the injury, and the compensation (assuming the taking is otherwise lawful) is the remedy. The delay in payment simply means that the claim that arose at the moment of the taking has not been remedied. *See Knick*, 139 S. Ct. at 2171 ("The fact that the State has provided a property owner with a

[2] In the context of this case, "taking" means the Sewerage and Water Board's damage to and interference with Appellants' property.

procedure that may subsequently result in just compensation cannot deprive the owner of his Fifth Amendment right to compensation under the Constitution, leaving only the state law right.").

Admittedly, some older Supreme Court cases have held that contemporaneous payment is not always required so long as compensation is "reasonably just and prompt." *Crozier v. Krupp A.G.*, 224 U.S. 290, 306 (1912). But the *Knick* Court explained those cases had been read "too broadly," and that "[t]hey concerned requests for injunctive relief, and the availability of subsequent compensation [in those cases] meant that such an equitable remedy was not available." *Knick*, 139 S. Ct. at 2175. In other words, these cases mean that courts will generally not enjoin a taking of property because it is uncompensated so long as the compensation is forthcoming. They do not negate the longstanding rule that under the Fifth Amendment compensation is due at the moment of the taking. *Cf. Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 305–06 (1923) (holding that if payment is delayed, it must be made with interest from the date of the taking).

Regardless of the continuing validity of the dicta in cases like *Crozier*, this case concerns payment that is neither just nor prompt. Rather, the position of the Sewerage & Water Board of New Orleans (SWB) is that it will not pay and cannot be made to pay any compensation for the property it damaged. But the U.S. Constitution says the SWB *must* pay, and a federal court is empowered to remedy that constitutional violation by compelling payment.

The district court insists that *Knick* means only that a plaintiff can bring a federal § 1983 claim against a local government in federal court before litigating in state court. The court went on: "The Justices said nothing, however, about a plaintiff's ability to bring a § 1983 suit to enforce a *state court*'s judgment in a takings case that has already been litigated in state court." *Ariyan*, 2021 WL 2483575, at *3. Leaving aside that this ignores the actual words of *Knick*, this holding leads to an utterly irrational result. Under the district court's reading of *Knick*, a property owner can file a federal claim immediately upon having his property taken and receiving no just compensation. But a similarly situated property owner whose property has been taken without just compensation can pursue no federal claim because he decided to or was

forced to litigate first in state court and now possesses an unenforceable state court judgment. Both property owners have un-remedied Fifth Amendment rights, but one is barred from federal court simply because a state court has *affirmed* that a constitutional taking occurred and calculated the value of the property. This seems counterintuitive. And in fact, it's not what *Knick* says.

III. Even before *Knick*, there was no legal basis for dismissing this claim.

Knick makes this case particularly easy, but *Knick* is not necessary to the outcome of this case. To the contrary, property owners in Appellant's circumstances have always been entitled to a federal remedy.

While this case was brought under 42 U.S.C. § 1983, the Supreme Court has long recognized "the self-executing character of the [Fifth Amendment] with respect to compensation." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (internal quotation marks omitted). As the Court put it, the right to sue for just compensation:

> rest[s] upon the Fifth Amendment. Statutory recognition [i]s not necessary. A promise to pay [i]s not necessary. Such a promise

> [i]s implied because of the duty to pay imposed by the amendment. The suits [are] thus founded upon the Constitution of the United States.

Jacobs v. United States, 290 U.S. 13, 16 (1933); *see also Seaboard Air*, 261 U.S. at 304 ("Just compensation is provided for by the Constitution and the right to it cannot be taken away by statute. Its ascertainment is a judicial function."). Historically, Congress could channel just compensation claims to particular courts, *see, e.g.*, *Broughton Lumber Co. v. Yeutter*, 939 F.2d 1547, 1557 (Fed. Cir. 1991), but it could not otherwise qualify or limit the right.

In 1985, the Supreme Court modified this state of affairs as it applied to state and local defendants. Reasoning that an uncompensated taking had not occurred until the government refused to pay a claim, the Supreme Court held that plaintiffs must first exhaust their state remedies—including judicial remedies such as inverse-condemnation suits—before bringing a takings claim in federal court. *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985) ("the property owner cannot claim a violation of the Just Compensation Clause until it has used the

procedure and been denied just compensation"), *overruled by Knick*, 139 S. Ct. at 2167.

But even under *Williamson County*, nothing would have stood in the way of property owners like Appellants. Appellants have done exactly what *Williamson County* demanded: They exhausted their state court remedies, and the defendant still refuses to pay. That would have cleared the road for this federal just-compensation suit with or without the Supreme Court's decision in *Knick*.

