No. 22-913

In the Supreme Court of the United States

RICHARD DEVILLIER, ET AL.
Petitioners,

v.

STATE OF TEXAS,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

May a person whose property is taken without compensation seek redress under the self-executing Takings Clause even if the legislature has not affirmatively provided them with a cause of action?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners (plaintiffs in the consolidated cases below) are 120 individuals and 5 corporate entities: Richard DeVillier;* Wendy DeVillier; Steven DeVillier; Rhonda DeVillier; David McBride; Angela McBride; Bert Hargraves; Barney Threadgill; Crystal Threadgill; Barbara DeVillier; David Ray; Gary Herman; Rhonda Glanzer; Chris Barrow; Darla Barrow; Dennis Dugat; Laurence Barron; Deanette Lemon; Jill White; Beverly Kiker; Yale DeVillier (individually and as personal representative of the Estate of Kyle H. DeVillier); Charles Monroe; Jacob Fregia; Angela Fregia; Jerry DeVillier; Mary DeVillier; Zalphia Hankamer; Larry Bollich; Susan Bollich; Sheila Marino; William Meissner; Taylor McBride; Brian Abshier; Kathleen Abshier; Jina Daigle; Coulon DeVillier; Halley Ray Sr.; Halley Ray, Jr.; Sheila Moor; John Rhame; Alex Hargraves; Tammy Hargraves; William DeVillier; Kyle Wagstaff; Allison Wagstaff; Kevin

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* The lower-court opinions and caption, following the complaint, spell the name "Devillier." The family name is in fact spelled "DeVillier." This Court sometimes follows the lower court's spelling of proper names and sometimes chooses to correct it. Compare *Aldrich* v. *Wainwright*, 479 U.S. 918, 918 n.* (order denying certiorari) ("Petitioner's last name was apparently misspelled as 'Aldridge' in the state-court proceedings."), and *Whitcomb* v. *Chavis*, 403 U.S. 124, 130 n.6 (1971) (referring to "Plaintiff Rowland Allan (spelled 'Allen' in the District Court's opinion)"), with *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 555 n.* (1980) ("Although respondents spell their name 'Millhollin,' throughout this litigation their name has been misspelled as 'Milhollin.' Because legal research catalogs and computers are governed by the principle of consistency, not correctness, we feel constrained to adhere to the erroneous spelling.").

Sonnier; Eugenia Molthen; Bradley Moon; John Roberts; Marilyn Roberts; Savanna Sanders; Robert Brown; Tracey Brown; Josh Baker; Lee Blue; Russell Brown; Margaret Carroll; Kevin Cormier; James Davis; Melissa Davis; Maria Gallegos; Christopher Ferguson; Angela Hughes; Robert Laird; Harold Ledoux; Kacey Sandefur; Tifani Staner; Stephen Stelly; Randall Stout; Patti Stout; Chris Day; Calvin Hill; Michael Weisse; Julie Weisse; Eleanor Leonard; Ivy Hamm; Claude Roberts; Bryan Olson; Caren Nueman; Floyd Cline, Jr.; Kenneth Coleman; Haylea Barrow; Carol Roberts; Jenica Vidrine; Charles Collier; Sharon Crissey; James Brad Crone; Heather Coggin; James Coggin; Clovis Melancon; Leroy Speights; Crossroads Asphalt Preservation, Inc.; Fesi Energy, LLC; Brian Fischer; Curtis Laird; Devon Boudreaux; Richard Belsey; Sharon Clubb; Janet Dancer; Porter May; Cindy Perez; Cecile Jimenez; Scott Hamric; Bruce Hinds; Tina Hinds; William Olivier; Esteban Lopez; Billy Stanley; Candace Abshier; Sean Fillyaw; Autumn Minton; Brandon Sanders; Rodney Badon; Charlie Carter; Myra Wellons; Jerry Stepan; Bryan Mills; Cat 5 Resources LLC; Joan Jeffrey; Randy Brazil; Monica Brazil; Herbert Dillard; Kerry Dillard; Southeast Texas Olive, LLC; and Gulf Coast Olive Investments, LLC. The Respondent is the State of Texas.

None of the petitioners has any parent corporation and no publicly held corporation holds more than 10% of the stock in any petitioner.

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JURISDICTION

The judgment of the court of appeals was entered on November 23, 2022. Timely filed motions for rehearing were initially denied on January 11, 2023, then denied again on March 23, 2023. The petition was timely filed on March 17, 2023. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part, "nor shall private property be taken for public use, without just compensation." The Fourteenth Amendment provides, in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

This case arises out of a series of state-court inverse-condemnation suits that were removed to and

consolidated in federal district court. The gist of all these lawsuits was the same: A Texas highway project was causing widespread flooding across a huge swath of rural land. JA-3–4. The flooding, the operative complaint alleges, was intentional. In reconstructing Interstate Highway 10, the Texas Department of Transportation not only raised the road but also built a three-foot-high, impenetrable concrete dam along the middle of it, dividing the eastbound lanes from the westbound. JA-3. The intended effect was to keep the south side of the highway dry in heavy rains, at the cost of flooding the land north of the highway. JA-3–4

The dam worked. When Tropical Storm Harvey hit Houston in 2017, water that would have normally flowed south into the Gulf of Mexico was dammed up on the north side of the highway—effectively creating an enormous lake for days on end. It looked like this:

JA-13.

Harvey was not a once-in-a-lifetime flood for these properties. A similar flood promptly happened

again—as both the property owners and Texas knew it would. JA-28–29. Indeed, as Tropical Storm Imelda loomed in 2019, landowner Steven DeVillier begged the authorities to take down parts of the dam or even let him remove parts of it with his backhoe. JA-29–30. Texas officials refused, and the dam worked again. The entire area flooded—and, again, did not drain for days. The problem was not the storms. The problem was the dam. *Ibid.* And, the complaint alleged, these floods would keep happening so long as Texas maintained that dam. JA-17–18.

Alleging that this recurrent flooding worked a taking under both the United States and the Texas constitutions, a group of local landowners filed an inverse-condemnation suit against the State of Texas in state district court. Pet App. 5a. Texas promptly removed the case to federal court. *Ibid.* Other state-court suits followed, with other property owners making the same takings claims about the same highway project causing the same floods. *Ibid.* Texas removed those, too. *Ibid.* Eventually, all of the cases were consolidated into a single action governed by a single operative complaint. Pet. App. 5a–6a. The plaintiffs include farmers and ranchers whose land has been in their families for generations.

Despite deliberately using those farms, ranches, and homes as a sprawling stormwater-detention pond, Texas argued that none of the plaintiffs had a claim under the Fifth Amendment. Having removed the cases to its chosen federal forum, Texas moved to dismiss them, arguing (in relevant part) that the property owners were not entitled to sue directly under the Fifth Amendment. Pet. App. 12a.

Takings claims, said Texas, could be brought only under 42 U.S.C. § 1983. And since Texas cannot be sued under that statute, it could not be sued for violating the Fifth Amendment at all. *Ibid.*

This, said the magistrate judge, was "pretzel logic" that would allow states to take private property without any compensation and leave property owners with no federal constitutional remedy. *Id.* at 15a. It would "eviscerate[] hundreds of years of Constitutional law in one fell swoop." *Ibid.*

The magistrate also observed that this Court has consistently treated Takings Clause claims differently—in part because that Clause expressly dictates a remedy—and has repeatedly reaffirmed that the Clause "creates a substantive right to just compensation that springs to life when the government takes private property." *Ibid.* (citing *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 315 (1987)). He invoked this Court's holding in *First English* that "a landowner is entitled to bring an action in inverse condemnation as a result of the self-executing character of the constitutional provision with respect to compensation" and that this remedy does not depend on "[s]tatutory recognition" for its existence. *Id.* at 16a (quoting *First English*, 482 U.S. at 315).

