No. 22-913

IN THE

# Supreme Court of the United States

RICHARD DEVILLIER, *et al.*,

*Petitioners,*

*v.*

TEXAS,

*Respondent.*

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

## BRIEF OF MINNESOTA, ALABAMA, ALASKA, IDAHO, INDIANA, LOUISIANA, MISSISSIPPI, NEBRASKA, NEW JERSEY, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, SOUTH CAROLINA, UTAH, AND VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT


KEITH ELLISON
*Attorney General of Minnesota*

LIZ KRAMER*
*Solicitor General*
MICHAEL GOODWIN
COLIN O'DONOVAN
*Assistant Attorneys General*
445 Minnesota Street, Suite 1100
St. Paul, MN 55101
(651) 757-1010
liz.kramer@ag.state.mn.us

*(Additional amici and counsel listed at end of brief)*

*Counsel of Record



325809

**TABLE OF CONTENTS**

*Page*

TABLE OF CONTENTS. . . . . . . . . . . . . . . . . . . . . . . . . . i

TABLE OF CITED AUTHORITIES . . . . . . . . . . . . . . iii

INTERESTS OF AMICI CURIAE . . . . . . . . . . . . . . . .1

SUMMARY OF THE ARGUMENT. . . . . . . . . . . . . . . .1

ARGUMENT. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .3

I. Recognizing An Implied Cause Of Action Under The Constitution Undermines State Sovereignty . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .3

A. Principles Of State Sovereignty Underlie This Court's Longstanding Recognition That States Are Immune From Damages Claims In Federal Court . . . . . . .3

B. Congress Has Not Abrogated State Sovereign Immunity For Takings Claims . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .6

II. This Court Generally Refrains From Recognizing Implied Causes Of Action . . . . . . . .9

A. Congress Has Not Created A Cause Of Action For Takings Claims Against States Or Tribes . . . . . . . . . . . . . . . . . . . . . .10

*Table of Contents*

*Page*

B. Habeas Remedies Are Described In Statute . . . . . . . . . . . . . . . . . . . . . . . . . . . . 11

III. An Implied Constitutional Cause Of Action Against States Would Upend States' Established And Robust Just Compensation Remedies . . . . . . . . . . . . . . . . . . . 12

A. The Proper Forum For A Takings Claim Against A Sovereign Is The Sovereign's Own Courts . . . . . . . . . . . . . . . . 12

B. State Courts Have Robust, Diverse Procedures For Addressing Just Compensation . . . . . . . . . . . . . . . . . . . . . . . . 14

C. Property Rights Are Well-Protected In State Courts . . . . . . . . . . . . . . . . . . . . . . . 17

D. Authorizing Federal Takings Claims Against States In Federal Courts Would Undermine State Just Compensation Processes And Invite Claim-Splitting . . . . . . . . . . . . . . . . . . . . . . . 19

CONCLUSION . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 22

## TABLE OF CITED AUTHORITIES

*Page*

### CASES

*74 Pinehurst LLC v. New York*,
59 F.4th 557 (2d Cir. 2023). . . . . . . . . . . . . . . . . . . . . . .14

*Addington v. Texas*,
441 U.S. 418 (1979) . . . . . . . . . . . . . . . . . . . . . . . . . . . . .4

*Alden v. Maine*,
527 U.S. 706 (1999) . . . . . . . . . . . . . . . . . . . . . .3, 5, 6, 21

*Atascadero State Hospital v. Scanlon*,
473 U.S. 234 (1985). . . . . . . . . . . . . . . . . . . . . . . . . . . . .6

*Baker v. McCollan*,
443 U.S. 137 (1979) . . . . . . . . . . . . . . . . . . . . . . . . . . . . .7

*Bay Point Properties, Incorporated v. Mississippi Transportation Commission*,
937 F.3d 454 (5th Cir. 2019). . . . . . . . . . . . . . . . . . . . . .14

*Bd. of Regents of State Colls. v. Roth*,
408 U.S. 564 (1972). . . . . . . . . . . . . . . . . . . . . . . . . . . .15

*Bd. of Trustees of Univ. of Alabama v. Garrett*,
531 U.S. 356 (2001). . . . . . . . . . . . . . . . . . . . . . . . . . . . .5

*Burnett v. Smith*,
990 N.W.2d 289 (Iowa 2023) . . . . . . . . . . . . . . . . . . . .20

*Page*

*Cherokee Nation v. S. Kan. Ry. Co.*,
135 U.S. 641 (1890) . . . . . . . . . . . . . . . . . . . . . . . . . . . . 14

*City of Boerne v. Flores*,
521 U.S. 507 (1997) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 6

*Coleman v. Ct. of Appeals of Maryland*,
566 U.S. 30 (2012) . . . . . . . . . . . . . . . . . . . . . . . . . . . 7, 9

*Correctional Services Corp. v. Malesko*,
534 U.S. 61 (2001) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 9

*de St. Aubin v. Flacke*,
68 N.Y.2d 66 (1986) . . . . . . . . . . . . . . . . . . . . . . . . . . . . 17

*Edelman v. Jordan*,
415 U.S. 651 (1974) . . . . . . . . . . . . . . . . . . . . . . . . . 4, 5, 6

