REGENT UNIVERSITY SCHOOL OF LAW

24th ANNUAL LEROY R. HASSELL, SR. NATIONAL CONSTITUTIONAL LAW MOOT COURT COMPETITION

No. 24-386

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2024

KARL FISCHER, ET AL.,

Petitioners,

V.

THE STATE OF NEW LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW LOUISIANA

KARL FISCHER, ET AL., *Plaintiffs,* v. STATE OF NEW LOUISIANA, *Defendant.*	**Case No. 23-CV-149**

MEMORANDUM OPINION AND ORDER

Before Roy Ashland, District Judge:

This case is before the Court on a motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(6) in response to plaintiffs' Fifth Amendment challenge to the State of New Louisiana's taking of property for the construction of Pinecrest's ski resort under the New Louisiana Economic Development Act. For the reasons set forth below, New Louisiana's motion is GRANTED.

I. The Parties and Background[1]

a. New Louisiana's Economic Development Plan

The New Louisiana legislature passed the Economic Development Act, giving the governor the power and funds to contract with businesses to revitalize the economy by

[1] The following facts are alleged in the Complaint.

expanding the State's tourism attractions and creating new jobs. Governor Anne Chase contracted with Pinecrest, Inc. to build a new luxury ski resort on the outskirts of the state capital. This project is projected to dramatically increase tax revenue for the area, attract wealthy tourists, and provide 3,470 new jobs. The project is anticipated to benefit business owners due to new employees moving to the area, new tourists visiting the resort, and property values increasing in the surrounding areas. Fifteen percent of the tax revenue from the ski resort will be used to revitalize and support the surrounding community to ensure long-lasting benefits.

b. The Property Owners

New Louisiana's project requires 1,000 acres of land owned by 100 different owners in three counties. Because New Louisiana state law allows takings purely for economic development, it is proper for the State to condemn property for this type of project. *See* NL Code § 13:4911. NL Code § 13:5109 provides that a statutory or executive waiver of sovereign immunity is required for a property owner to obtain just compensation from the State for a taking. New Louisiana has not waived immunity generally or specifically for this project, leaving the property owners with no right to just compensation under state law. The state was therefore able to get ninety owners to sell their land for well below market value.

This suit is brought by the ten holdout property owners, whose properties are small, family-owned farms and single-family homes in a poor, predominantly minority neighborhood. The family farms have been struggling to produce marketable crops because of the soil conditions, and many plots have become overgrown, depleting their value as farmland. Many of the single-family homes have been passed down for multiple generations, creating a tight-knit community and sentimental attachment to the land that could not be accounted for in the State's purchase offer. The average income of the neighborhood is $50,000, making it difficult for these

families to find comparable housing elsewhere. Some of the homes are in relatively poor condition, although none are dilapidated or pose any risk or threat to the public. Many homes require substantial improvements, depressing local market value. The primary holdout owner and lead plaintiff in this case is Karl Fischer, who owns a small farm. The State has initiated proceedings to take land that has been in Karl's family for 150 years. He does not want to sell—and particularly not below market value—because the land is important to his family. For similar reasons, the nine other plaintiffs also refused to sell.

On March 13, 2023, New Louisiana authorized Pinecrest to begin construction on the ninety purchased properties, and the State initiated eminent domain proceedings against the ten holdout properties, notifying the owners that state law provides no right to compensation.

c. Procedural History

On March 15, 2023, the ten property owners brought suit against the State under the Fifth and Fourteenth Amendments,[2] seeking temporary and permanent injunctive relief for violating the Takings Clause because the taking is not for public use, or, in the alternative, just compensation for any taking that occurs.

In response, without filing an answer, New Louisiana moved to dismiss both claims under Rule 12(b)(6), based on two primary arguments. First, the State argues that *Kelo v. City of New London* allows for takings for economic development, and therefore this project satisfies the public use prong. Second, it argues that the property owners cannot bring a claim for just compensation because the Fifth Amendment is not self-executing and thus does not provide such a cause of action. New Louisiana cites the Tucker Act, 28 U.S.C. § 1491, and 42 U.S.C. § 1983

[2] The Fifth Amendment has been incorporated against the states via the Fourteenth Amendment Due Process Clause. *Chic. Burlington & Quincy Ry. v. Chicago*, 166 U.S. 226, 239 (1897).

to show that statutes, not the Fifth Amendment, provide the cause of action for just compensation in takings cases and correctly notes that no such statute applies here.