The magistrate noted that courts nationwide have followed this Court's directions and recognized the very Fifth Amendment cause of action that Texas said was forbidden. *Id.* at 17a. In keeping with all of this authority, the magistrate held that the Takings Clause provides a mandatory remedy for takings and

that property owners may sue to enforce that remedy. *Ibid.*

Finally, the magistrate noted the significance of Texas's decision to remove this case. *Id.* at 17a–18a. It was true, the magistrate conceded, that federal courts "rarely hear federal takings claims against a state. *Id.* at 17a. But this was because states rarely make the tactical decision to affirmatively invoke federal-question jurisdiction by removing an inverse-condemnation claim. That decision had consequences, and so this particular federal claim was properly adjudicated in federal court. *Id.* at 17a–18a; cf. *id.* at 20a–21a (noting that Texas conceded that removal waives its Eleventh Amendment immunity from suit).

The district court adopted the magistrate's report and recommendation in its entirety and denied Texas's motion to dismiss. *Id.* at 34a. Texas then successfully sought leave to appeal that order under 28 U.S.C. § 1292(b), asking the Fifth Circuit to resolve whether property owners may sue under the Takings Clause without invoking § 1983.[1] Pet. App. 37a.

The Fifth Circuit reversed. The panel opinion (as amended by a panel-rehearing order) disposed of the case in a single substantive sentence: "Because we hold that the Fifth Amendment Takings Clause as applied to the states through the Fourteenth Amendment does not provide a right of action for takings claims against a state, we VACATE the district

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[1] The federal remedy matters here because Texas has suggested below that a different test determines whether government action was sufficiently intentional to be a taking under the State constitution. See Pet. 4 n.4.

court's decision and REMAND for further proceedings."[2] *Id.* at 2a (footnote omitted). In reaching this conclusion, the panel cited none of this Court's Takings cases. Instead, it relied on two cases: *Hernandez* v. *Mesa*, 140 S. Ct. 735 (2020), which declined to allow a *Bivens*[3] cause of action in the context of a cross-border shooting, and *Azul-Pacifico, Inc.* v. *City of Los Angeles*, 973 F.2d 704 (9th Cir. 1992), which asserts (also without reference to this Court's Takings cases) that the Takings Clause provides "no cause of action directly under the United States Constitution." Pet. App. 2a n.1. The Fifth Circuit denied rehearing en banc, *id.* at 41a, and the property owners petitioned this Court for certiorari.

Then the Fifth Circuit denied rehearing en banc again, this time with three opinions respecting the denial. Pet. Supp. App. 42a–97a. Two judges from the original panel filed solo concurrences giving different explanations of the panel's one-sentence per curiam holding. Judge Oldham, joined by Judges Smith, Elrod, Engelhardt, and Wilson, dissented.

The lead concurrence asserted that the federal courts lack power to hear Takings Clause claims absent a "jurisdictional grant such as 42 U.S.C. § 1983."

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[2] The original panel opinion vacated the district court's opinion "for want of jurisdiction" and remanded the case "with instructions to return this case to the state courts." Pet. Supp. App. 76a (emphases omitted). The panel struck the quoted language after Texas correctly observed that the absence of a cause of action did not deprive the court of jurisdiction and that the property owners' other claims remained properly pending in the district court. *Ibid.*

[3] *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971).

Pet. Supp. App. 45a (Higginbotham, J., concurring). In that concurrence's view, the right course would be for takings claims to be litigated solely in the state courts unless eventually reviewed in this Court. *Ibid.*

Another concurrence offered a different theory. *Id.* at 51a (Higginson, J., concurring). Rather than sounding in jurisdiction, it argued that this case is about whether to engage in "some kind of judicial genesis to bring the [Takings Clause] remedy into being." *Id.* at 54a n.1. Relying heavily on this Court's recent *Bivens* decisions, it argued that only the legislature can determine the availability of just compensation under the Takings Clause. *Id.* at 56a–57a. Since Congress has not provided a cause of action against the States, it said, no remedy against the States exists. *Ibid.*

Judge Oldham dissented. *Id.* at 64a. The dissent correctly recognized that the panel's holding rendered "federal takings claims non-cognizable in state or federal court." *Ibid.* In short, the panel's holding that federal Takings claims could be brought solely under § 1983 both extinguished the Petitioners' claims on the merits and rendered the Takings Clause a "dead letter" throughout the Fifth Circuit. *Id.* at 78a–79a.

On the merits, the dissent surveyed two hundred years of history demonstrating that "the Takings Clause afforded a remedy for uncompensated takings separate and apart from any statute." *Id.* 80a–84a. And, like the magistrate judge, the dissent stressed that this Court has, consistent with this history, repeatedly asserted that the Takings Clause is "self-executing," and claims for just compensation exist

without any need for "[s]tatutory recognition." *Id.* 85a–86a (citation omitted).

SUMMARY OF ARGUMENT

The question presented is whether property owners can invoke their right to just compensation under the Takings Clause without a statutory cause of action like § 1983. And that question is easy because this Court has already held that the Takings Clause gives property owners the right to sue for compensation, even without statutory recognition of that right.

This case can begin and end, then, with *First English Evangelical Church* v. *County of Los Angeles*. 482 U.S. 304 (1987). That case held, as this Court had long recognized, that suits for just compensation do not need "[s]tatutory recognition" because they are "founded upon the Constitution of the United States itself." *Id.* at 315 (quoting *Jacobs* v. *United States*, 290 U.S. 13, 16 (1933)). That holding resolves this case. To be sure, Congress *has* authorized many suits for damages under § 1983. But Congress cannot by inaction negate a right founded upon the Constitution itself.

This Court has repeatedly reaffirmed *First English*'s core holding that the Constitution itself authorizes lawsuits seeking just compensation. And the basic principle articulated in *First English*—that a *legal obligation to pay money* necessarily implies the right to *sue to have that money paid*—is uncontroversial. It is the rule that governs the Fifth Amendment's clear command to pay money. It is also the rule that governs *statutory* commands to pay money. It is, across the board, the rule.

And it is a rule that finds further support in text, history, and tradition. Text is easy: The Constitution explicitly requires the payment of just compensation. Only one other remedy (habeas corpus) even warrants mention. Whatever the status of constitutional remedies generally, surely the Constitution secures at least the remedies it expressly provides.

History counsels no different. The right to prompt cash compensation for the taking of property dates at least to the adoption of Magna Carta in 1215. And the right grew only stronger from there. As confirmed by commentators from St. George Tucker to James Madison himself, the reason the Fifth Amendment textually requires a remedy is that it was meant to *require a remedy*. That remedy is designed to ensure that the government pays—is *forced* to pay—when it seizes private property.

The historical case grows stronger still with the ratification of the Fourteenth Amendment. By the mid-nineteenth century, federal and state courts routinely entertained claims for just compensation. And the Takings Clause was specifically invoked as a reason for adopting the Fourteenth Amendment. John Bingham, a primary architect of that Amendment, held up this Court's decision in *Barron ex rel. Tiernan* v. *Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), which refused to apply the Takings Clause to the States, as a reason that the Constitution should be more protective of federal rights.

This historical record is unrefuted. The *enforceable* right to prompt compensation is central to the Fifth and Fourteenth Amendments' protections of

individual rights. Texas has mustered no authority to the contrary.

More broadly, Texas misconceives the nature of this case. It is not about the judiciary's power to *create* a cause of action to enforce one part of the Constitution or another. It is about whether the Constitution itself *substantively requires compensation*. If it does (and it does), then courts must enforce that command, with or without legislative recognition of the claim.