*EEE Minerals, LLC v. State of North Dakota*,
81 F.4th 809 (8th 2023) . . . . . . . . . . . . . . . . . . . . . . . . . 14

*Egbert v. Boule*,
142 S. Ct. 1793 (2022) . . . . . . . . . . . . . . . . . . . . . . . . 9, 10

*Ex Parte Bollman*,
8 U.S. 75 (1807) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 11

*Ex Parte Dorr*,
44 U.S. 103 (1845) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 11

*Page*

*Ex Parte Young*,
209 U.S. 123 (1908). . . . . . . . . . . . . . . . . . . . . . . . . . . . . .6

*Fed. Mar. Comm'n v. S.C. State Ports Auth.*,
535 U.S. 743 (2002). . . . . . . . . . . . . . . . . . . . . . . . . . . . . .5

*Fitzpatrick v. Bitzer*,
427 U.S. 445 (1976). . . . . . . . . . . . . . . . . . . . . . . . . . . . . .7

*Franchise Tax Bd. of California v. Hyatt*,
139 S. Ct. 1485 (2019) . . . . . . . . . . . . . . . . . . . . . . . . . .4

*Frein v. Pennsylvania State Police*,
47 F.4th 247 (3d Cir. 2022). . . . . . . . . . . . . . . . . . . . . . .14

*Green v. U.S.*,
586 Fed. Appx. 586 (Fed. Cir. Dec. 8, 2014) . . . . . . .10

*Hans v. Louisiana*,
134 U.S. 1 (1890). . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .6

*Hawaii Hous. Auth. v. Midkiff*,
467 U.S. 229 (1984). . . . . . . . . . . . . . . . . . . . . . . . . . . . . .4

*Health & Hosp. Corp. of Marion Cnty. v. Talevski*,
599 U.S. 166 (2023). . . . . . . . . . . . . . . . . . . . . . . . . . . . . .7

*Hendler v. United States*,
175 F.3d 1374 (Fed. Cir. 1999). . . . . . . . . . . . . . . . . . . .13

*Page*

*Hernandez v. Mesa*,
140 S. Ct. 735 (2020). . . . . . . . . . . . . . . . . . . . . . . . . .9, 10

*Hess v. Port Auth. Trans-Hudson Corp.*,
513 U.S. 30 (1994) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .5

*Idaho v. Coeur d'Alene Tribe of Idaho*,
521 U.S. 261 (1997) . . . . . . . . . . . . . . . . . . . . . . . . . . . . .4

*In re Rapp*,
621 N.W.2d 781 (Minn. 2001). . . . . . . . . . . . . . . . . . . . .15

*Kelo v. City of New London, Conn.*,
545 U.S. 469 (2005) . . . . . . . . . . . . . . . . . . . . . . . .17, 18

*Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*,
599 U.S. 382 (2023). . . . . . . . . . . . . . . . . . . . . . . . . . . . .5

*Ladd v. Marchbank*,
971 F.3d 574 (6th Cir. 2020). . . . . . . . . . . . . . . . . . . . . .14

*Mack v. Williams*,
522 P.3d 434 (Nev. 2022) . . . . . . . . . . . . . . . . . . . . . . .20

*Maine Community Health Options v. United States*,
140 S. Ct. 1308 (2020). . . . . . . . . . . . . . . . . . . . . . . . . . .9

*Mapes v. Madison County*,
107 N.W.2d 62 (1961) . . . . . . . . . . . . . . . . . . . . . . . . . .16

*Page*

*Matter of Friedenburg v. New York State Dep't of Env't Conservation*, 3 A.D.3d 86 (2d Dep't 2003) . . . . . . . . . . . . . . . . . . . .19

*McGuire v. United States*, 550 F.3d 2008 (9th Cir. 2008) . . . . . . . . . . . . . . . . . . . .13

*Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). . . . . . . . . . . . . . . . . . . . . . . . . . . . .11

*Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782 (2014) . . . . . . . . . . . . . . . . . . . . . . . . . . . . .8

*Murphy v. NCAA*, 138 S. Ct. 1461 (2018). . . . . . . . . . . . . . . . . . . . . . . . . .20

*Murr v. Wisconsin*, 582 U.S. 383 (2017). . . . . . . . . . . . . . . . . . . . . . . . .15, 17

*Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984). . . . . . . . . . . . . . . . . . . . . . . . . . .6, 21

*Quern v. Jordan*, 440 U.S. 332 (1979). . . . . . . . . . . . . . . . . . . . . . . . . . . . .8

*Ramos v. Louisiana*, 140 S. Ct. 1390 (2020). . . . . . . . . . . . . . . . . . . . . . . . . . . .8

*Reich v. Collins*, 513 U.S. 106 (1994) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .5

*Page*

*Rogers v. Tennessee*,
532 U.S. 451 (2001) . . . . . . . . . . . . . . . . . . . . . . . . . . . .15

*Santa Clara Pueblo v. Martinez*,
436 U.S. 49 (1978) . . . . . . . . . . . . . . . . . . . . . . . 11, 13, 14

*Seminole Tribe of Fla. v. Florida*,
517 U.S. 44 (1996) . . . . . . . . . . . . . . . . . . . . . . . . . . . .3, 5

*Shalala v. Illinois Council on Long Term Care, Inc.*,
529 U.S. 1 (2000) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .14