The plaintiffs argue that taking property to establish a private ski resort is not consistent with the plain meaning and historical understanding of "public use." The plaintiffs also argue that the Fifth Amendment's takings clause is self-executing and creates a cause of action because "just compensation" is a constitutionally mandated remedy. The plaintiffs argue that the Tucker Act and § 1983 waive sovereign immunity but were not the source of the cause of action for a remedy for a taking because the text of the Fifth Amendment provides the cause of action. Additionally, claims for injunctive relief predated the passage of those two statutes.

II. Discussion

a. Standard of Review

To survive a Fed. R. Civ. P. 12(b)(6) motion, the pleading, on its face, must plausibly demonstrate entitlement to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007). A motion to dismiss may be granted only if it appears beyond doubt that the plaintiff cannot prove any facts supporting his claim which would entitle him to relief. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). But, here, the sole issue is whether the plaintiffs have raised a valid claim under which they are entitled to offer evidence for relief, which is a pure question of law. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

b. Analysis

For the following reasons, this Court agrees with New Louisiana and holds that the taking is valid, and the plaintiffs have no claim for just compensation because the Fifth Amendment is not self-executing.

Validity of the Taking

The Fifth Amendment allows takings for "public use." In an earlier line of cases, the Supreme Court construed public use broadly. *See Berman v. Parker*, 348 U.S. 26, 32 (1954) (holding that the plaintiff's non-blighted property could be taken for a community redevelopment project which addressed a pervasive blight problem in the area); *see also Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984) (holding that it was a valid public use for the state to take properties from landlords and transfer title to tenants to decrease the monopolization of land ownership). Following these cases, in 2005 the Supreme Court held that "public use" extended to takings where the public purpose conferred an economic benefit, and the properties were not taken to abate a public harm. *Kelo v. City of New London*, 545 U.S. 469, 476 (2005).

Similar to *Kelo*, the properties here are being taken to confer an economic benefit on New Louisiana. Pinecrest is projected to drastically increase the tax revenue of the area, increase the surrounding properties' value, increase tourism revenue, and provide thousands of jobs. Although the Court is sympathetic to the plaintiffs' objection to having their property taken when it will not be put to pure public use, they are asking this Court to reject the holding in *Kelo,* which it does not have the authority to do. The Supreme Court has spoken, and this Court cannot overrule it.

New Louisiana's motion to dismiss the plaintiffs' claim seeking to enjoin the taking is GRANTED.[3]

Claim for Just Compensation

Plaintiffs alternatively claim that they are entitled to compensation for any taking that occurs. Although the Takings Clause requires "just compensation" when the government takes

[3] The court, however, GRANTS plaintiffs' motion pursuant to FRCP 62(d) to stay the proceedings pending appeal.

property, New Louisiana argues that (1) this language does not create a self-executing cause of action, and (2) the plaintiffs' claims must be dismissed because no law provides a cause of action against the State. The property owners acknowledge that no other law provides the right to seek just compensation, but they argue the Fifth Amendment creates a constitutional mandate that inherently includes a cause of action.

Constitutional rights provide defenses and generally do not create causes of action. *Egbert v. Boule*, 596 U.S. 482, 490-91 (2022). The Supreme Court has held that the Fourth, Fifth, and Eighth Amendments provide causes of action for civil rights claims against federal agents, the so-called "*Bivens* claims." *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971) (excessive force during an arrest); *Davis v. Passman*, 442 U.S. 228, 242 (1979) (sex discrimination in federal employment); *Carlson v. Green*, 446 U.S. 14, 25 (1980) (inadequate care in prison). However, the Court has narrowed the situations for which a *Bivens* claim can be filed, and a takings claim is not among them. *Egbert,* 596 U.S. at 491 (limiting *Bivens* claims to only cases factually similar to the three situations listed above to prevent the judiciary from acting in place of the legislature, except in extreme circumstances). And here, the plaintiffs' claims are against the state, not federal agents. So, the issue is whether the Takings Clause is self-executing, or whether a separate source of law must provide the cause of action for just compensation.