Finally, *stare decisis* counsels in favor of retaining the *First English* rule. Lower courts have applied it without any difficulty in the decades since this Court's decision. Moreover, a contrary rule would effectively eliminate just-compensation claims against the States. The premise of the dueling concurrences below was that federal takings claims, important though they are, belong in state court. Even setting aside this Court's rejection of that premise, the consequence of a ruling for Texas is not that claims for compensation under the Fifth Amendment will proceed in state court. It is that they will not proceed. State courts entertain federal just-compensation claims because this Court, in *First English*, held that the Constitution commands them to. If this Court instead held that the Constitution did not require recognition of just compensation claims—if those claims were cognizable only through a legislative vehicle like § 1983—then state courts would follow that instruction too. Inevitably, decisions about compensation—about what constitutes a taking, about how much compensation is "just," and about whether compensation will be paid at all—would be litigated exclusively under state law, on whatever terms a state chooses.

But the Constitution promises property owners a *federal* remedy for takings. And this Court has consistently held that property owners have one. There is no reason for the Court to change course now, and the judgment below should be reversed.

ARGUMENT

The constitution provides property owners with a self-executing, judicially enforceable right to just compensation when their property is taken for public use.

A. This court's precedent holds that the Takings Clause provides an enforceable right to just compensation.

1. The easiest way to answer the question presented is to recognize that the Court already has. In *First English Evangelical Church* v. *County of Los Angeles*, the Court squarely held that the just-compensation requirement of the Takings Clause was "self-executing" and that "[s]tatutory recognition was not necessary" for Takings claims because they "are grounded in the Constitution itself[.]" 482 U.S. 304, 315 (1987).

First English is exactly on point. There, the plaintiff church sought damages caused by a Los Angeles ordinance that prohibited it from building any structure on its property, which (the church alleged) deprived it of its property's entire value. *Id.* at 308. The trial court struck allegations about the deprivation of property because California law did not authorize a damages remedy for regulatory takings. *Ibid.* (citing *Agins* v. *Tiburon*, 598 P.2d 25 (Cal. 1979)). A property owner could sue to invalidate a law

through declaratory relief or mandamus, but damages for the time before that declaration were unavailable. *Ibid.* California's *Agins* rule had long been controversial, and this Court had repeatedly granted certiorari to address it, only to find (for procedural reasons) that it could not resolve the constitutional question. *Id.* at 311. When the property owner in *First English* appealed, then, the California Court of Appeal held that *Agins* still controlled: It interpreted the complaint as "one seeking damages for the uncompensated taking of" the church's property, which meant it had to be dismissed "because the United States Supreme Court has not yet ruled on the question of whether a state may constitutionally limit the remedy for a taking to nonmonetary relief[.]" *Id.* at 309 (quotation marks omitted).

This Court then answered that question, holding that a damages remedy for takings is mandatory, whether authorized by state law or not. The Court's analysis began with the text of the Takings Clause, which "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *Id.* at 314. Put differently, the just-compensation requirement "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *Id.* at 315.

Beyond the Clause's plain text, this Court noted that it had already, for decades, recognized that suits for just compensation do not require "[s]tatutory recognition" because they are "founded upon the Constitution of the United States" itself. *Id.* at 315

(quoting *Jacobs* v. *United States*, 290 U.S. 13, 16 (1933)). In other words, "a landowner is entitled to bring an action in inverse condemnation as a result of 'the self-executing character of the constitutional provision with respect to compensation . . . .'" *Ibid.* (quoting *United States* v. *Clarke*, 445 U.S. 253, 257 (1980)).

First English resolves this case. Here, this Court is told that plaintiffs can sue for a taking only if they can "shoehorn" their claims into § 1983. BIO 16. But in *First English*, the property owners did not fit their claims into § 1983 at all: Not only was that statute not pleaded in the complaint, it had "never been mentioned in" the lower courts. Tr. of Oral Arg. in *First English*, O.T. 1986, No. 85-1199, p. 22:2–3 (Alderson Reporting January 14, 1987), available at https://www.supremecourt.gov/pdfs/transcripts/1986/85-1199_01-14-1987.pdf. The arguments in *First English* are the arguments here. There, this Court was told that "'the Constitution does not, of its own force, furnish a basis to award money damages against the government.'" 482 U.S. at 316 n.9 (quoting Brief for United States as Amicus Curiae 14). Here, it has heard the same, that "there is no cause of action directly under the United States Constitution to sue for a taking." BIO 15 (quotation marks omitted). There, this Court easily pronounced these arguments "refute[d]" by a century of American caselaw. 482 U.S. at 16 n.9; see also *id.* at 315–16 (collecting cases). It should do the same here.

2. The basic principle behind *First English* runs throughout this Court's Takings Clause jurisprudence. After all, this Court has "never tolerated" a rule under which "the government [can] appropriate

private property without just compensation so long as it avoids formal condemnation." *Cedar Point Nursery* v. *Hassid*, 141 S. Ct. 2063, 2076 (2021). Similarly, the Court has reaffirmed *First English* by name, noting that "[w]hen the government condemns property for public use, it provides the landowner a forum for seeking just compensation, *as is required by the Constitution*." *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 714 (1999) (emphasis added) (citing *First English*). And the Court has emphasized that "*First English* . . . reject[s] the view that the Constitution 'does not, of its own force, furnish a basis for a court to award money damages against the government[.]'" *Knick* v. *Twp. Of Scott*, 139 S. Ct. 2162, 2172 (2019). This understanding of *First English*'s holding is widespread and uncontroversial. See, *e.g.*, *Stop the Beach Renourishment, Inc.* v. *Fla. Dep't of Env't Prot.*, 560 U.S. 702, 740–41 (2010) (Kennedy & Sotomayor, JJ., concurring in part) ("[T]he Court subsequently held that the Takings Clause requires the availability of a suit for compensation against the States [in] *First English*[.]"); accord *Manning* v. *Mining & Mins. Div. of the Energy, Min. & Nat'l Res. Dep't*, 144 P.3d 87, 90–91 (N.M. 2006) (citing *First English* as holding that the "compensation remedy is required by the Constitution"); *SDDS, Inc.* v. *State*, 650 N.W.2d 1, 9 (S.D. 2002) (recognizing that *First English* means "the [compensation] remedy does not depend on statutory facilitation").

These cases also make clear that the compensation remedy is mandatory no matter which government entity takes property. In *Knick*, for example, this Court invoked *Jacobs* for the idea that "no matter what sort of procedures the government puts in place

to remedy a taking, a property owner has a Fifth Amendment entitlement to compensation as soon as the government takes his property without paying for it." 139 S. Ct. at 2170. And that entitlement arises every time property is taken by any government: "Although *Jacobs* concerned a taking by the Federal Government, the same reasoning applies to takings by the States." *Id.* at 2171.

Indeed, the consistently reaffirmed self-executing remedy provided by the Takings Clause undergirds the entire existing structure of federal takings law. Takings claims against the federal government proceed under the Tucker Act, but the Tucker Act is "only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages." *United States* v. *Testan*, 424 U.S. 392, 398 (1976). Put differently, the Tucker Act "provides a waiver of sovereign immunity and a grant of federal-court jurisdiction, but it does not create any right of action." *Me. Cmty. Health Options* v. *United States*, 140 S. Ct. 1308, 1332 (2020) (Alito, J., dissenting). The "right of action" that federal Takings claims invoke under the Tucker Act *is* the self-executing Fifth Amendment recognized by *First English* and other decisions. *United States* v. *Causby*, 328 U.S. 256, 267 (1946) ("If there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to hear and determine."). Petitioners here have everything a Tucker Act plaintiff has: (1) the absence of sovereign

immunity,[4] (2) a grant of federal-court jurisdiction under 28 U.S.C. § 1331, and (3) exactly as much of a cause of action as any takings plaintiff who invokes the Tucker Act.

