SUPREME COURT OF LOUISIANA

DOCKET NO. 2024-C-00055

WATSON MEMORIAL SPIRITUAL TEMPLE OF CHRIST, ET AL.
Plaintiffs-Respondents

v.

GHASSAN KORBAN, ET AL.
Defendants-Applicants

CIVIL PROCEEDING

On Writ of Certiorari from the Fourth Circuit Court of Appeal,
Docket No. 2023-CA-0293
The Honorable Daniel L. Dysart, Joy Cossich Lobrano, and
Karen K. Herman, presiding, and

On Appeal from the Civil District Court, Orleans Parish, No. 2022-10955,
Division "F-14, Honorable Jennifer M. Medley, presiding

BRIEF OF INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-RESPONDENTS, WATSON MEMORIAL SPIRITUAL TEMPLE OF CHRIST, ET AL.

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INTEREST OF *AMICUS* INSTITUTE FOR JUSTICE

The Institute for Justice ("IJ") is a nonprofit, public interest law firm dedicated to the essential foundations of a free society. As the nation's leading law firm for liberty, IJ provides *pro bono* representation on behalf of clients nationwide whose core liberties have been infringed by the government. IJ litigates regularly in the area of property rights, and in particular has significant institutional knowledge on fighting eminent domain abuse. IJ represented the homeowners in the highly controversial *Kelo v. City of New London*, 545 U.S. 469 (2005), in which the U.S. Supreme Court upheld the use of eminent domain solely for private economic development. IJ also represented the homeowners in the landmark *City of Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006), in which the Ohio Supreme Court rejected *Kelo*, holding that eminent domain for private economic development violates the Ohio Constitution's Public Use clause.

IJ also works to ensure that government entities cannot escape their obligations to pay just compensation when they take property. Most recently, IJ represented a Texas rancher after the state flooded his property. For years, Texas tried to duck the rancher's claims under the Takings Clause, and was successful, until a unanimous U.S. Supreme Court, in *DeVillier v. Texas*, 601 U.S. __ (2024), held that the rancher could pursue his claims against Texas under the Takings Clause. Thus, not only is the general use of eminent domain an issue of keen interest to IJ, but also the specific issue here—whether government entities in Louisiana can avoid paying just compensation after they take property.

No party or counsel for a party contributed money intended to fund the preparation and submission of this brief. No person or party other than amicus contributed money that was intended to fund preparing or submitting this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is about takings and just compensation. The Sewer and Water Board of New Orleans owes the landowners "just compensation" after they won inverse condemnation claims. This appeal asks whether the payment of that just compensation is "discretionary" or "ministerial." But under the Fifth Amendment of the U.S. Constitution, the payment of just compensation cannot be discretionary. As a result, the landowners can use mandamus to force SWB to pay the mandatory "just compensation" that the Constitution requires.

To avoid that straightforward result, SWB and Louisiana both frame this case as involving run-of-the-mill money judgments. That's wrong. The landowners won inverse condemnation claims against SWB. "Inverse condemnation claims derive from the Takings Clause contained in both the Fifth Amendment of the U.S. Constitution and Art. I, § 4 of the Louisiana Constitution." *Crooks v. Dep't of Nat. Res.*, 2019-0160. p. 10 (La. 1/29/20); 340 So. 3d 574, 581.

That constitutional mooring is dispositive. The Fifth Amendment is special because the text itself spells out what remedy the government must provide: "[N]or shall private property be taken for public use, without just compensation." Louisiana's constitution says the same thing: "Property shall not be taken or damaged by the state . . . except for public purposes and with just compensation

paid to the owner." Art. I, § 4(B)(1). In other words, the Takings Clause imposes a mandatory duty on the government to pay just compensation when it takes property, just as it has a mandatory duty to refrain from unreasonable searches or infringing on the freedom of speech. This means that *just compensation* claims are not requests for money damages. Claimants under the Takings Clause do not say the government has acted unlawfully and therefore must pay damages. Instead, they say the government has acted lawfully—it has taken property for public use—in a way that triggers a mandatory, nondiscretionary duty to pay just compensation.