Louisiana's anti-seizure provision—which makes takings judgments in Louisiana state courts unenforceable—makes this case and its predecessor *Violet Dock Port* fairly unusual takings cases. In both cases, property owners completed the state-court litigation without foreclosing their federal claims. In the typical takings case, a state-court proceeding will result either in the payment of just compensation or in the resolution of certain factual disputes (about, for example, whether a taking has occurred at all) that make subsequent federal litigation impossible. *See San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 347 (2005) (holding that federal courts hearing a subsequent federal takings claim must apply ordinary preclusion

principles to the state- court action).[3] But here, the state-court litigation resulted in determinations of the value of the property taken (which is res judicata as between these parties), but it did *not* result in any enforceable compensation remedy. These cases therefore present the rare instances in which federal litigation subsequent to state-court takings proceedings is not only possible but affirmatively necessary.

IV. The Supremacy Clause requires that federal courts step in to remedy Appellants' Fifth Amendment rights—lest federal constitutional rights be left at the mercy of state legislatures.

The district court holding is not only antithetical to the Takings Clause, but also to our system of federalism. Under the Supremacy Clause, states cannot immunize otherwise liable state officials or political subdivisions from federal liability. *Howlett v. Rose,* 496 U.S. 356, 360 (1990) ("[A] State cannot immunize an official from liability for injuries compensable under federal law.") (citing *Martinez v. California,* 444 U.S. 277 (1980)); *Hampton v. City of Chicago*, 484 F.2d

[3] The interplay between *Williamson County* (which required exhaustion of state remedies) and *San Remo* (which requires application of normal preclusion rules in eminent domain cases) created what practitioners referred to as the "*San Remo* trap," effectively closing federal court to most takings plaintiffs until *Knick* overruled *Williamson County*. *See, e.g.,* Raymond J. Nhan, *Minimalist Solution to Williamson County*, 28 Duke Env't L. & Pol'y F. 73, 77 (2017).

602, 607 (7th Cir. 1973) ("Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 or § 1985(3) cannot be immunized by state law."). That is essentially what the government is attempting to do here—albeit in a roundabout way. The practical effect of rejecting a federal remedy here would be to hold federal constitutional rights captive to what is effectively a state law immunity.

The Louisiana Constitution's anti-seizure provision is a creature of compromise. When Louisiana overhauled its Constitution in 1974, the framers wanted to abolish governmental immunity in a limited capacity. Lee Hargrave, *"Statutory" and "Hortatory" Provisions of the Louisiana Constitution of 1974*, 43 La. L. Rev. 647, 653–57 (1983). They amended the Constitution to abolish immunity "in contract or for injury to person or property." La. Const. art. XII, § 10(A). But then as a backend balancing provision, they added that "no public property or public funds shall be subject to seizure" and that judgments against state governmental entities must be paid from funds appropriated by the "legislature or the political subdivision against which the judgment is rendered." La. Const. art. XII, § 10(C). Louisiana courts have interpreted this provision to mean that only the state legislature or a

political subdivision— not the courts—can execute judgments against Louisiana governmental entities. *Newman Marchive P'ship, Inc. v. City of Shreveport*, 979 So. 2d 1262, 1265 (La. 2008). And the decision whether to appropriate funds to pay a judgment is "discretionary" rather than "ministerial." *De Laureal Eng'rs, Inc. v. St. Charles Par. Police Jury*, 406 So. 2d 770, 772 (La. Ct. App. 1981).

Predictably, Louisiana's anti-seizure provision has functionally operated as an immunity. Louisiana courts have repeatedly held that they cannot enforce monetary judgments—including takings judgments—against government defendants. *Vogt v. Bd. of Comm'rs of Orleans Levee Dist.*, 814 So. 2d 648, 656 (La. Ct. App. 2002) ("This court recognizes and sympathizes with plaintiffs' plight in getting a judgment against the State or political subdivision satisfied. Nonetheless, this court is without constitutional or statutory authority to compel the Levee Board to pay the judgment rendered against it."); *see also Jazz Casino Co. v. Bridges*, 223 So. 3d 488, 496 (La. 2017). And when they can't be forced to pay and there are no consequences for not paying, many government defendants simply refuse to pay, as the SWB is doing here. Others use the anti-seizure provision as leverage; one Louisiana

jurisdiction simply adopted a policy of never paying tort judgments "unless the plaintiff agreed to waive legal interest on the judgment and to accept quarterly payments on the principal." *Scarbrough v. Simpson*, No. CV 04-812-C-M3, 2006 WL 8432552, at *1 (M.D. La. Feb. 6, 2006), *report and recommendation adopted*, 2006 WL 8432695 (M.D. La. Feb. 27, 2006); *see also Freeman Decorating Co. v. Encuentro Las Americas Trade Corp.*, No. CV 02-2103, 2008 WL 4922072, at *3 (E.D. La. Nov. 12, 2008), *aff'd*, 352 F. App'x 921 (5th Cir. 2009) ("[I]t borders on the absurd that a political sub-division of this state may negotiate a contract for services, receive those negotiated-for services, then never have to pay because there is 'no coercive means' to collect an outstanding payment.").