The Supreme Court has addressed the extent to which the Fifth Amendment provides rights but has not definitively resolved whether it is self-executing. The Court has held that the Takings Clause provides a right to just compensation immediately upon the taking without the need to exhaust state remedies. *Knick v. Twp. of Scott*, 588 U.S. 180, 192 (2019). *Knick* relied heavily on *First Eng. Evangelical Lutheran Church v. Cnty. of L.A.*, 482 U.S. 304, 315 (1987), in

which the Court held that the "just compensation" provision creates a condition on the exercise of the power to take property for public use. However, both *Knick* and *First Eng. Evangelical Lutheran Church* involved claims brought under other sources of law. *See Knick*, 588 U.S. at 192 (a claim brought under 42 U.S.C. § 1983); *First Eng. Evangelical Lutheran Church*, 482 U.S. at 308 (a claim brought under state inverse condemnation law).

DeVillier v. Texas, 601 U.S. 285, 288 (2024) was the first case in which the Supreme Court analyzed a claim for just compensation that was brought solely under the Takings Clause, not under state law or a federal statute. The Court did not, however, resolve whether the Fifth Amendment is self-executing because it determined that state law provided the plaintiff a remedy under state law. *Id*. at 292. The Court deferred this issue to a case where, as here, there is no state takings remedy, and the Court suggested that the nature of the relief sought could determine whether there is a self-executing cause of action. *Id.* at 292 n.2.

To support the argument that the Takings Clause is self-executing, Plaintiffs cite a line of cases where claims for equitable relief against a taking were brought without citation to other sources of law. *See, e.g., Dohany* v. *Rogers*, 281 U.S. 362, 364 (1930); *Norwood* v. *Baker*, 172 U.S. 269, 276 (1898). However, a claim for just compensation seeks money, not equitable relief, and "just compensation" requires the fair market value of the property. *United States v. Miller*, 317 U.S. 369, 374 (1943). The courts grant equitable remedies only in special circumstances where compensation is not appropriate. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984). And as the Supreme Court has noted, all cases seeking just compensation in federal court have been brought under other sources of law. *DeVillier*, 601 U.S. at 288.

Specifically, two federal statutes authorize claims for violations of federal constitutional rights: the Tucker Act, 28 U.S.C. § 1491, which permits claims against the federal government,

and 42 U.S.C. § 1983, which permits claims against state actors. While it is true that the Tucker Act and § 1983 waive sovereign immunity, the history of both statutes shows that they also created the right to pursue legal remedies, including under the Takings Clause. Prior to the Tucker Act, claims for compensation for government takings were brought only through private acts of Congress. *Lib. of Cong, v. Shaw*, 478 U.S. 310, 316 n.3 (1986). The Tucker Act therefore not only waived sovereign immunity but created the claim for property owners to obtain compensation. *United States v. Great Falls Mfg. Co.*, 112 U.S. 645, 657 (1884). Likewise, § 1983 creates a "species of liability in favor of persons deprived of their federal civil rights by those wielding state authority." *Felder v. Casey*, 487 U.S. 131, 139 (1988). The central objective of this statute is to ensure that individuals whose federal constitutional or statutory rights are abridged by state authorities may recover damages or secure injunctive relief. *Burnett v. Grattan*, 468 U.S. 42, 55 (1984).

These two statutes reflect that (1) Congress recognized that another source of law must provide the right to seek just compensation because the Fifth Amendment does not include an implied cause of action, and (2) the statutes did not simply waive sovereign immunity but provided a cause of action for damages. Because these two federal statutes do not apply here, and no other source of law provides the plaintiffs with a cause of action for compensation, the plaintiffs failed to state a claim for which the relief of just compensation may be granted.