That mandatory duty means that the landowners here have a claim that is categorically different from a money judgment for say, a slip and fall, fender bender, or breach of contract. While paying the latter may be discretionary under state law, the former has long been mandatory under the Constitution, which makes paying it a "ministerial" duty under La. R.S. 13:5109(B)(2). Indeed, for over 800 years, "just compensation" has meant a contemporaneous payment of cold hard cash—not some paper IOU.[1] And until the government actually pays that cash, there's an ongoing Fifth Amendment violation. That's why courts have recognized that the government cannot take property and then excuse itself from paying. *See, e.g.*, *In re*

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[1] The phrase "IOU" dates back to 1795 and means "I owe you." It's a piece of "paper that has on it the letters IOU," which typically includes a "stated sum" and "acknowledgment of a debt," but not specific repayment terms. *See IOU*, Merriam-Webster, https://www.merriam-webster.com/dictionary/IOU (last visited Apr. 17, 2024) ("I don't have any cash, so I'll have to give you an *IOU*.").

Fin. Oversight & Mgmt. Bd., 41 F.4th 29, 44–45 (1st Cir. 2022); *In re City of Detroit*, 524 B.R. 147, 270 (Bankr. E.D. Mich. 2014). After all, the right to just compensation flows from the Constitution, not legislative grace.

This Court should recognize the same. Under the Takings Clause, the payment of just compensation *is* mandatory, it *does* require a cash payment, and state officials do *not* have discretion to withhold payment from landowners. To be sure, at least one court, in a split decision, has reached the opposite conclusion. *See In re City of Stockton*, 909 F.3d 1256, 1276–77 (9th Cir. 2018) (Friedland, J., dissenting) (calling out the majority for "recast[ing] [the] constitutional right to just compensation as a mere monetary claim" under state law). But this Court should join the correct side of the established split, not deepen it. As the text and history of the Fifth Amendment make clear, "just compensation" is a mandatory cash payment when the government takes property; it is not a discretionary IOU payable only when the legislature willingly budgets for it. The Court should affirm.

ARGUMENT

I. The Fifth Amendment of the U.S. Constitution creates a mandatory obligation to pay cash.

The Fifth Amendment "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *First Eng. Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 314 (1987). That condition is "just compensation." If the government takes private property for public use, the landowner has a Fifth Amendment claim "for just compensation at the time of the taking." *Knick v. Township of Scott*, 588 U.S. 180, 192 (2019). As a

result, the Takings Clause does not "limit the governmental interference with property rights *per se*, but rather [it] secure[s] *compensation* in the event of otherwise proper interference amounting to a taking." *First Eng.*, 482 U.S. at 315. The Takings Clause, then, is as simple as the Pottery Barn rule: If you break it, you buy it.

According to SWB (at 25) and Louisiana (at 6), however, the government can take whatever it wants for free. In their view, when the government takes property, the landowner is not entitled to compensation. Instead, all landowners get is an unenforceable IOU—worth no more than the paper it's written on.[2] And if the landowners ever want to turn that IOU into something, like cash, they can "take [it] to the City Council" and beg for payment, which, depending on factors like the "budget" and "every other issue in Louisiana," may never happen.

That's wrong, as a matter of both history and precedent. The Framers rejected this IOU tactic—the same ploy English kings used long ago to avoid paying for things they took—by including specific language in the Fifth Amendment: "just compensation." That language enshrined a rule dating back to Magna Carta—that

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[2] That's exactly how this case has played out. New Orleans built drainage canals to reduce the risk of flooding in the city. During construction, a group of nearby landowners suffered nearly $1 million in damage to their properties. The landowners filed (and won) inverse condemnation claims for the takings. But what did they get? —a piece of paper (i.e., a judgment) saying SWB owes them the money. And if Louisiana and SWB are correct, under La. R.S. 13:5109(B)(2), that judgment is worthless until and unless SWB voluntarily appropriates the money, which it has refused to do for years, or the legislature directly funds an appropriation to an entity whose operating budget it does not regularly fund at all.

takings of private property must be paired with contemporaneous cash payments rather than unenforceable IOUs.