*Sossamon v. Texas*,
563 U.S. 277 (2011) . . . . . . . . . . . . . . . . . . . . . . . . . . . . .5

*Thomsen v. State by Head*,
170 N.W.2d 575 (Minn. 1969) . . . . . . . . . . . . . . . . . 15-16

*Torres v. Texas Dep't of Pub. Safety*,
597 U.S. 580 (2022) . . . . . . . . . . . . . . . . . . . . . . . . . . . . .4

*Valenzula v. Silversmith*,
699 F.3d 1199 (10th Cir. 2012) . . . . . . . . . . . . . . . . . . . .14

*Will v. Michigan Dep't of State Police*,
491 U.S. 58 (1989) . . . . . . . . . . . . . . . . . . . . . . . . .7, 8, 11

*Willams v. Lee*,
358 U.S. 217 (1959) . . . . . . . . . . . . . . . . . . . . . . . . . . . .13

*Williams v. Utah Department of Corrections*,
928 F.3d 1209 (10th Cir. 2019) . . . . . . . . . . . . . . . . . . . .14

*Page*

*World-Wide Volkswagen Corp. v. Woodson*,
444 U.S. 286 (1980). . . . . . . . . . . . . . . . . . . . . . . . . . . .4

*Ziglar v. Abbasi*,
582 U.S. 120 (2017). . . . . . . . . . . . . . . . . . . . . . . . . . . .9

**STATUTES AND RULES**

U.S. Const., amend. V . . . . . . . . . . . . . . 1, 3, 4, 8, 10, 15, 17

U.S. Const., amend. XI . . . . . . . . . . . . . . . . . . . . . . . . . . .7

U.S. Const., amend. XIV . . . . . . . . . . . . . . 1, 2, 3, 6, 7, 8, 9

25 U.S.C. § 1303 . . . . . . . . . . . . . . . . . . . . . . . . . . . . 11, 14

28 U.S.C. § 1257 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .17

28 U.S.C. § 1331 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .20

28 U.S.C. § 1346(a)(2) . . . . . . . . . . . . . . . . . . . . . . . . . . .13

28 U.S.C. § 1491(a) . . . . . . . . . . . . . . . . . . . . . . . . . . . . .10

28 U.S.C. § 1491(a)(1) . . . . . . . . . . . . . . . . . . . . . . . . . . .21

28 U.S.C. § 1491(c) . . . . . . . . . . . . . . . . . . . . . . . . . . . . .21

28 U.S.C. § 2254(d)(1) . . . . . . . . . . . . . . . . . . . . . . . . . . .12

28 U.S.C. §§ 171(b) - 172(a) . . . . . . . . . . . . . . . . . . . . . . .13

*Page*

705 Ill. Comp. Stat. 505/1 . . . . . . . . . . . . . . . . . . . . . . . . . .19

Mich. Comp. Laws § 213.71 . . . . . . . . . . . . . . . . . . . . . . . .16

Mich. Comp. Laws Ann. § 600.6404(1) . . . . . . . . . . . . . .19

Minn. Const. Art. I, Sec. 13 . . . . . . . . . . . . . . . . . . . . . . . .15

Minn. Stat. § 117.025, Subd. 11(b) . . . . . . . . . . . . . . . . . . .18

Minn. Stat. § 117.045 . . . . . . . . . . . . . . . . . . . . . . . . . . . . .16

Minn. Stat. §§ 117.075-085 . . . . . . . . . . . . . . . . . . . . . . . . .16

N.J.S.A. 20:3-5. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .16

N.Y. Envtl. Conserv. Law § 25-0404 . . . . . . . . . . . . . . . . .17

New York Court of Claims Act, Art. 2, § 8. . . . . . . . . . .19

New York Court of Claims Act, Art. 2, § 9(2) . . . . . . . .19

New York Court of Claims Act, Art. 2, § 9(3) . . . . . . . .19

New York Eminent Domain Procedure Law 501(A). . .19

Ohio Rev. Code Ann. §§ 2743.01-.51 . . . . . . . . . . . . . . . .19

W. Va. Code §§ 14-2-1 to -29. . . . . . . . . . . . . . . . . . . . . . .19

*Page*

**OTHER AUTHORITIES**

ABA, Fifty-State Survey: Law of Eminent Domain (William G. Blake ed., 2012). . . . . . . . . . . . .15

Nichols on Eminent Domain, vol. 2A, § 6.01(12)(c) (2023) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .15

OLR Research Report: Post-*Kelo Eminent Domain Legislation in Other States*, Connecticut General Assembly (Sept. 6, 2005), https://www.cga.ct.gov/2005/rpt/2005-r-0662.htm (last visited Dec. 19, 2023). . . . . . . . . . . . . . . . . . . . . .18

Stephen F. Broadus IV, *Ten Years After Kelo v. City of New London and the Not So Probable Consequences*, 34 Miss. C. L. Rev. 323 (2015) . . . . .18

The Federalist and Other Constitutional Papers, No. 32 (E.H. Scott ed. 1898) . . . . . . . . . . . . . .3

The Federalist and Other Constitutional Papers, No. 45 (E.H. Scott ed. 1898) . . . . . . . . . . . . . .3

William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782 (1995) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .6, 10, 13

## INTERESTS OF AMICI CURIAE

Amici are the States of Minnesota, Alabama, Alaska, Idaho, Indiana, Louisiana, Mississippi, Nebraska, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, Utah, and Virginia. Amici States have a sovereign interest in their broad and robust just compensation regimes, which protect state-created property rights, subject to review in their own courts (and ultimately by this Court). The Amici States also have an interest in the scope of their traditional immunity from suit in federal court, which though not passed on below has been raised by a number of Petitioners' amici.