This court therefore also GRANTS the state's motion to dismiss plaintiffs' claims for compensation with prejudice.

IT IS SO ORDERED.

Dated: June 28, 2023

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

No. 23-19042

KARL FISCHER, ET AL.,

Appellants,

v.

THE STATE OF NEW LOUISIANA,

Appellee.

Appeal from the United States
District Court for the District of
New Louisiana
Roy Ashland, District Judge,
Presiding

Argued and Submitted December 8, 2023
Before Randall Mendoza, Chief Judge, and Daniel Hayes and Helen Willis, Judges

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OPINION

Mendoza, Chief Circuit Judge:

In an effort to boost its economy, New Louisiana initiated eminent domain proceedings against unwilling landowners to give their land to Pinecrest, Inc. to construct a luxury ski resort. The hope was that the resort would develop the economy through tax revenue, new jobs, and an increase in tourism. When ten property owners refused to sell to the State, the State initiated eminent domain proceedings against those properties and began construction on 90 adjacent tracts that the state purchased. The holdout owners sued under the Fifth Amendment's Takings Clause arguing that (1) the taking was invalid because it was not for public use, and in the

alternative, (2) they are entitled to just compensation for the fair market value of land taken. The district court dismissed these claims. The property owners appealed, and we affirm.

I. STANDARD OF REVIEW

A district court's determination of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) is reviewed de novo. See *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015).

II. DISCUSSION

A. Public Use

The district court properly held that the property owners' claim to enjoin the taking should be dismissed for failure to state a claim upon which relief could be granted. Under *Kelo v. City of New London,* 545 U.S. 469, 476 (2005), "public use" extends to takings for economic development even when no harm is being remediated, and the property is given to another private party. This precedent is binding and controlling here, and we cannot overturn it, no matter its merits.

B. Source of Claim for Just Compensation

The appellants claim that they are entitled to just compensation for any takings that occur and, because no other law provides a cause of action, bring this claim solely under the Fifth Amendment. The district court properly held that the Fifth Amendment is not self-executing and thus does not create a right to bring a claim for relief. Both the Tucker Act, 28 U.S.C. § 1491, and 42 U.S.C. § 1983 waive immunity and create a cause of action under which relief for the violation of constitutional rights, including under the Takings Clause, can be sought. *United States v. Great Falls Mfg. Co.*, 112 U.S. 645, 657 (1884); *Felder v. Casey*, 487 U.S. 131, 139 (1988). However, as plaintiffs properly concede, these statutes do not apply here. The district

court correctly held that the Fifth Amendment only provides a right to just compensation if a right to sue is otherwise provided by law. Because no such law exists here, and the State has not waived its immunity for this project, we AFFIRM the district court's dismissal of the plaintiffs' claims for compensation.[4]

Hayes, J, Concurring:

I join in affirming the district court's well-reasoned decision. Although I recognize *Kelo v. City of New London*, 545 U.S. 469 (2005) has many detractors, I write separately to explain why I believe the Supreme Court should maintain its public use precedent and not continue its recent trend of reversing precedent, which destabilizes the law and undermines confidence in the judiciary.

The Court considers several factors when deciding whether stare decisis requires adherence to precedent: the quality of the reasoning, the workability of the rule, the consistency with other related decisions, and reliance on the decision. *Janus v. AFSCME, Council 31*, 585 U.S. 878, 917 (2018). Stare decisis is strongly presumed because it promotes stability and evenhandedness. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). A past decision should be overturned only if there are strong grounds for doing so. *United States v. IBM*, 517 U.S. 843, 855-56 (1996). Although reasonable minds can differ over what "public use" means, *Kelo* does not meet these high standards.

Quality of the Reasoning

Kelo follows and logically flows from the reasoning in prior takings cases. Earlier cases defined "public use" to include traditional government functions that serve a legitimate public purpose. *See, e.g., Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 527 (1906)

[4] The court, however, GRANTS the landowners' motion pursuant to Federal Rules of Appellate Procedure 41(d)(1) to stay the court's mandate pending a petition for writ of certiorari.