Here, the SWB has used Louisiana's quasi-immunity provision to get out of paying state court judgments under the Louisiana Takings Clause. This leaves Appellants without the just compensation the Constitution demands. Their federal Fifth Amendment rights are un-remedied. By arguing that an unenforceable state court judgment leaves a federal court powerless to remedy these Takings Clause violations, the SWB is attempting to subject federal rights and federal

courts to Louisiana's anti-seizure rules. But "the Supremacy Clause cannot be evaded by formalism," *Haywood v. Drown*, 556 U.S. 729, 742 (2009), and a state law immunity cannot subjugate federal constitutional rights.[4]

Indeed, the Fifth Circuit has specifically held that federal courts enforcing federal rights are not bound by Louisiana's anti-seizure provision. With regard to this provision, the court has held that federal courts must enforce federal law and compel "the responsible state official to satisfy the judgment." *Gary W. v. Louisiana*, 622 F.2d 804, 807 (5th Cir. 1980).

[4] While state law immunities cannot subjugate federal rights, the Supremacy Clause does not always require that federal law be enforced *in state court*. The Supreme Court has recognized that there are circumstances where recovery on a federal claim in state court may not be possible "because of a neutral state rule regarding the administration of the courts." *See Howlett v. Rose*, 496 U.S. 356, 372 (1990). In other words, the Supremacy Clause does not require states to have courts that are imbued with particular powers—or, indeed, to have courts at all. This means that states are generally permitted to de-fang their own judicial systems and leave their citizens without meaningful state court remedies for violations of their federal rights, so long as they also provide no meaningful remedy for state rights. Louisiana has been willing to do exactly that with its anti-seizure provision. But the government takes this too far. The Supreme Court has never allowed states to use neutral procedural rules to effectively immunize themselves, their officials, or their political subdivisions from federal liability. Federal courts must be able to enforce federal law when state courts, such as those in Louisiana, are unwilling or unable to do so because their judicial systems have been disempowered. Otherwise, federal rights will be at the mercy of state legislatures.

There's also precedent for federal courts stepping in when Louisiana's anti-seizure provision has left federal rights un-remedied in state court. In *Vogt v. Board of Commissioners of Orleans Levee Dist.,* 294 F.3d 684 (5th Cir. 2002), the Louisiana legislature passed a statute ordering the Orleans Levee District, a political subdivision of Louisiana, to return land it had expropriated. 294 F.3d 684 at 687. When the levee district returned the land but refused to repay mineral royalties, the landowners filed suit in state court. *Id.* at 687–88. The landowners received a state court judgment, but the levee district refused to satisfy it, taking shelter in Louisiana's anti-seizure provision. *Id.* at 688. The landowners then filed a federal takings claim in federal court. *Id.* Like the SWB, the levee district argued that plaintiffs' claim was not a valid takings claim, but merely an attempt to force a federal court to execute a state judgment. *Id.* at 696. The Fifth Circuit disagreed, holding that plaintiffs stated a federal takings claim *even though* plaintiffs possessed the same kind of unenforceable state judgment that Appellants in this case have.[5] *Id.* at 697.

[5] A distinction between *Vogt* and the case at hand is that in *Vogt*, the mineral royalties were the subject of the taking. After the levee district refused to return the royalties in the face of a state court judgment, plaintiffs filed a federal takings claim

As *Vogt* makes clear, federal courts are not required to sit back and allow states to effectively immunize their political subdivisions, but must ensure the enforcement of federal rights when states are unwilling or unable to do so. Otherwise, federal constitutional rights will be left at the mercy of state legislatures.

Nor should the court reassure itself that government defendants will eventually "do the right thing." Courts do not take it on faith that private actors will hold themselves accountable when there are no incentives to do so. Government defendants are no different. That this case has arisen so quickly after *Violet Dock Port* demonstrates that the state and its subdivisions will continue to skirt the Constitution by avoiding payment of judgments unless held accountable.

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in federal court to retrieve them. The Fifth Circuit held: "What was the landowners' property has suddenly vanished behind a veil of sovereign immunity in state court. We hold, however, that this result is untenable against a federal takings claim." *Vogt*, 294 F.3d 684 at 697. But whether plaintiffs seek their actual property or just compensation for their property in their takings claim does not matter. The point stands that the Fifth Circuit has intervened when Louisiana's anti-seizure provision has left federal rights un-remedied—and it should do so again here.

CONCLUSION

When private property is taken for public use, the Constitution requires compensation, not an IOU. Federal courts are empowered to compel government entities to compensate property owners. This Court should reverse and remand with instructions to compel compensation.

Dated: August 23, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2021, I caused the foregoing Brief of *Amicus Curiae* Institute for Justice in Support of Plaintiffs-Appellants to be filed electronically with the Clerk of the Court using the Court's CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

Upon acceptance by the Clerk of the Court of the electronically filed document, the required number of bound copies of the Brief of *Amicus Curiae* Institute for Justice in Support of Plaintiff-Appellant will be filed with the Clerk of the Court.

/s/ Jeffrey Redfern

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because this brief contains 4,639 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and the Rules of this Court.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century Schoolbook font with 12-point Century Schoolbook footnotes.

Dated: August 23, 2021 /s/ Jeffrey Redfern

Counsel for Amicus Curiae