And the rule is not unique to takings. *First English* does not announce a surprising interpretive principle that applies only to the Fifth Amendment. Rather, it reflects simple logic: A law "commanding the payment of a specified amount of money . . . impliedly authorizes (absent other indication) a claim for damages in the defaulted amount." *Bowen* v. *Massachusetts*, 487 U.S. 879, 923 (1988) (Scalia, J., dissenting). As this Court recently reaffirmed, the creation of a legal "right to receive money" will "typically display an intent to provide a damages remedy" to collect the obligated funds. *Me. Cmty. Health*, 140 S. Ct. at 1328 n.12 (2020). Anything else would render the underlying legal obligation "meaningless." *Ibid.*

Maine Community Health is instructive here. That case concerned an aspect of the Affordable Care Act that sought to mitigate insurance companies' risks in participating in the newly created federal healthcare exchanges. *Id.* at 1315–16. As part of the mitigation, Congress provided that profitable plans "shall pay" a certain amount to the government, while the government in turn "'shall pay'" an amount to plans that lost money. *Id.* at 1316 (quoting 42 U.S.C.

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[4] Petitioners do not concede that a State could ever invoke sovereign immunity in the face of a superior constitutional obligation to pay just compensation, but in all events Texas has waived its immunity here under *Lapides* v. *Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 624 (2002).

§ 18062). Those terms created an obligation by the government to pay money. *Id.* at 1320–21. And, since the statute was "fairly . . . interpreted as mandating compensation by the Federal Government[,]" that mandate was judicially enforceable through the Tucker Act. *Id.* at 1328.

It would be odd indeed if the compensation-mandating language of the Affordable Care Act created a judicially enforceable right when the compensation-mandating language of the Constitution itself did not. But of course (as the Court acknowledged), that is not the case. The Takings Clause does not *explicitly* say that property owners can file lawsuits, but the mandatory nature of the Clause gives property owners the right to enforce it. *Id.* at 1328 n.12.[5] In *Maine Community Health*, this Court treated that

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[5] The dissent in *Maine Community Health Options* relies on *Hooe* v. *United States*, 218 U.S. 322 (1910), as having "rejected the argument that a takings claim could be based 'exclusively on the Constitution[.]'" 140 S. Ct. at 1334 & n.3 (Alito, J., dissenting) (quoting *Hooe*, 218 U.S. at 335). But *Hooe* does not reject Takings claims based on the Constitution wholesale. It rejects the claim *in that case* because the government action at issue went beyond the scope of congressional authorization. *Hooe*, 218 U.S. at 334. So the Court held that "[t]he taking of private property by an officer of the United States for public use, without being authorized . . . to do so by some act of Congress, is not the act of the government." *Id.* at 336. And that much is true: "Authorized acts of the government may be takings . . . but unauthorized or mistaken ones are torts for which the officer alone is answerable (unless immune)." *In re Chi., Milwaukee St. Paul & Pac. R.R. Co.*, 799 F.2d 317, 326 (7th Cir. 1986) (Easterbrook, J.). *Hooe* establishes that the plaintiff in *Hooe* should lose, not that every plaintiff who invokes the Fifth Amendment's guarantee of just compensation should lose as well.

proposition as uncontroversial. The same conclusion follows here.

B. Text, history, and tradition all establish an enforceable right to just compensation.

There are good reasons *First English* came out the way it did. In determining the scope of a constitutional right, this Court looks to both "text" and "history." *E.g.*, *N.Y. State Rifle & Pistol Ass'n* v. *Bruen*, 142 S. Ct. 2111, 2130 (2022). The same holds true for determining the scope of rights protected under the Fourteenth Amendment, where the Court asks whether a right is both "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition." *Timbs* v. *Indiana*, 139 S. Ct. 682, 687–89 (2019). The right to receive just compensation—and to have that compensation awarded by a court if necessary—passes this test with points to spare.

1. Begin with the text. The Constitution mentions exactly two remedies: habeas corpus and just compensation. In determining what remedies are mandated by the Fourteenth Amendment, those are a good place to start. And, for purposes of this case, to end. Cf. Pet. Supp. App. 93a (Oldham, J., dissenting) (noting that the special treatment of these rights "suggests these two rights—even if not all others in the Constitution—have special protections against congressional abrogation or dereliction"). The Constitution specifically requires the just-compensation remedy, and that means the just-compensation remedy is specifically required.

And the just-compensation right is different in a second way too. As this Court has recognized, the text of the Takings Clause sets it apart from the rest of the Bill of Rights because it "does not prohibit the taking of private property [for public use], but instead places a condition on the exercise of that power." *First English*, 482 U.S. at 314. Unlike other, purely prohibitory parts of the Constitution, the Fifth Amendment tells us exactly what must happen when property is taken: Just compensation must be paid. If government *must* pay just compensation, it follows that courts of competent jurisdiction may *order* it to pay when it hasn't.

2. Although the Court could stop with the text, history leads to the same conclusion. See Pet. Supp. App. 80a–84a (Oldham, J., dissenting); cf. *O'Connor* v. *Eubanks*, 83 F.4th 1018, 1029 (6th Cir. 2023) (Thapar, J., concurring) (noting Judge Oldham's "thoughtful opinion . . . collecting over a century of Supreme Court cases suggesting plaintiffs have a cause of action directly under the Takings Clause[.]").

A. The right to prompt compensation dates at least to the signing of Magna Carta in 1215. See *Horne* v. *Dep't of Agric.*, 576 U.S. 350, 358 (2015) (citing Magna Carta, cl. 28 (1215), in William Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* 329 (2d ed. 1914)). But Magna Carta established neither the government's power to take property nor the government's obligation to pay for it. Instead, Magna Carta's rights-protecting innovation was the demand for *immediate* payment.

At the time of Magna Carta, there was no question the crown had the power of "purveyance"—that is, the right 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* *287. "Purveyance," in other words, was an early species of what is now called eminent domain: Property was taken, without the owner's consent, at an appraised value. *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*.").

Purveyance was particularly important to the functioning of government because English kings found themselves "compelled by their administrative duties and induced by the pleasures of the chase to move constantly from district to district." McKechnie, *supra*, at 329. When the court came to town, it had the right to acquire provisions at market rates to ensure "that the work of government should not be brought to a standstill for want of supplies." *Id* at 330.

The controversy arose not over *whether* payment was due but *when*. "In theory . . . the provisions seized were to be paid for at the market rate[,] but practice tended to differ lamentably from theory." *Ibid.* And delayed payments were a major cause of these lamentations: "Payment was often indefinitely delayed or made not in coin but in exchequer tallies." *Ibid.* Exchequer tallies were a kind of proto-IOU: long sticks used to record debts owed from the crown to particular subjects. After carving a series of marks

into the stick, the king's servants would split it lengthwise, giving half to the creditor and keeping the other to store with the treasury against eventual redemption. It was a simple, difficult-to-forge system for authenticating government debts. See Christine Desan, *Making Money: Coin, Currency, and the Coming of Capitalism* 173–85 (2014).

It was also unworkable for King John's barons. Because an exchequer tally could be authenticated only with the other half, the sticks were mostly useful to offset the holder's future tax debt: To the extent they could be sold for cash, they sold at a steep discount from their face value. *Id.* at 185.

Magna Carta sought to fix this problem. 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." McKechnie, *supra*, at 386 (emphasis added). The heart of Clause 28, then, was not to ensure that property was not seized without payment—that had been settled long before. The heart of Clause 28 was to ensure that seizures of property were paid for promptly.

This principle traveled with the colonists to the New World, where courts held that the legislature could take only the property that it paid for. See *Bowman* v. *Middleton*, 1 S.C.L. (1 Bay) 252, 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"); *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, whether or not their constitutions contain a just-compensation clause).