That history tracks modern cases from the U.S. Supreme Court, which confirm 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. That means, as the Supreme Court has repeatedly explained, the right to just compensation is "irrevocable." *Knick*, 588 U.S. at 192 (citing *First Eng.*, 482 U.S. at 315, 318); *DeVillier*, slip op. at 4 (same). As a result, once the government makes the decision to take property, it doesn't have the option *not* to pay cash for the taking. Put simply, it's a *mandatory* obligation.

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

The Constitution specifically requires "just compensation" when the government takes property. This requirement dates back at least to the signing of Magna Carta in 1215. At that time, King John would use "purveyance," which as Blackstone explained, was 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 the consent of the owner." 1 William Blackstone, Commentaries *277. In other words, purveyance was a predecessor to modern eminent domain: Property was taken, without the owner's consent, at an appraised value. *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-eight[h] section of *magna charta*.").

The controversy over purveyance was not *whether* payment was due, but *when*. There was no dispute that the king was supposed to pay for whatever he took. William Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John, with a Historical Introduction* 386 (1905). The same is true today with eminent domain. (And in this case—SWB admits (at 15, 25) that it owes the landowners "damages.") The problem with purveyance, however, was that "[p]ayment was often indefinitely delayed or made not in coin but in exchequer tallies." McKechnie, *supra*, at 387. Even worse, "in the hurry of the moment, the king's purveyors often omitted the formality of paying altogether." *Id.* So in the end, if the landowner was lucky enough to receive *something* for the taking, it was typically just an "exchequer tallie"—not coins (or the modern equivalent of cash).

Exchequer tallies were one of the earliest forms of an IOU. Also known as "tally sticks," exchequer tallies were literal sticks used to document royal debts. After carving a series of marks into the stick, the king's servants would split it lengthwise, giving one half (the "stock") to the creditor and keeping the other half (the "foil") in the royal treasury.

In theory, the lines on the stock and foil would line up, so in the future, the parties could match up the sticks and prove the authenticity of the debt. *See* Christine Desan, *Making Money: Coin, Currency, and the Coming of Capitalism*

173–85 (2014). In practice, however, these sticks were unworkable and essentially worthless. Because you needed both sticks to confirm the IOU, a stock's value was mostly limited to offsetting future tax debts to the crown. To the extent they could be sold for cash at all, they sold at a steep discount from their face value. *Id.* at 185. So if the King refused to voluntarily pay up (he rarely did), the holder would be left with just a piece of wood. *See Landlords, Peasants and Politics in Medieval England* 310 (T.H. Aston ed., 2006) (explaining the "common difficulty of getting [tallies] cashed").

Unsurprisingly, this system of taking property for sticks grew wildly unpopular. As one critic put it, "It would be better . . . to eat from wooden platters and pay in coin for food than serve the body with silver and give pledges of wood. It is a sign of vice to pay for food with wood." *Id.* (cleaned up); Desan, *supra*, at 187 n.126 ("They use the king's silver for their own pleasures, and produce wood, or tallies, instead of contributing to the prosperity of the people."). Purveyance then, would "strike with crushing severity" and force families into poverty because the king could essentially take property "without payment." Aston, *supra*, at 313–15.

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 postponment thereof by permission of the seller." William Sharp 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—and with money, not IOUs.

That principle of just compensation was reaffirmed countless times in the centuries since. Both by English parliaments,[3] and in the French Declaration of the Rights of Man and of the Citizen, which provided that "property is an inviolable and sacred right," which if the government takes for a "public necessity," "the owner shall have been previously and equitably indemnified." Declaration of the Rights of Man of 1789, https://avalon.law.yale.edu/18th_century/rightsof.asp. And this principle travelled with the colonists to the New World, where American courts confirmed their commitment to Magna Carta's idea of just compensation, even before independence and incorporation against the states.[4]

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[3] Magna Carta was reissued in England four times by two kings—and confirmed by parliament at least fifty more times by 1422. *See* J.C. Holt, *The Ancient Constitution in Medieval England, in The Roots of Liberty: Magna Cart, Ancient Constitution, and the Anglo-American Tradition of Rule of Law* 55 (Ellis Sandoz ed., 1993).

[4] *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 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, 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. 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 limits the government's taking power).