(facilitating agriculture and mining for the welfare of the states); *Berman v. Parker*, 348 U.S. 26, 33 (1954) (transforming a blighted area into a productive community through redevelopment). Similar to government functions that serve the public, economic development also benefits the community. The purpose behind the taking in *Kelo* was to rehabilitate the city and promote long-term economic growth. *Kelo*, 545 U.S. at 472. This rule prohibits purely private takings or takings that appear to be for a public purpose but only bestow a private benefit. *Id.* at 478. Because economic development cannot reasonably be distinguished from other legitimate public purposes, *Kelo's* logical extension of early decisions to allow a taking for economic development is arguably correct, is not obviously wrong, and is certainly defensible—even if it is disputable.

Workability of the Rule

The workability factor requires the court to assess how easily a rule can be understood and applied in a consistent and predictable manner. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 220 (2022). *Kelo* creates a straightforward rule that provides flexibility for the government to serve the public good. *Kelo*, 545 U.S. at 482-83. An overly restrictive interpretation of public use would not only depart from decades of established precedent but would also undermine this goal.

Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 158-64 (1896) first interpreted public use to extend to legitimate public purposes. The earlier "use by the public" test was difficult to administer and could not evolve with changing community needs. *Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co.*, 240 U.S. 30, 32 (1916). The more flexible rule that evolved to the holding in *Kelo* is more workable than a strict interpretation of public use and better serves the purposes of the Takings Clause.

Consistency with Other Related Decisions

Kelo is consistent with longstanding public use precedent. *See, e.g., Bradley*, 164 U.S. at 158-64 (1896) (interpreting "public use" as "public purpose"); *Berman*, 348 U.S. at 34-35 (upholding renovation of a blighted community); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 233 (1984) (forcing conveyances to lessees to eliminate oligopoly). *Kelo* authorized takings to revitalize a community in economic distress. *Kelo*, 545 U.S. at 472. The remedy for the harm differed in these cases but reflected a consistent understanding of public use.

Kelo does not conflict with another related precedent. Judge Willis argues that the Court's decision in *Knick v. Twp. of Scott*, 588 U.S. 180 (2019) creates a conflict with *Kelo*. But *Knick* only addressed the right to compensation; it did not address when a taking may occur. Even if there is some analytical tension between these two cases, this factor alone would not warrant abandoning stare decisis because the other factors collectively and clearly weigh in favor of preserving *Kelo*.

Reliance on the Decision

Kelo has been relied on for almost two decades. The Court's refusal to review cases seeking to overturn *Kelo*, *e.g., Eychaner v. City of Chicago*, 141 S. Ct. 2422, 2422 (2021) *cert. denied*, reflects the decision's resilience. Overturning this decision would impact how communities develop and grow via eminent domain. Garreth Cooksey, *Takings Care of Business: Using Eminent Domain for Solely Economic Development Purposes*, 79 Mo. L. Rev. 715, 726 (2014). Redevelopment projects take years, require negotiations and planning with multiple parties, and cost millions of dollars. Without *Kelo,* these plans could come to a halt and communities could suffer because one property owner refuses to sell.

Willis, J., Concurring in part and Dissenting in part:

Given *Kelo v. City of New London*, 545 U.S. 469 (2005), I have no choice but to concur with the majority's holding that New Louisiana's economic development plan satisfies the Supreme Court's current definition of "public use." I write separately to exhort the Court to take this opportunity to overrule *Kelo*. I also dissent from the holding that the Takings Clause is not self-executing.

A. Public Use

Judge Hayes correctly lists the factors that must be assessed for the Supreme Court to overrule its precedent, but those factors clearly weigh in favor of overruling *Kelo*.

Quality of the Reasoning

Kelo is poorly reasoned because it conflates "public purpose" with "public use." The Court should construe "public use" according to its plain meaning and not substitute the broader concept of "purpose" for "use." See *Kelo*, 545 U.S. at 470 (Thomas, J., dissenting). *Kelo* correctly noted that economic development is a long-accepted function of government, *id.* at 484, but the power of eminent domain was not created to further all governmental functions.