Judges, including the young nation's most influential jurists, routinely grounded this principle in universal natural law. In 1816, for example, New York's Chancellor James Kent held that a court sitting in equity could enjoin enforcement of a statute that allowed for the diversion of a stream without compensation. *Gardner* v. *Vill. Of Newburgh*, 2 Johns. Ch. 162, 166 (N.Y. Ch. 1816). Chancellor Kent did not question the legislature's power to divert the stream, but held that "to render the exercise of [that] power valid, a fair compensation must, in all cases, be previously made to the individuals affected, under some equitable assessment to be provided by law." *Ibid.* This requirement, explained Chancellor Kent, "is adopted by all temperate and civilized governments from a deep and universal sense of its justice" and flowed from authorities, ranging from Grotius and Pufendorf to the Fifth Amendment itself, which was "absolutely decisive of the sense of the people of this country." *Id.* at 166, 167.[6]

And Chancellor Kent was not alone. Other early courts also held both that laws seizing property without compensation were void and that the officials

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[6] Chancellor Kent's opinion does not cite the New York bill of rights because there was none: New York was, at the time, one of four states that had not adopted some sort of express declaration of rights. J.A.C. Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 Wis. L. Rev. 67, 69–71 (1931).

doing the seizing owed damages. See, *e.g.*, *Hooper* v. *Burgess* (Md. Provincial Ct. 1670), *reprinted in* 57 *Archives of Maryland, Proceedings of the Provincial Court 1666–1670*,[7] at 571, 574 (J. Hall Pleasants ed., 1940) (holding that an uncompensated seizure of cattle was "Contrary to the Act of [Parliament] of Magna Charta" and awarding the plaintiff compensation of "Forty Five Thousand Nyne Hundred & Fifty poundes of Tobaccoe"). For at least some 800 years, then, the basic common-law principles undergirding American law have recognized that a taking must be paired with just compensation.

b. But even these common-law principles were insufficient for the Framers, who recognized that the government all too often shirked its legal obligation to pay for what it took. In the words of St. George Tucker, the earliest commentator on the Fifth Amendment, the Just Compensation Clause "was probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army . . . as was too frequently practiced during the revolutionary war, without any compensation whatever." 1 *Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* 305–06 (St. George Tucker ed., 1803).

Or take the word of the Fifth Amendment's drafter, James Madison. As Madison himself noted in

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[7] The relevant Proceedings of the Provincial Court of Maryland have been digitized and are available at https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000057/html/am57--574.html.

his essay *Property*, the constitutional protection against uncompensated takings was essential to the constitutional order:

> Government is instituted to protect property of every sort. . . . If there be a government then which prides itself in maintaining the inviolability of property; which provides that none shall be taken *directly* even for public use without indemnification to the owner, and yet *directly* violates the property which individuals have in their opinions, their religion, their persons, and their faculties; nay more, which *indirectly* violates their property, in their actual possessions, in the labor that acquires their daily subsistence, and in the hallowed remnant of time which ought to relieve their fatigues . . . such a government is not a pattern for the United States.

James Madison, *Property*, Nat'l Gazette (Mar. 27, 1792), *reprinted in* 14 *The Papers of James Madison* 266, 266–268 (Robert A. Rutland and Thomas A. Mason, eds., 1983). *available at* https://founders.archives.gov/documents/Madison/01-14-02-0238. In other words, the Constitution's plan of ordered liberty centered on respect for property rights and specifically on the right to just compensation when that property is taken. This was not a wise policy to be implemented by the legislature; it was a command that had been ratified by the People.

Madison's essays also made clear that the promises of the Constitution would be enforced by the

federal judiciary. Critics of the Bill of Rights observed that rights protections in state constitutions had not prevented governments from sometimes violating those rights. True enough, Madison acknowledged, but that was why the federal Constitution created federal courts:

> If [these rights] are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.

James Madison, *Amendments to the Constitution* (June 8, 1789), 12 *The Papers of James Madison*, *supra*, at 196–210, *available at* https://founders.archives.gov/documents/Madison/01-12-02-0126. In short, Madison viewed the right to compensation as foundational to the constitutional order, and he viewed the federal judiciary as essential to the protection of that right.

These views were given life in the Fifth Amendment, which identifies an affirmative right to just compensation. This is reflected not only by Madison's public writing, but also by the constitutional models available to him at the Framing. Madison would have been familiar with "the Vermont Constitution of 1777, the Massachusetts Constitution of 1780 and the Northwest Ordinance of 1787, each of which provided

for an affirmative right to compensation once property was taken." Douglas W. Kmiec, *The Original Understanding of the Taking Clause Is Neither Weak nor Obtuse*, 88 Colum. L. Rev. 1630, 1661 & n.161 (1988) (explaining why this Court so easily rejected the United States' position in *First English*). In other words, the Fifth Amendment was not unique—it was part of a widespread shift away from the idea of just compensation as a legislative obligation and towards the idea of just compensation as a judicially enforceable right. Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 Vand. L. Rev. 57, 107 n.220 (1999) ("[T]he proliferation of just compensation clauses may have been due to a [] general loss of faith in legislatures.").

This self-executing right was made applicable against the States through the Fourteenth Amendment.[8] Indeed, John Bingham, who drafted the relevant section of that Amendment, explained the importance of adding substantive rights protections by citing this Court's decision in *Barron ex rel. Tiernan* v. *Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), which had held the Takings Clause did not bind the

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[8] This Court has generally held that the Bill of Rights is applicable to the States via the Fourteenth Amendment's Due Process Clause. See *Timbs* v. *Indiana*, 139 S. Ct. 682, 687 (2019). As Members of this Court have observed, the correct vehicle for protecting substantive rights is likely the Amendment's Privileges or Immunities Clause. See *id.* at 691 (Gorsuch, J., concurring); *ibid.* (Thomas, J., concurring). As in *Timbs*, "nothing in this case turns on that question," and Petitioners are entitled to prevail under either constitutional provision. *Ibid.* (Gorsuch, J., concurring).

States. Cong. Globe, 39th Cong., 1st Session 1089–90 (1866); see also *id.* at 1090 ("By the decisions read, the people are without remedy. . . . [T]he State Legislatures may by the direct violations of their duty and oaths avoid the requirements of the Constitution."). In other words, one of the avowed purposes of the Fourteenth Amendment, as identified by its primary architect, was to ensure that States could not take property for public use without just compensation.

c. The history of takings litigation in American courts further confirms that the just-compensation right is enforceable.

Begin with federal court. There are, of course, few early federal cases about the Takings Clause. This is in part because the Takings Clause did not apply to the states[9] and in part because the federal government for nearly a century relied on the states' eminent-domain powers to take the land it needed.[10] But mostly there are few early federal cases about the Takings Clause because there was no general federal-question jurisdiction until 1875 and no Tucker Act jurisdiction until 1887. Instead, early takings claims against the federal government were resolved directly by Congress. To be clear, this did not mean the compensation was discretionary: "While Congress was the forum for takings claims, it did not have discretion to deny takings claims mandated by the Takings Clause." William Michael Treanor, *The Original Understanding of the Takings Clause and the Political*

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[9] See *Barron*, 32 U.S. (7 Pet.) at 243.

[10] See William Baude, *Rethinking the Federal Eminent Domain Power*, 122 Yale L.J. 1738, 1762 (2013).

Process, 95 Colum. L. Rev. 782, 794–95 n.69 (1995); see also *ibid.* (acknowledging that the early preference for legislative rather than judicial resolution of takings claims may not reflect the original understanding of the Fifth Amendment).

Even with the jurisdictional limits, this Court confirmed that compensation was *mandatory*, not discretionary. In *Mitchell* v. *Harmony*, for example, the Court noted that the military could confiscate private property in times of great need but that "[u]nquestionably, in such cases, the government is bound to make full compensation to the owner." 54 U.S. (13 How.) 115, 134 (1851). And the Court criticized the limited jurisdiction of the Court of Claims, "regret[ting] that Congress ha[d] made no provision by any general law for ascertaining and paying this [required] just compensation." *Langford* v. *United States*, 101 U.S. 341, 343–45 (1879) (discussing Court of Claims' lack of jurisdiction over takings). It even stretched the point sometimes, converting claims about takings (over which the Court of Claims had no jurisdiction) into claims about contracts (over which it did). Take *United States* v. *Russell*, in which this Court held that a claim by plaintiffs whose steamboats had been commandeered during the Civil War actually sounded in contract because the constitutional just-compensation requirement meant that taking the boats came with an implicit promise to pay for them. 80 U.S. 623, 630 (1871).[11]

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[11] Again, the Tucker Act remedied the *jurisdictional* barrier to Takings Clause claims, but it did not provide a right of action.