So 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.[5] And that just-compensation principle, which is one of the oldest and most firmly established rights protected by the Constitution, includes the requirement of immediate cash payment.

B. The U.S. Supreme Court confirmed that the Takings Clause requires immediate compensation when property in taken.

In 2019, the U.S. Supreme Court explained that the Fifth Amendment means exactly 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*, 588 U.S. at 189. Still less does the Fifth Amendment say what SWB and Louisiana want it to say: "Nor shall private property be taken for public use, without a totally unenforceable promise of future payment."

The U.S. Supreme Court didn't stop there. It also explained *when* just compensation is due. Echoing Magna Carta, the U.S. Supreme Court held that "a property owner has a Fifth Amendment entitlement to compensation as soon as

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[5] Although the federal Takings Clause—and its history and tradition of "just compensation"—is dispositive here, the Territory of Orleans was no different. Before statehood and the just-compensation requirement in the Louisiana Constitution, "the same principle was enunciated in the Code Napoleon, Article 545, which declared that no one can be compelled to part with his property, unless by reason of public utility and on consideration of an equitable *and previous* indemnification." *Britt v. Shreveport*, 83 So. 2d 476, 477 (La. App. 2 Cir. 1955) (emphasis added). That "[Napoleonic] article was incorporated in the Civil Code of 1808, 1825 and 1870." *Id.*

the government takes his property without paying for it." *Id.* at 190. And contrary to SWB's argument (at 22), the right to immediate payment exists whether the government "initiat[es] direct condemnation proceedings," like expropriation or eminent domain actions, or instead, "the government does nothing," like it did here, "forcing the owner" to bring an inverse condemnation claim. *Knick*, 588 U.S. at 190–91. Either way, a taking requires just compensation, and that payment is due immediately when the taking occurs. *DeVillier*, slip op. at 4 ("We have explained that 'a property owner acquires an irrevocable right to just compensation immediately upon a taking' . . . ." (quoting *Knick*, 588 U.S. at 192)).

C. Governments cannot nullify their obligation to pay just compensation after they take property.

Even before *Knick*, the government was still required to pay for a taking. For over 100 years, the U.S. Supreme Court—time and again—"frequently repeated the view that, in the event of a taking, the compensation remedy is required by the Constitution." *First Eng.*, 482 U.S. at 316 (collecting cases). That's because, with "the combination of those two words," "just" and "compensation," there is "no doubt that the compensation must be a full and perfect equivalent for the property taken." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893). That language, then, does not give the legislature a choice to pay (or not pay); instead, it creates a categorical requirement: "The constitution has declared that just compensation *shall be paid*." *Id.* at 327 (emphasis added).

That doesn't mean, however, that the legislature somehow "lose[s] control" over public projects and its budget every time it needs to update sewers, fix roads,

or install power lines. *See* SWB Br. 25. The Fifth Amendment itself solves any separation-of-powers issues because it creates legislative discretion on the front end: "The legislature may determine what private property is needed for public purposes" because, after all, "that is a question of a political and legislative character." *Monongahela*, 148 U.S. at 327. In other words, the legislature gets to decide *when* to trigger the Takings Clause in the first instance.[6] But once "the taking has been ordered, then the question of compensation is judicial." *Id.*

That's exactly what James Madison and the Framers had in mind. The Fifth Amendment, like contemporary state constitutions, took any prerogative of just compensation out of the hands of legislatures and placed it in the hands of the judiciary. *See* James Madison, *Amendments to the Constitution*, 12 *The Papers of James Madison* 196, 196–210 (June 8, 1789) (explaining that courts "will be an impenetrable bulwark against every assumption of power in the legislative or executive"), *available at* https://founders.archives.gov/documents/Madison/01-12-02-0126. That was true for "the Vermont Constitution of 1777, the Massachusetts Constitution of 1787 and the Northwest ordinance of 1787, each of which provided for an affirmative right to compensation once property was taken." Douglas W.

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[6] This control belies the grave budget concerns that SWB and Louisiana allude to. Government entities can refrain from taking property they can't afford or are unwilling to pay for. For example, if SWB cannot afford to pay for property that it needs for a project, as required by the just compensation clause, then it may decide that now is not the best time for that project. Or, in contrast, if a project is truly necessary now, then SWB can prioritize funding for that project in its budget.