The Amici States support the State of Texas and the Fifth Circuit's decision to vacate and remand for further proceedings. The Fifth Circuit properly found the State of Texas' courts are open to hear inverse condemnation claims based on both the U.S. and Texas Constitutions with differing remedies and constraints based on the nature of the taking. Moreover, the Fifth Circuit's concurrences on the denial of rehearing en banc correctly concluded that there was no need to imply a constitutional cause of action under the Fourteenth and Fifth Amendments that would authorize direct actions against States or otherwise disturb the system of review by this Court to review decisions of the States' highest courts by writ of certiorari.

## SUMMARY OF THE ARGUMENT

In this nation's federalist tradition, States possess broad authority to set their own fiscal policy, protect their residents, and provide just compensation when property is taken for public use. With this in mind, this

Court has repeatedly held that federal courts generally lack authority to issue judgments for money damages against them. Even when federal courts issue injunctive relief, they do so against state officials, not the States themselves, pursuant to the *Ex Parte Young* doctrine. Although the Fourteenth Amendment makes many of the rights in the Constitution applicable to States, this Court has long held that it does not itself create a cause of action. And, though sovereign immunity is not directly raised by the Petitioners, this Court has recognized that the Fourteenth Amendment does not abrogate sovereign immunity absent specific legislation, which has never been enacted. The Court has also been cautious in recognizing implied causes of action, acknowledging that creating damages remedies is generally a function of Congress.

The Constitution's structure – and this Court's case law – also dictates that the proper forum against States for money damages is their own courts. Every sovereign – federal, state, and tribal – can only be sued in their own courts for money damages. Petitioners' rule would necessarily require this Court to revisit its sovereign immunity jurisprudence and upend carefully-crafted, State-created just compensation regimes. Every State has strong procedures in place to provide just compensation for takings. This Court regularly reviews takings cases originating in state courts, and state courts and legislatures have shown they respond to this Court's takings jurisprudence, often choosing to provide stronger protection.

## ARGUMENT

### I. Recognizing An Implied Cause Of Action Under The Constitution Undermines State Sovereignty.

Respect for States' status as separate sovereigns is a core concept in this Court's jurisprudence. Recognizing a cause of action for money damages under the Fifth and Fourteenth Amendments will necessarily subvert this unbroken line of case law, particularly *Will v. Michigan Dep't of State Police*. The Court should decline the invitation of Petitioners and amici to do so.

#### A. Principles Of State Sovereignty Underlie This Court's Longstanding Recognition That States Are Immune From Damages Claims In Federal Court.

"Although the Constitution establishes a National Government with broad, often plenary authority over matters within its recognized competence, the founding document 'specifically recognizes the States as sovereign entities.'" *Alden v. Maine*, 527 U.S. 706, 713, (1999) (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 71, n. 15 (1996)). In urging ratification of the Constitution, Alexander Hamilton reassured those fearful of a strong central government that "State governments would clearly retain all the rights of sovereignty which they before had […]." The Federalist and Other Constitutional Papers, No. 32, p. 169 (E.H. Scott ed. 1898) . *See also id.*, No. 45, p. 258 (recognizing the powers retained by the States as "numerous and indefinite," including "all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal

order, improvement, and prosperity of the State."). The Constitution likely would not have been ratified without such assurances. *E.g.*, *Edelman v. Jordan*, 415 U.S. 651 (1974).

This Court has long recognized state sovereignty as central to the constitutional design. *See, e.g., Franchise Tax Bd. of California v. Hyatt*, 139 S. Ct. 1485, 1493 (2019) (acknowledging that "the States considered themselves fully sovereign nations" at the founding). Even when deciding that States surrendered a measure of sovereignty in the "plan of the Convention," this Court has recognized that the Constitution "protect[s] the sovereign prerogatives of States within our government." *Torres v. Texas Dep't of Pub. Safety*, 597 U.S. 580, 587 (2022). After all, this Court has recognized that the "essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." *Addington v. Texas*, 441 U.S. 418, 431, (1979) (recognizing that states are free to develop their own civil commitment standards as long as they meet the constitutional minimum). Sovereign prerogatives include control over public lands, the police power to protect public health and welfare, and creating judicially enforceable remedies in their own courts. *See id*; *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 283 (1997) (recognizing state interest in "sovereign control over submerged lands"); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 240, (1984) (recognizing that Fifth Amendment's "'public use' requirement is thus coterminous with the scope of a sovereign's police powers."); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980) (recognizing that sovereignty includes "sovereign power to try causes in their courts").

Sovereign prerogatives also include protection of a State's fiscal integrity. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994) (noting that sovereign immunity was understood at the founding to protect States from "financial ruin"). That is why sovereign immunity is a "fundamental aspect" of state sovereignty, *Alden v. Maine*, 527 U.S. 706, 713 (1999), and a necessary corollary to "sovereignty and self-governance." *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382, 393 (2023).