The Founders held property rights in the highest regard, which is reflected in their choice of "public use" instead of, for example, "general welfare," when crafting the Takings Clause. 1 *Records of the Federal Convention of 1787* 302 (M. Farrand ed. 1911). The Constitution includes the broader concept of "general welfare" in other provisions, such as in its Preamble and Article I Section 8. The Takings Clause explicitly and unambiguously limits the taking of private property for "public use." State constitutions at the founding defined the right to take more broadly, suggesting that "use" in the federal constitution was intended to be narrower. For example, the Massachusetts Declaration of Rights used "public exigencies," and the Vermont

Constitution of 1786 used "public necessity." Nathan Alexander Sales, *Classical Republicanism and the Fifth Amendment's "Public Use" Requirement*, 49 Duke L. J. 339, 367-68 (1999). *Kelo* ignores the historical background and original meaning of the Takings Clause, instead relying on previous takings cases that imply that the Court should broadly interpret "public use" to allow for legislative discretion. 545 U.S. at 488-90.

Although the Court should demonstrate fidelity to the Fifth Amendment's literal text, it alternatively could construe "public use" to allow for acts taken for a legitimate public purpose but only to prevent harm. *Id.* at 498 (O'Connor, J., dissenting). Allowing takings that are benefit-conferring blurs the line between public and private use. The government cannot take property from one individual for the benefit of another private person. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 326 (2002). The public benefit that flows from a project like the one here cannot mask the fact that there is no public harm that is being remediated by a transfer of property from one private party to another. *Kelo*, 545 U.S. at 500 (O'Connor, J., dissenting).

Workability of the Rule

Kelo is unworkable because it ignores the intended limit on the government's power, making the rule easy to apply but detrimental to a constitutional right. *Kelo* extends "public use" to mean any government function that benefits the public. *Id.* at 484. This interpretation of the Takings Clause allows for any taking except one where the government takes land from one private person, gives it directly to another, and the purpose does not serve the public. *Id.* at 502 (O'Connor, J., dissenting). *Knick v. Twp. of Scott*, 588 U.S. 180, 204-05 (2019), held that *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 437 U.S. 172, 186 (1985), was unworkable because its holding precluded full access to a constitutional right.

Similarly, if *Kelo's* interpretation of "public use" is improper, full protection of property ownership is being denied. Indeed, *Kelo* is not particularly difficult to understand, and so a court might consider it workable, but that is not the best understanding of this factor. Regardless, the other factors collectively and overwhelmingly favor reversing *Kelo*.

Consistency with Other Related Decisions

Kelo goes beyond the limits established in previous cases and mandated by the Constitution. *Kelo* is inconsistent with *Berman*, 348 U.S. at 32, and *Midkiff*, 467 U.S. at 240, which only authorized public purpose takings to prevent public harm. *Kelo* 545 U.S. at 489-99 (O'Connor, J., dissenting). A taking that is purely for economic development, as in this case, simply does not meet any reasonable definition of public "use." Because it has gone beyond the mandate in the Takings Clause, *Kelo* is inconsistent with *Knick. Knick* overruled *Williamson County* for limiting the textual right to just compensation. *Knick*, 588 U.S. at 204. Furthermore, *Knick* adhered to the clear facial meaning of the Takings Clause, *id.* at 189, while *Kelo* does not.

Reliance on the Decision

Lastly, reliance on *Kelo* is low because, given the overwhelmingly negative reaction to the decision, Diana Berliner, *Looking Back Ten Years After Kelo*, 125 Yale L. J. 82, 84 (2015), many states have subsequently taken steps to circumvent the holding. Eleven states did so by amending their constitutions and forty enacted statutes to protect property rights from *Kelo*-type takings. *Id.* The fact that the Court recently overruled similarly misguided precedent involving a related Takings Clause issue, *see Knick*, 588 U.S. at 192, *overruling Williamson County*, 437 U.S. at 186, shows that there is little, to no, concern about reliance on misguided rules in this area of law.