Kmiec, *The Original Understanding of the Takings Clause Is Neither Weak nor Obtuse*, 88 Colum. L. Rev. 1630, 1661 & n.161 (1988).

This separation-of-powers design makes sense. The legislature decides *what* and *when* to take property. But once it makes that decision, it doesn't then get to decide *whether* and *how much* it has to pay for the taking—that's the role of the judiciary. *See* Cong. Globe, 39th Cong., 1st Session 1089–90 (1866) (explaining how the Fourteenth Amendment was, in part, designed to prevent state legislatures from taking property for public use without just compensation). And as this case shows, the Framers were a bit prognostic. The impetus behind the implementation of just compensation clauses and a mandatory obligation to pay landowners for a taking was a "general loss of faith in legislatures" in the Founding Era. *See* Robert Brauneis, *The First Constitutional Tort: The Remedial Resolution in Nineteenth-Century State Just Compensation Law*, 52 Vand. L. Rev. 57, 107 n.220 (1999) (citing Gordon Wood, *The Creation of the American Republic, 1776–1787*, at 403-09 (1969) (detailing the "mounting criticisms" of state legislatures)).

That textual structure and history of the Fifth Amendment defeats the bulk of SWB's (at 16–25) and Louisiana's (at 2–5) arguments. Contrary to their "budget concerns," this Court can require just compensation without violating any separation-of-powers concerns.[7] Under the Fifth Amendment, SWB and Louisiana

[7] It is true, however, that governments could easily balance their budgets if they could take whatever property they wanted and never had to pay for it. *See* Applicant's Br. 24. But that's precisely why we have the Fifth Amendment.

get to choose *what* to take and *when* to take it, but once those decisions are made, the just-compensation mandate kicks in—and courts get to enforce it.

Consistent with that framework, courts have rejected legislative attempts to reduce or nullify the amount of just compensation after a taking. For instance, when Puerto Rico faced a fiscal emergency in 2016, a financial oversight board was tasked with restructuring the Commonwealth's debts through bankruptcy. *In re Fin. Oversight & Mgmt. Bd.*, 41 F.4th at 37. Those debts included takings claims for just compensation that existed before the bankruptcy proceedings began. The board wanted to treat these claims as "unsecured creditors" so it could reduce or eliminate the obligation to pay just compensation. *Id.* at 41–42. But the First Circuit Court of Appeals flatly rejected such a plan as itself unconstitutional. "[I]n the case of the Takings Clause, the Constitution clearly spells out both a monetary remedy and even the necessary quantum of compensation due." *Id.* at 45. As a result, "the denial of adequate (read: just) compensation for a taking is itself constitutionally prohibited." *Id.* (citing *First Eng.*, 482 U.S. at 316).

When the city of Detroit filed for bankruptcy, it faced the same issue. *In re City of Detroit*, 524 B.R. 147, 267–70 (Bankr. E.D. Mich. 2014). The city wanted to treat property owners with Takings Clause claims as general unsecured creditors, which would have paid the owners a fraction of the actual "just compensation" owed. *Id.* at 267. But just like the First Circuit said with Puerto Rico, the bankruptcy court said Detroit could not discharge or discount the amount of just compensation without violating the Fifth Amendment. *Id.* at 268; *but see In re City*

of Stockton, 909 F.3d at 1262, 1266–69 (rejecting a challenge to a bankruptcy plan that characterized an inverse condemnation claim, which suffered from a myriad of independent procedural problems, as an unsecured claim).

From Magna Carta, through our Founding, and into modern bankruptcies, the just-compensation requirement has prevented the same purveyance abuses that crippled medieval families. The king used to be able to take whatever he wanted without paying. But Magna Carta put an end to that abuse. And the Fifth Amendment provides the same backstop today: SWB cannot take property and then excuse itself from paying just compensation—no matter the excuse.[8]

II. Giving government officials discretion to *not* pay just compensation will render the Takings Clause dead letter and violate the Supremacy Clause of the U.S. Constitution.