Federal courts generally have no authority to order relief that is "measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials." *Edelman*, 415 U.S. at 668. Sovereign immunity bars federal courts from forcing States to pay money damages unless the immunity is validly waived or abrogated. *Alden*, 527 U.S. at 750–51 (recognizing that "[a] general federal power to authorize private suits for money damages would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens"); *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 364 (2001) (holding that purported abrogation of state sovereign immunity went beyond Congress' Enforcement Clause authority). "Sovereign immunity principles enforce an important constitutional limitation on the power of the federal courts." *Sossamon v. Texas*, 563 U.S. 277, 284 (2011). That is why this Court's tests for waiver and abrogation are "stringent." *Id.*; *Seminole Tribe*, 517 U.S. at 56. This is true even in cases of self-executing constitutional rights. *See Reich v. Collins*, 513 U.S. 106, 111-14 (1994) (noting that sovereign immunity generally bars tax refund claims

against States in federal court). *See also City of Boerne v. Flores*, 521 U.S. 507, 524 (1997) (describing the first eight amendments of the Constitution as "self-executing").

This Court has made clear that States can only be sued in federal courts for injunctive relief. *Ex Parte Young*, 209 U.S. 123, 159-60 (1908). But *Ex Parte Young* does not authorize federal courts to order States to pay money, even when such orders are framed in equitable terms. *Edelman*, 415 U.S. at 664. Requiring payment of retroactive damages from state treasuries attacks the doctrinal foundation on which *Ex Parte Young* rests. *Edelman*, 415 U.S. at 664; *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 124-35 (1984).

### B. Congress Has Not Abrogated State Sovereign Immunity For Takings Claims.

At the time of the founding and even after the ratification of the Fourteenth Amendment, sovereign immunity was the norm. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 239, n. 2, (1985); *Alden*, 527 U.S. 724 (1999) (noting that the "handful of state statutory and constitutional provisions authorizing suits or petitions of right against States only confirms the prevalence of the traditional understanding that a State could not be sued in the absence of an express waiver."). Private lawsuits against States were considered "a thing unknown to the law." *Hans v. Louisiana*, 134 U.S. 1, 16 (1890). This is true even in the takings context, in which just compensation was usually provided not by the judiciary but by the legislature. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 783 (1995) (surveying just

compensation practices in the founding era and noting "[t]the decision whether or not to provide compensation was left entirely to the political process.").

States necessarily yielded some aspects of sovereignty to the federal government in ratifying the Fourteenth Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455, (1976) (citing recognizing that the Fourteenth Amendment "shifted the federal-state balance").) The Fourteenth Amendment did not, however, create a cause of action. *See Coleman v. Ct. of Appeals of Maryland*, 566 U.S. 30, 43 (2012) (recognizing that Congress may exercise its Enforcement Clause authority only after identifying "a pattern of constitutional violations and tailor[ing] a remedy congruent and proportional to the documented violations."). Thus, Congress passed what became 42 U.S.C. §1983 in 1871 to "provide[] a federal forum to remedy many deprivations of civil liberties." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989). *See also Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 177 (2023) (discussing history of Section 1983); *Baker v. McCollan*, 443 U.S. 137, 145 n. 3 (1979) (holding that Section 1983 "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred […]").

In passing Section 1983, this Court has recognized that Congress "had no intention to disturb the States' Eleventh Amendment immunity and so to alter the federal–state balance in that respect." *Will*, 491 U.S. at 66 (noting case law from the Reconstruction Era clearly established sovereign immunity). *See also Talevski*, 599 U.S. at 179 (noting this Court's recognition that Congress did not intend to abolish immunities "firmly rooted in the

common law" in enacting Section 1983); *Quern v. Jordan*, 440 U.S. 332 (1979). Thus, states, state agencies, and state officials sued for money damages in their official capacity are not "persons" within the meaning of Section 1983. *Will*, 491 U.S. at 71. Moreover, even where rights are incorporated against the States, this Court has recognized that incorporation does not necessarily imply a judicially-enforceable right of action against a state. *Cf. Ramos v. Louisiana*, 140 S. Ct. 1390, 1406 (2020) (recognizing that the "scope of an incorporated right and whether a right is incorporated at all are two different questions.")

Inferring a cause of action against a state under the Fifth and Fourteenth Amendments would do what the Court expressly declined to do in *Will*: infer that the framers of the Constitution intended to make States suable in federal court. Indeed, amici supporting petitioner explicitly ask this Court to revisit state sovereign immunity in the takings context. Br. of Amicus Curiae Farm Bureau Federation, 10-16. But the Court's sovereign immunity jurisprudence has been consistently applied by this Court since the founding and has thus induced considerable reliance interests on the part of state governments and legislatures. *Cf. Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 800 (2014) (noting Congressional prerogative to weigh reliance interests involved in determining scope of tribal immunity). Neither Petitioner nor their amici have provided this Court with any reason to revisit this precedent and upset these reliance interests.

## II. This Court Generally Refrains From Recognizing Implied Causes Of Action.

This Court held just three years ago "there is no express cause of action under the Takings Clause." *Maine Community Health Options v. United States*, 140 S. Ct. 1308, 1328 n.12 (2020). This Court has also made clear its hesitancy to recognize implied causes of action, especially in the constitutional context. *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring); *Ziglar v. Abbasi*, 582 U.S. 120, 135 (2017). Petitioners acknowledge this hesitancy to recognize implied causes of action but effectively ask the Court to do just that. Pet. Br. 34-35.