B. Source of Claim for Just Compensation

There are two reasons why the district court's holding that the Takings Clause is not self-executing should be reversed. First, the federal statutes that relate to takings claims, the Tucker Act, 28 U.S.C. § 1491, and 42 U.S.C. § 1983, only waived sovereign immunity but did not explicitly or implicitly provide a cause of action. Second, early takings claims were brought under the Fifth Amendment. A self-executing claim of right better fits the significance the Framers placed on property rights.

Legislation is not required to assert the right to just compensation. The Tucker Act waives sovereign immunity for claims against federal agents who violate constitutional civil rights. *United States v. White Mt. Apache Tribe*, 537 U.S. 465, 472 (2003). Prior to the Tucker Act, takings claims against the federal government were brought through private acts of Congress whereby Congress waived its immunity, and claims for just compensation were presented directly to the treasury department. *Lib. of Cong. v. Shaw*, 478 U.S. 310, 316 n.3 (1986). The issue was not a lack of a claim under the Fifth Amendment but the federal government maintaining or waiving its sovereign immunity. Similarly, § 1983 permits suits for actions "under color of state law" that result in a deprivation of the plaintiff's federal rights. Although a municipality may be sued for the actions of its officials, *Connick v. Thompson*, 563 U.S. 51, 60 (2011), a state must waive immunity before a suit is brought under § 1983. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66 (1989).

The Takings Clause was the first constitutional provision to be incorporated against the states, which reflected the importance of property rights, specifically, the right to exclude others and be compensated. *Chic. Burlington & Quincy Ry. v. Chicago*, 166 U.S. 226, 239 (1897). The protection of property rights was a paramount consideration of the Framers. Alexander Hamilton

described the security of property as one of the great objectives of government. 1 *Records of the Federal Convention of 1787* 302 (M. Farrand ed. 1911).

An interpretation of the Takings Clause that requires legislative action to assert a claim does not align with the importance of property rights. Unless the Takings Clause is self-executing, a property owner has no effective protection against a state that refuses to waive its immunity, notwithstanding the facial right to obtain just compensation. Furthermore, cases where equitable relief has been sought against municipalities but was not brought under § 1983 indicate that the Takings Clause provided a right to seek equitable relief. See *Dohany* v. *Rogers*, 281 U.S. 362, 364 (1930); *Norwood* v. *Baker*, 172 U. S. 269, 276 (1898). It makes no sense to hold that the Takings Clause authorizes claims for equitable relief but not for textually mandated just compensation. The lower court's holding is patently inconsistent with the text of the Takings Clause, illogical, and contrary to the intent of the Framers.

It is also not correct that a claim for just compensation is a claim at law for damages. A claim for just compensation is *sui generis*. The plaintiff seeks only to obtain what the text provides to hold the government to its word—not to get damages for a wrongful act. Where government agents take property for "public use, the government is under an obligation, imposed by the Constitution, to make compensation." *United States v. Great Falls Mfg. Co.,* 112 U.S. 645, 656 (1884). The right to compensation is incident to the power of eminent domain, and a property owner can sue to force the government to uphold its constitutional obligation to compensate justly. *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 324-25 (1893). Given that the Takings Clause creates a claim of right to seek equitable relief, it also creates a claim of right to just compensation.

I exhort the Supreme Court to grant review and rework its "public use" precedent. But, regardless, I would remand the case for a determination of just compensation.

Dated: March 13, 2024

IN THE
SUPREME COURT
OF THE UNITED STATES

No. 24-386

OCTOBER TERM 2024

KARL FISCHER, ET AL.,

Petitioners,

v.

THE STATE OF NEW LOUISIANA,

Respondent.

ORDER GRANTING WRIT OF CERTIORARI

The Petition for Writ of Certiorari is hereby GRANTED.

IT IS ORDERED that the above captioned cause be set down for argument in the October Term of 2024, limited to the following issues:

I. Under the Fifth Amendment's Takings Clause, (1) should *Kelo v. City of New London* be overruled, and, if so (2) what constitutes a permissible taking for a "public use"?

II. Is the Takings Clause self-executing, thereby creating a cause of action against a state for just compensation when no other federal or state remedy is available?

Dated: August 17, 2024