If SWB and Louisiana get their way, and the payment of "just compensation" is discretionary and not ministerial, then the Takings Clause will mean nothing for Louisianans. That's not hyperbole—it's reality. The Fifth Amendment has two parts: The government is allowed to take private property, but it must pay just

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[8] SWB's (at 24–25) and Louisiana's (at 6) most perplexing excuse is that the landowners are somehow required to swallow their losses in order to "benefit all people living in the State rather than favoring a chosen few plaintiffs." Setting aside the fact that the landowners did not "choose" for SWB to take their property, that argument flips the Takings Clause on its head. As the U.S. Supreme Court reaffirmed this month, "the Takings Clause saves individual property owners from bearing 'public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Sheetz v. County of El Dorado*, 144 S. Ct. 893, 899 (2024) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

compensation when it exercises that power. Finding the latter "discretionary" would allow SWB to take property without paying for what it took—meaning that it could violate the Constitution's just-compensation requirement with impunity. That would "render the Takings Clause a dead letter," and it would force Louisiana landowners to "rely exclusively upon the generosity of the judgment debtor" (akin to King John's tallies) to eventually pay up. *DeVillier v. State*, 63 F.4th 416, 433 (5th Cir. 2023), *vacated*, 601 U.S. __ (2024) (Oldham, J., dissenting) (citing *Ariyan, Inc. v. Sewerage & Water Bd. of New Orleans*, 29 F.4th 226, 228 (5th Cir. 2022)). That's not how the Fifth Amendment is supposed to work.

Finding the just-compensation requirement "discretionary" would also raise serious constitutional concerns to our system of federalism. Under the Supremacy Clause, states cannot immunize 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 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.").

But that is exactly what SWB and Louisiana are attempting to do here. The effect of relegating the just-compensation requirement to a "discretionary" payment would, in effect, hold federal constitutional rights captive to state law. And it would leave the landowners (who suffered a now undisputed taking) without the just compensation the Constitution demands. The reason for doing so? –because, as

SWB put it (at 25), requiring an appropriation before it can pay just compensation is "a wise and prudent necessity" of Louisiana fiscal policy. That policy choice violates the Supremacy Clause: "States . . . lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies." *Haywood v. Drown*, 556 U.S. 729, 736 (2009). This Court should not (and indeed, cannot) leave federal constitutional rights at the mercy of the state legislature.

III. The Fifth Circuit Opinion Creates No *Res Judicata* Problem.

Finally, there's no *res judicata* problem here because this case seeks to enforce a state-law judgment, not bring a federal claim. The landowners already won their inverse condemnation claims. *See Lowenburg v. Sewerage & Water Bd. of New Orleans*, 19-0524 (La. App. 4 Cir. 7/29/20), __ So. 3d __, 2020 WL 4364345. That established that a taking did, in fact, occur—and thus, the landowners are entitled to just compensation.

But since then, SWB has refused to pay. That refusal spawned an alleged new taking, which the landowners filed in federal court and the Fifth Circuit dismissed. *Ariyan, Inc. v. Sewerage & Water Bd. of New Orleans*, 29 F.4th 226, 229 (5th Cir. 2022) (explaining the landowners' theory of a "second taking"). But unlike the cases SWB cites (at 9–10), the landowners here are not trying to bring new claims after they lost. They are trying to enforce the judgment they already won. In other words, this is not a new lawsuit with new claims; rather, it involves a post-judgment remedy, much like a garnishment proceeding, to try to compel the payment of just compensation that SWB admittedly owes.

To be sure, however, although the landowners lost their federal lawsuit, the state law question at the heart of this case (i.e., whether the payment of just compensation is ministerial or discretionary) is still controlled by federal law. As explained above (at 6–11, 15–16), the "just compensation" language in the Fifth Amendment triggers a mandatory cash payment when the government takes property—and states cannot skirt that constitutional requirement through policy choices or statute. The Court can resolve the merits of the mandamus question.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Dated this 26th day of April, 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing brief of *amicus* Institute for Justice was served this 26th day of April, 2024, via email and first-class mail, postage pre-paid to the following counsel of record:

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