Indeed, the Court describes its approach to implied causes of action with one word: "caution." *Hernandez v. Mesa*, 140 S. Ct. 735, 742 (2020). There is good reason to be cautious. *Egbert v. Boule*, 142 S. Ct. 1793, 1803 (2022); *Correctional Services*, 534 U.S. at 75. "[S]eparation-of-powers principles should be central to the analysis." *Ziglar*, 582 U.S. at 121. In deciding whether Congress or the Court should authorize a damages suit, the "answer will most often be will Congress." *Ziglar*, 582 U.S. at 75. This is particularly true where the Constitution gives Congress the explicit authority to make laws that intrude on state sovereign authority upon making appropriate findings. U.S. Const. Amend. 14, §5; *Coleman*, 566 U.S. at 43.

### A. Congress Has Not Created A Cause Of Action For Takings Claims Against States Or Tribes.

The creation of a cause of action is legislative in nature and involves the delicate balancing of policy considerations. *Egbert*, 142 S. Ct. at 1803. This Court has recognized that the legislative branch is the appropriate forum for policy considerations related to the creation of a cause of action. *Id.*; *Hernandez*, 140 S. Ct. at 741. This Court therefore gives the "utmost deference" to Congress to prevent subjugating its legislative power, and this is especially true in the appropriations and damages context. *Maine Community*, 140 S. Ct. at 1323. Congress has repeatedly recognized sovereigns' unique interests related to takings by limiting causes of action, forums, and waivers of sovereign immunity.

At the founding, payment of just compensation claims was generally thought to be a legislative function. Until the 1870s, Congress, not Courts, resolved and paid claims for just compensation under the Fifth Amendment. Treanor, *supra*, at 794 n. 69. Today, takings claims against the federal government retain a legislative character, as they must be brought to a legislative Article I court, the Court of Federal Claims. *Id.* That Court was established in 1887 to reduce the burden on Congress to process those claims. *Id*. With the Tucker Act, Congress again expressed its intent to respect the federal government's own sovereignty by granting only a limited waiver of sovereign immunity and only allowing money damage claims in one forum, the Court of Federal Claims. *Green v. U.S.*, 586 Fed. Appx. 586, 587 (Fed. Cir. Dec. 8, 2014) ("Tucker Act supplies a limited waiver of sovereign immunity only for claims within its reach."); 28 U.S.C. 1491(a) (permitting district courts to hear money damage claims less than $10,000).

More recently, in enacting the Indians Civil Rights Act of 1968, Congress again made clear its intent to respect sovereign interests and limit the forums in which such federal rights could be prosecuted. 25 U.S.C. § 1303; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). In fact, in *Santa Clara*, the Court held not only that "sovereign immunity protected a tribe from suit under the Act," but also that the Act "did not create a private cause of action cognizable in federal court, and that a tribal court was the appropriate forum for vindication for rights created by the Act." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 170 n.19 (1982) (Stevens. J., concurring); *Santa Clara Pueblo*, 436 U.S. at 58.

In short, Congress has never created a cause of action or otherwise authorized takings claims that would allow an individual to proceed against a sovereign anywhere but in their own courts. *Knick* is not to the contrary because municipalities are not sovereigns. *See Will*, 491 U.S. at 70.

### B. Habeas Remedies Are Described In Statute.

Petitioner's reference to the Habeas Clause actually cuts against their argument. Pet. Br. at 18. Although habeas is also a constitutionally-authorized remedy, judicial authority to grant the remedy is described in statute. *Ex Parte Bollman*, 8 U.S. 75, 77 (1807) ("By the judiciary act, all the beforementioned courts…shall have power to issues writs of scire facias, habeas corpus…"); *Ex Parte Dorr*, 44 U.S. 103, 105 (1845) (holding the Supreme Court's authority to issue the writ of habeas corpus was limited by the terms of the Judiciary Act of 1789). Congress has also repeatedly narrowed habeas relief through its legislative authority without this Court finding

Congress impermissibly diminished that constitutional right. *See*, *e.g.*, 28 U.S.C. § 2254(d)(1) (Antiterrorism and Effective Death Penalty Act).

In sum, no express cause of action exists. Despite having had over 150 years to promulgate a statute authorizing a cause of action under the Takings Clause against States, Congress has declined to do so. This Court should remain cautious of implied causes of action and refrain from implying a cause of action against the States in keeping with separation of powers principles and the States' sovereignty.

## III. An Implied Constitutional Cause Of Action Against States Would Upend States' Established And Robust Just Compensation Remedies.

As discussed above, Petitioner's proposal for a federal court takings remedy against States would be inconsistent with this Court's historic understanding of state sovereignty and separation of powers. It would also upend States' legislatively-created remedies, which are numerous and robust.

### A. The Proper Forum For A Takings Claim Against A Sovereign Is The Sovereign's Own Courts.

Currently, every sovereign – federal, tribal, and state – may only be sued in that sovereign's own courts for an alleged taking which all derive from the identical mandate of "just compensation." There is no reason to change that rule, and this Court should decline to do so. Petitioners' proposal for a self-executing direct cause of

action and general federal jurisdiction would create an unwarranted anomaly in which States would be the only sovereign to be sued outside their own courts for takings claims. Pet. Br. at 16.