Once this Court recognized that the Takings Clause had been incorporated against the states, federal courts had jurisdiction over more takings claims. See *Chi., Burlington & Quincy R.R. Co.* v. *City of Chicago*, 166 U.S. 226, 238–41 (1897). And they used it. Strikingly, this Court's post-incorporation Takings cases did *not* invoke the Civil Rights Act of 1871. Instead, they appear to have been predicated directly upon the Constitution. See *Vill. of Norwood* v. *Baker*, 172 U.S. 269, 277 (1898) ("The plaintiff's suit proceeded upon the ground, distinctly stated, that the assessment in question was in violation of the fourteenth amendment . . . . It has been adjudged that the due process of law prescribed by that amendment requires compensation to be made or secured to the owner when private property is taken by a state, or under its authority, for public use."); accord *Dohany* v. *Rogers*, 281 U.S. 362 (1930); *Vill. of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926); *Del., Lackawanna & W. R.R. Co.* v. *Town of Morristown*, 276 U.S. 182 (1928); *Cuyahoga River Power Co.* v. *City of Akron*, 240 U.S. 462 (1916); see also Ann Woolhandler & Julia D. Mahoney, *Federal Courts and Takings Litigation*, 97 Notre Dame L. Rev. 679, 681 (2022) (noting that the Civil Rights Act of 1871 "played little role in takings cases, which were generally pursued as claims under diversity jurisdiction or under the federal question statute").

Not only did litigants not invoke the Civil Rights Act, this Court repeatedly reminded them that

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That right of action, the same right advanced here, already existed. See pp. 15–16, *supra*.

they didn't need to. Their right to compensation flowed from the Constitution, not legislative grace. The cases are admirably clear: "Just compensation is provided for by the Constitution and the right to it cannot be taken away by statute." *Seaboard Air Line Ry. Co.* v. *United States*, 261 U.S. 299, 304 (1923). "[T]he right to recover just compensation for property taken by the United States for public use . . . rest[s] upon the Fifth Amendment." *Jacobs* v. *United States*, 290 U.S. 13, 16 (1933). The constitutional guarantee of a remedy meant "[s]tatutory recognition was not necessary." *Ibid.*

The history of Takings litigation under state law tells a similar story. As this Court has noted, at the founding, property owners whose land was invaded by government officials could obtain an injunction against an ongoing invasion but generally sued in trespass for backward-looking damages rather than suing directly for just compensation. *Knick*, 139 S. Ct. at 2176. But state courts made clear that compensation was a duty. *People ex rel. Utley* v. *Hayden*, 6 Hill 359, 360 (N.Y. Sup. Ct. 1844) (holding that mandamus is the appropriate remedy when appraisers refuse to undertake duty to assess damages for taking); *Backus* v. *Lebanon*, 11 N.H. 19, 27 (1840) (remitting the case "to the common pleas" with directions to accept the report of the committee assessing damages); *Thayer* v. *Boston*, 36 Mass. (19 Pick.) 511, 515–16 (1837) (allowing action directly against city for damages caused by highway project). Contemporary commentators agreed that the "provision for compensation . . . in American constitutional jurisprudence[] is founded in natural equity, and is laid down by jurists as an acknowledged principle of universal

law." 2 James Kent, *Commentaries on American Law* 339 (2d ed. 1832); accord 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1784 (1833) ("[H]ow vain it would be to speak of [the administration of justice] when all property is subject to the will or caprice of the legislature, and the rulers.")

To be sure, sometimes colonial courts found that nothing had been taken because the original land grant had reserved some property to the Crown. *McClenachan* v. *Curwen*, 3 Yeates 362, 373 (Pa. 1802) (denying compensation for land taken for roadbuilding because "compensation [had] been originally made in each purchaser's particular grant" for the building of public roads). But courts uniformly made clear that compensation for takings was mandatory—and that, even if a particular court was not the correct forum for an initial claim for compensation, it would stand ready to hear a claim should compensation truly be denied. See *Gedney* v. *Inhabitants of Tewsbury*, 3 Mass. 307, 310 (1807) ("The regular course for the plaintiff in this case is to move the Court of Sessions for an order of payment, upon which he may take out his warrant of distress. Should they deny the motion, he may apply here for another remedy, which will not probably be refused.").

In the early part of the nineteenth century, then, property owners could vindicate their absolute right to compensation through two paths. A suit in equity could enjoin the uncompensated taking, while a suit at law invoking one of the common-law forms of action (usually trespass) provided for damages. Cf. *Knick*, 139 S. Ct. at 2176. But, then, in the middle of that century, states abolished the forms of action. Cf.

Douglas Laycock, *How Remedies Became a Field: A History*, 27 Rev. Litig. 161, 171 (2008) (noting that the abolition of the forms began in 1848). As a result, courts rapidly embraced suits that look just like modern inverse-condemnation cases. This Court's state-law cases from that era confirm as much. Most famously, in *Pumpelly* v. *Green Bay Co.*, this Court explained the "settled principle of universal law that the right to compensation is an incident to the exercise of [the] power" to take private property. 80 U.S. 166, 178 (1871). And *Pumpelly* was not an outlier. See *Pac. R.R. Removal Cases*, 115 U.S. 1, 5–6 (1885); *Miss. & Rum River Boom Co.* v. *Patterson*, 98 U.S. 403 (1878); *N. Transp. Co.* v. *City of Chicago*, 99 U.S. 635 (1878); *Hollingsworth* v. *Parish of Tensas*, 17 F. 109 (C.C.W.D. La. 1883).

State courts show the same pattern, recognizing that the entity itself was the appropriate defendant in cases demanding just compensation. The New Hampshire Supreme Court, for example, held that a property owner whose land was flooded by a railroad project could recover damages even though no statute provided him with a just-compensation remedy. *Eaton* v. *Bos. Concord & Montreal R.R.*, 51 N.H. 504, 517 (1872). The *Eaton* court also expressly rejected the idea that any suit for damages had to be framed as a trespass. Just-compensation claims did not need to fit into "the old forms of action" that had been abolished "in a large proportion of the States." *Id.* at 520–21. See also, *e.g.*, *Reardon* v. *City & County of San Francisco*, 6 P. 317, 325 (Cal. 1885); *Harman* v. *City of Omaha*, 23 N.W. 503, 503 (Neb. 1885); *City of Elgin* v. *Eaton*, 83 Ill. 535, 536–37 (1876) ("[F]ailing to provide compensation for the damages, the city became

liable to an action," as "the right to recover damages was given by the constitution[.]" (citing *Clayburg* v. *City of Chicago*, 25 Ill. 535 (1861))). In short, by the mid-nineteenth century, courts nationwide had converged on the remedy for government takings: suits directly against public entities, based directly on constitutional just-compensation guarantees. They did this routinely, without any suggestion "that their holding was novel." Brauneis, *supra*, at 110.

The history is clear. Since at least Magna Carta, property owners have been entitled to prompt cash payments when their property is taken for public use. That entitlement was originally entrusted to the legislature, which had to pay when land was taken. But the responsibility for enforcing the right to compensation shifted over time to the judiciary—and this shift was exemplified by the Fifth Amendment itself. By the time the Fourteenth Amendment was ratified, the shift was complete: Jurisdictions nationwide recognized direct lawsuits for just compensation against governments that took their property. Suits like this one.

This Court's just-compensation cases square with this history now—and they have squared with it for generations. One hundred years ago, this Court said the compensation right "is provided for by the Constitution and . . . cannot be taken away by statute." *Seaboard Air Line*, 261 U.S. at 304. Four years ago, it said that "in the event of a taking, the compensation remedy is required by the Constitution." *Knick*, 139 S. Ct. at 2172. And in between the two, it held that "a landowner is entitled to bring an action in inverse condemnation as a result of 'the self-executing

character of the constitutional provision with respect to compensation . . . .'" *First English*, 482 U.S. at 315. It should say the same thing here.