For takings claims against the federal government asserting money damages, a legislative Article I court, the Federal Court of Claims, resolves the claims subject to review only in the Federal Circuit under a deferential standard. 28 U.S.C. § 171(b) - 172(a); *Hendler v. United States*, 175 F.3d 1374, 1378 (Fed. Cir. 1999) (acknowledging the clear error standard of review for Court of Federal Claims decisions "gives considerable deference to the trial court's factual findings."). *See generally* Treanor, *supra*, at 796 n. 69 (discussing passage of the Tucker Act). Article III district courts are not open to hear such claims against the federal government, with the only exception being a limited grant of jurisdiction for claims under $10,000. *See* 28 U.S.C. § 1346(a)(2); *McGuire v. United States*, 550 F.3d 2008 (9th Cir. 2008). There is no principled basis to allow the federal government to limit its sovereign immunity and restrict all its money damages to a single specialized court and not afford state sovereigns the same prerogative.

Similarly, tribal courts are the exclusive forum for takings claims against tribal governments. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). In *Santa Clara*, this Court recognized that Indian tribes have the power to make substantive law and the right "to enforce that law in their forums." *Id.*, citing *Willams v. Lee*, 358 U.S. 217 (1959). As with claims in the Court of Federal Claims, appellate review is extremely deferential and may only be sought pursuant to the writ of habeas corpus. 25

U.S.C. § 1303; *Santa Clara*, 436 U.S. at 70-71; *Valenzula v. Silversmith*, 699 F.3d 1199, 1203 (10th Cir. 2012).

Likewise, every State in the union offers a state court remedy for a taking. Although *Knick v. Township of Scott* allows property owners to bring a Section 1983 takings claim in federal court without first seeking a state law remedy, the circuits agree that *Knick* did not recognize a federal court remedy against a sovereign. *See, e.g.*, *Ladd v. Marchbank*, 971 F.3d 574, 579 (6th Cir. 2020); *Bay Point Properties, Incorporated v. Mississippi Transportation Commission*, 937 F.3d 454, 456-57 (5th Cir. 2019); *EEE Minerals, LLC v. State of North Dakota*, 81 F.4th 809, 815-16 (8th 2023); *Williams v. Utah Department of Corrections*, 928 F.3d 1209, 1214 (10th Cir. 2019); *74 Pinehurst LLC v. New York*, 59 F.4th 557, 570 (2d Cir. 2023); *Frein v. Pennsylvania State Police*, 47 F.4th 247, 257 (3d Cir. 2022). Because *Knick* was a claim against a municipality, the Court had no occasion to pass on the propriety of federal constitutional claims against a sovereign. The Court would not have lightly discarded its sovereign immunity jurisprudence without saying so. *See Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*.").

### B. State Courts Have Robust, Diverse Procedures For Addressing Just Compensation.

The bedrock principle of just compensation has always been that an aggrieved owner is "entitled to reasonable, certain, and adequate provision for obtaining compensation." *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 659 (1890). This Court in *Knick* accurately noted

that all 50 States have procedures to provide for just compensation. *Knick*, 139 S. Ct. at 2168; *see also* ABA, Fifty-State Survey: Law of Eminent Domain (William G. Blake ed., 2012) (available on Lexis). Consistent with these constitutional obligations, many States have developed a range of procedures to protect both owners and condemning authorities in eminent domain and inverse condemnation proceedings. That makes sense given the States' historic role in creating, defining, and defending property rights. *See Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972); *Rogers v. Tennessee*, 532 U.S. 451, 461 (2001); *Murr*, 582 U.S. at 393-94.

In fact, many state constitutions provide broader property protections than the federal constitution. About half of States, including Minnesota and Texas, provide broader constitutional protection for takings. Nichols on Eminent Domain, vol. 2A, § 6.01[12][c] (2023) (discussing States passing constitutional amendments so that property "could not be *taken* or *damaged* for public use without just compensation. Approximately one-half of the state constitutions contain similar provisions today."). In these States, compensation is provided when property is *damaged* or *destroyed* as well as "taken." Minn. Const. Art. I, Sec. 13; *In re Rapp*, 621 N.W.2d 781, 784-85 (Minn. 2001) ("While the provisions of the state and federal constitutions are similar, a review of state and federal case law makes it clear that the Minnesota Constitution guarantees significantly broader rights than those secured by the Fifth Amendment to the United States Constitution.").