C. Federal courts can enforce the federal constitution.

Ultimately, Texas, like the concurring opinions below, makes this case unnecessarily complicated. Texas's brief in opposition to certiorari, just like the concurrences, asks whether this Court should *create* a cause of action to enforce the Takings Clause. But this is the wrong question. Instead, this case asks the simple question of whether federal courts can enforce the federal Constitution. And of course they can.

To be sure, federal courts need jurisdiction to hear constitutional claims—but, here, they have it. The complaint asserts that the defendants are required to pay just compensation under the Fifth Amendment, as applied through the Fourteenth Amendment. JA-36. That is a claim arising under federal law, and, notwithstanding Judge Higginbotham's suggestion below that § 1983 is needed to confer "jurisdiction," 28 U.S.C. § 1331 gives the federal courts jurisdiction. Contra Pet. Supp. App. 44a–45a (Higginbotham, J., concurring).

And once a court has jurisdiction, it may issue orders enforcing the obligations of the Constitution. Doing this does not require the court to invoke a power to "freely create[] implied private causes of action for damages[.]" *Hernandez* v. *Mesa*, 140 S. Ct. 735, 750 (2020) (Thomas, J., concurring); cf. Pet. Supp. App. 54a n.1 (Higginson, J., concurring) (arguing that allowing a cause of action for just compensation requires an act of "judicial genesis"). Instead,

Petitioners' argument is that, for all the reasons explained above, the Fifth Amendment (as applied through the Fourteenth) creates a judicially enforceable obligation to pay just compensation. If that is true, the question is not whether the Court should *infer* a cause of action. The question is whether the scope of the constitutional right *includes* a judicially cognizable right to compensation.

On questions like that—questions about the meaning of the Constitution—this Court has never deferred to the legislature. Neither has it refused to enforce the Constitution without legislative permission. Just the opposite. In *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, for example, the government objected that "'petitioners [had] not pointed to any case in which this Court has recognized an implied private right of action directly under the Constitution to challenge governmental action under the Appointments Clause or separation-of-powers principles.'" 561 U.S. 477, 491 n.2 (2010). The Court rejected this argument as all but absurd. Of course there was such a "right to relief as a general matter." *Ibid.* And of course this Court has long "sustain[ed] the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution." *Ibid.* (quoting *Bell* v. *Hood*, 327 U.S. 678, 684 (1946)).

This insistence that courts have the power to enforce the law is foundational to American law. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection."

Marbury v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). And that duty is not just of government, but specifically a duty of the courts. Indeed, "[i]n Great Britain, the king himself [was] sued in the respectful form of a petition, and he never fail[ed] to comply with the judgment of his court." *Ibid.*[12] Consistent with this principle, this Court has repeatedly held that federal courts may enforce constitutional commands, from *Ex parte Young*, 209 U.S. 123, 149 (1908), through *Bell* v. *Hood* and *Free Enterprise Fund*. These cases all recognize the Courts "duty 'as the bulwar[k] of a limited constitution against legislation encroachments.'" *Nw. Austin Mun. Util. Dist. No. 1* v. *Holder*, 557 U.S. 193, 206 (2009) (quoting The Federalist No. 78, at 526 (Alexander Hamilton) (J. Cooke ed., 1961)). This duty is part of the constitutional design, not only of the original Constitution but also of the Fourteenth Amendment. After all, a major purpose of that Amendment was "to see the Federal judiciary clothed with the power to take cognizance of the question" of state violations of individual rights. Cong. Globe, 39th Cong., 1st Sess. 158 (1866) (remarks of Rep. Bingham); see also William Baude et al., *General Law and the Fourteenth Amendment*, 76 Stan. L. Rev.

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[12] As some scholars have argued, there is historical evidence for the proposition that the First Amendment's Petition Clause protects a substantive right to this sort of judicial resolution of constitutional disputes. See James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 Nw. U. L. Rev. 899, 906–73 (1997); *cf. Borough of Duryea* v. *Guarnieri*, 564 U.S. 379, 404 (2011) (Scalia, J., concurring in the judgment in part and dissenting in part) (acknowledging Pfander's "detailed historical argument" but leaving its "resolution to another day").

(forthcoming 2024) (manuscript at 30)[13] (noting that the first draft of Section One of the Fourteenth Amendment was revised to ensure constitutional rights would be judicially cognizable even if the Civil Rights Act of 1866 were repealed).

Put differently, the *Constitution itself is self-executing* and, where the commands of the Constitution are clear, this Court, not just the legislature, is required to enforce them. If the duty to pay is constitutionally required, it can be enforced by a court of competent jurisdiction. If not, not. Some rights, as a matter of text, history, and tradition, may not include a damages remedy. At least one—just compensation—does. The question, then, is not whether Congress has chosen to provide a cause of action by which the Constitution may be enforced. The question is whether the Constitution, properly understood, imposes the duty in the first place. If the Constitution does not impose the duty, other questions may follow—like whether Congress has provided a remedy or whether this Court should "create[] implied private causes of action for damages[.]" *Hernandez* v. *Mesa*, 140 S. Ct. 735, 750 (2020) (Thomas, J., concurring). But those later questions do not arise here. Here, text and history (to say nothing of *First English*) give the answer: Just compensation is mandatory, so claims for just compensation are cognizable directly under the Constitution.

Indeed, a contrary rule would lead to preposterous results. Both the federal government (under cases like *Free Enterprise Fund*) and the states (via

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[13] Available at https://tinyurl.com/298dee78.

Ex parte Young) can be hauled into federal court and enjoined from taking property in violation of the Fifth Amendment. If courts cannot enforce the duty to provide just compensation, their only option would be equitable remedies for the uncompensated taking. If Texas is right, then, Petitioners should instead demand injunctive relief to cut culverts into the highway. Rather than simply award compensation, courts should apparently appoint special masters to oversee massive construction (or de-construction) projects.

But of course they shouldn't. The Constitution already tells us how to remedy takings for public use: with just compensation. Since the Constitution prescribes the remedy, the most straightforward course is for courts to enforce that remedy—not perversely limit themselves to injunctions. This is not "inferring" a cause of action. It is enforcing the Constitution.

D. There is no reason to abandon the rule in *First English*.

As explained above, *First English* answered the question presented. Texas can point to no reason to abandon either *First English* or any of the cases reaffirming its holding. In deciding whether to adhere to precedent, this Court's *stare decisis* cases provide several factors to consider, including "the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, . . . and reliance on the decision." *Knick* v. *Twp. of Scott*, 139 S. Ct. 2162, 2178 (2019). Each factor counsels in favor of retaining the *First English* rule.

1. Begin with the decision's reasoning. As demonstrated above, *First English* reflects a century of this Court's precedent. *First English* simply applies

a rule this Court had consistently articulated since at least *Jacobs* v. *United States*, 290 U.S. 13, 16 (1933). See pp. 13–14, *supra*. And that rule *has to be right*. Otherwise, a constitutional command becomes a constitutional request. Surely the Framers' specific instructions carry more weight than that.

2. Moreover, the *First English* rule is perfectly workable, as demonstrated by its consistent application in the lower courts. State courts have had no trouble recognizing that the Fifth Amendment obligates them to hear just-compensation claims.[14] Federal courts recognize the same thing.[15] Indeed, only two appellate courts seem to have gotten the question wrong: The Fifth Circuit in the decision below, and

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[14] See, *e.g.*, *First Union Nat'l Bank* v. *Hi Ho Mall Shopping Ventures, Inc.*, 869 A.2d 1193, 1197–98 & n.3 (Conn. 2005); *Greenway Dev. Co.* v. *Borough of Paramus*, 750 A.2d 764, 770 (N.J. 2000); *Manning* v. *Mining & Mins. Div. of the Energy, Min. & Nat'l Res. Dep't*, 144 P.3d 87, 91–92 (N.M. 2006); *SDDS, Inc.* v. *State*, 650 N.W.2d 1, 9 (S.D. 2002); *City of Baytown* v. *Schrock*, 645 S.W.3d 174, 176 (Tex. 2022); *Boise Cascade Corp.* v. *State ex rel. Or. State Bd. of Forestry*, 991 P.2d 563, 568 (Or. Ct. App. 1999).

[15] See, *e.g.*, *Mann* v. *Haigh*, 120 F.3d 34, 37 (4th Cir. 1997) (identifying just-compensation claims as a "situation in which the Constitution itself authorizes suit against the federal government"); *Baker* v. *City of McKinney*, 601 F. Supp. 3d 124, 145 (E.D. Tex. 2022) ("Accordingly, the Court holds that, because the Fifth Amendment is self-executing, [a] claim under the Fifth Amendment Takings Clause is not dependent upon the § 1983 vessel."), *rev'd on other grounds*, 84 F.4th 378 (5th Cir. 2023); *Speed* v. *Mills*, 919 F. Supp. 2d 122, 128 (D.D.C. 2013) ("[T]he Supreme Court has held that takings claims can be stated directly under the Fifth Amendment, without recourse to a statutory remedy[.]").

the Ninth Circuit in *Azul-Pacifico, Inc.* v. *City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992). But these decisions do not prove the rule in *First English* is unworkable or even controversial. Each simply ignored the issue: Neither case so much as cites *First English*. That is not evidence that courts are *confused* by the rule in *First English*. It is, at best, evidence that they have sometimes declined to acknowledge it.

And other courts have not found this circuit split confusing—quite the contrary. To the extent lower courts acknowledged *Azul-Pacifico* before it was cited below, it was simply to note that the Ninth Circuit had gotten it wrong. See *Lawyer* v. *Hilton Head Pub. Serv. Dist. No. 1*, 220 F.3d 298, 302 n.4 (4th Cir. 2000) (noting that *Azul-Pacifico* was "in apparent conflict with *First English*"). If the rule in *First English* presented some practical difficulties for the lower courts, one would expect them to have emerged by now.

3. And *First English* fits with this Court's other Takings Clause cases. Indeed, the Court reaffirmed this just a few years ago in overruling *Williamson County Regional Planning Commission* v. *Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). One reason to abandon the rule in *Williamson County*, this Court held, was that it "conflicted with much of [the Court's] takings jurisprudence," pointing specifically to *Jacobs* and *First English*. *Knick*, 139 S. Ct. at 2178. If inconsistency with *First English* is a reason to overrule *other* precedents, then that is necessarily a reason to retain *First English* itself.

4. Most importantly, overturning *First English* would harm the reliance interests of property owners

nationwide who purchased land with the understanding that it could not simply be seized by an unaccountable state agency. "Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved[.]" *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991).

Indeed, adopting a contrary rule here would be wildly destabilizing—not just for takings by the States but for takings by the United States. As discussed above, the self-executing Takings Clause is at the heart of every single takings claim filed under the Tucker Act. See pp.15–16, *supra*. To the extent Petitioners lack a "cause of action" to enforce their right to compensation, so too do federal plaintiffs. Abandoning *First English*'s interpretation of the Takings Clause would cast doubt on the continuing viability of federal takings claims entirely. To accept Texas's arguments is to accept that state and federal governments alike may seize property with impunity, leaving property owners to beg the legislature for recompense. Even if that regime were a wise one, it is not the regime on which every American landowner has come to rightfully rely.

Undermining these reliance interests and giving the government a freer hand to take property without paying for it would harm all Americans' rights. But the harm would not fall uniformly. Instead, it would fall disproportionately on poorer, less politically powerful property owners. Governmental and academic studies alike emphasize that takings disproportionately affect disadvantaged groups. U.S. Comm'n on Civil Rights, *The Civil Rights*

Implications of Eminent Domain Abuse (2014); Dick M. Carpenter & John K. Ross, *Testing O'Connor And Thomas: Does The Use Of Eminent Domain Target Poor And Minority Communities?*, 46 Urban Stud. 2447 (2009); see also Brief of NAACP et al. as Amici Curiae, *Kelo* v. *City of New London*, 545 U.S. 469 (U.S. 2005), available at 2004 WL 2811057. Uncompensated takings will not land at the door of those with the power and influence to protect themselves through the political process. They will land on the backs of "the powerless groups and individuals that the [Takings] Clause protects." *Kelo* v. *City of New London*, 545 U.S. 469, 521–22 (2005) (Thomas, J., dissenting). They will land, in other words, on the very people whose only recourse, historically, has been to the courts of the United States.

Indeed, as Judge Oldham noted in dissent below, abandoning the mandatory-compensation rule effectively renders the Takings Clause a "dead letter." Pet. Supp. App. 78a. The ruling below left property owners in the Fifth Circuit with two choices: They could challenge the uncompensated taking of their property solely under state law, abandoning their federal claims. Or they could file federal claims, subjecting their suits to removal—where the absence of an express federal cause of action would doom those claims. See *ibid.*

A similar ruling from this Court would have even more devastating consequences. The concurring opinions below each suggested that Takings Clause claims should be heard in Texas state courts—which, they hasten to add, are happy to hear them. Pet. Supp. App. 44a–45a & n.2 (citing *City of Baytown* v.

Schrock, 645 S.W.3d 174, 178 (Tex. 2022)). But state courts do not entertain federal takings claims out of the goodness of their hearts. They entertain them because this Court has told them they must. *E.g.*, *Manning* v. *Mining & Mins. Div. of the Energy, Min. & Nat'l Res. Dep't*, 144 P.3d 87, 91–92 (N.M. 2006). If this Court says the opposite—that Takings claims are instead impossible without a legislative vehicle—lower courts would again follow its directive.

And that would mean the States could violate the Constitution's just-compensation requirement with impunity. Yes, property owners might still have the federally protected right to seek an injunction against an uncompensated taking. Cf. *Ex parte Young*, 209 U.S. 123 (1908). But, as Justice Brennan observed in his dissent in *San Diego Gas & Electric Co.* v. *City of San Diego*, enjoining an uncompensated taking merely turns the government action up to the moment of the injunction into an equally unconstitutional uncompensated *temporary* taking. 450 U.S. 621, 654–55 (1981) (Brennan, J., dissenting).[16]

With no enforceable federal just-compensation right, that taking would be remedied only to the extent state courts wanted to provide a remedy. Sometimes state courts might enforce the full scope of property owners' federal rights under their state constitutions. Other times not. Cf. Pet. Supp. App. 78a–79a

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[16] *San Diego Gas & Electric* was one of several cases in which this Court found it was unable to decide the constitutionality of California's no-compensation rule for procedural reasons. *Id.* at 623 (finding no jurisdiction). Justice Brennan's dissent, of course, ultimately carried the day when this Court reached the merits in *First English*. 482 U.S. at 315.

(noting that Louisiana law does not provide an enforceable state-law takings remedy). With no federal claim brought against the State, this Court would have no jurisdictional basis to review those decisions. The inevitable result, to borrow Judge Oldham's phrase, would be "as if the People never bothered to ratify the federal Takings Clause in the first place." *Id.* at 78a.

But the People *did* ratify the Takings Clause. And this Court, up to now, has insisted on enforcing the rights that Clause secures. Indeed, it has squarely rejected the idea that state courts should be primarily entrusted with safeguarding federally guaranteed rights under the Fifth Amendment. Cf. *Knick*, 139 S. Ct. at 2169–70; see also *Lambert* v. *City & County of San Francisco*, 529 U.S. 1045, 120 S. Ct. 1549, 1551–52 (2000) (Scalia, J., dissenting from denial of certiorari) (noting California appellate decision that "call[s] into question the state court's willingness to hold state administrators to the Fifth Amendment standards set forth by this tribunal" which "may be more than a local and isolated phenomenon"). It should not change course now. The judgment below should be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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