In Minnesota, for example, property owners may sue for inverse condemnation. *Thomsen v. State by Head*,

170 N.W.2d 575, 580 (Minn. 1969); *see also* Minn. Stat. § 117.045. Technically, the action is a suit for mandamus, which, if successful, requires the trial court to order the condemning authority to institute statutory condemnation proceedings to value the property and award damages. The benefit of such a process is that all takings – de jure, de facto, inverse, or regulatory – follow the same procedures, which are extensive and robust. Those procedures include requiring that three disinterested commissioners with experience in real estate transactions actually go to the physical location to view the property before assessing its value and awarding damages. Minn. Stat. § 117.075 - 085. Any party dissatisfied with the Commissioners' award may then appeal for a trial de novo that is itself subject to three additional levels of appellate review, including to this Court. *Id.*

Other States likewise have implemented various procedures to avoid piecemeal litigation and ensure all claims are considered. For example, Iowa allows claims of inverse condemnation to be presented to its district court by certiorari, injunction, declaratory judgment, and recognizes a mandamus remedy to compel condemnation of property not included in a prior condemnation. *See ABA Fifty-State Survey*; *Mapes v. Madison County*, 107 N.W.2d 62, 64 (1961); *see also* Mich. Comp. Laws § 213.71 (joining counterclaims for inverse condemnation with any previously initiated formal condemnation proceeding); N.J.S.A. 20:3-5 (granting jurisdiction to the New Jersey Superior Court over "all matters in condemnation," including jurisdiction "to fix and determine the compensation to be paid and the parties thereto[.]").

Similarly, in the wake of *Penn Central*, States responded with processes to minimize damages to property owners and to protect their own regulatory authority. For example, under New York's Tidal Wetlands Act, if a permit denial is challenged, the court first determines whether the agency decision is supported by substantial evidence and then whether the regulatory action constitutes a taking requiring compensation. N.Y. Envtl. Conserv. Law § 25-0404. If the court rules in favor of the owner, "the Commissioner is directed, at his option, to either grant the requested permit or institute condemnation proceedings." *de St. Aubin v. Flacke,* 68 N.Y.2d 66, 70 (1986).

In sum, state just compensation processes work. They have worked since the founding. Petitioners' desired rule works a substantial and unwarranted change in the law.

### C. Property Rights Are Well-Protected In State Courts.

The diversity of the States' property protections strengthens property rights and ensures affected owners are justly compensated. Although Petitioner has not offered the Court any reason to be concerned about the fairness or efficacy of these procedures, the availability of certiorari review in this Court should allay any such concerns. The Court has the authority to review state court takings judgments to ensure Fifth Amendment rights are protected. *See* 28 U.S.C. § 1257 (providing authority to review state court judgments). The Court has not been shy about doing so. *See, e.g., Murr v. Wisconsin*, 582 U.S. 383, 392 (2017); *Kelo*, 545 U.S. at 490.

When this Court speaks, States listen. State legislatures are responsive to federal decisions even when their state is not a party to the litigation before the Court. For example, many States made changes in the wake of this Court's decision in *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005), holding that using eminent domain for economic development qualified as "public use" and was therefore entitled to just compensation. The Minnesota Legislature revised the definition of "public use" to limit the use of eminent domain to acquire property for redevelopment and mandated special findings to be made in a court hearing prior to condemnation. *See* Minn. Stat. § 117.025, Subd. 11(b). Within two months of this Court's decision, fifteen other States had introduced or already enacted legislation addressing *Kelo*. *See* OLR Research Report: Post-*Kelo Eminent Domain Legislation in Other States*, Connecticut General Assembly (Sept. 6, 2005).[1] And over the next several years an overwhelming number of States adopted legislation or constitutional amendments to increase protections against the use of eminent domain for economic development purposes. Stephen F. Broadus IV, *Ten Years After Kelo v. City of New London and the Not So Probable Consequences*, 34 Miss. C. L. Rev. 323, 331-44 (2015).

Petitioners in their brief, and Judge Oldham in his dissent on the denial for rehearing en banc, suggest that review by this Court of state supreme court decisions is generally insufficient or would be inadequate by requiring constant review of the same issue in all 50 States. Pet. Br. at 44; 63 F.4th 416, 433 (5th Cir. 2023). Such a contention

1. Available at https://www.cga.ct.gov/2005/rpt/2005-r-0662.htm (last visited Dec. 19, 2023).

has no basis. *Kelo* was a writ to the Supreme Court of Connecticut, and nearly every State in the union responded in short order. Simply put, review of state supreme court decisions remains effective, including for takings claims.

### D. Authorizing Federal Takings Claims Against States In Federal Courts Would Undermine State Just Compensation Processes And Invite Claim-Splitting.

Recognizing an implied cause of action against States in federal court would upend multiple States' frameworks for paying just compensation. Several States have created specialized courts of claims similar to the Court of Federal Claims. *See*, *e.g.*, New York Court of Claims Act, Art. 2, § 9(2), (3) (New York); 705 Ill. Comp. Stat. 505/1 (Illinois); Mich. Comp. Laws Ann. § 600.6404(1) (Michigan); W. Va. Code §§ 14-2-1 to-29 (2008) (West Virginia); Ohio Rev. Code Ann. §§ 2743.01-.51 (Ohio). In New York, for example, all monetary claims against the State of New York, including those for "appropriations" (i.e., condemnations, both de jure and de facto) and for constitutional torts such as regulatory takings, must be filed in the New York Court of Claims subject to the state's limited waiver of sovereign immunity. *See* New York Court of Claims Act, Art. 2, §§ 8, 9(2)-(3); New York Eminent Domain Procedure Law 501(A); *Matter of Friedenburg v. New York State Dep't of Env't Conservation*, 3 A.D.3d 86, 100 (2d Dep't 2003). An implied cause of action would upend these legislatively-established compensation regimes, implicating serious federalism concerns.

An implied federal cause of action could also effectively commandeer State authority to decide how it waives immunity and in which fora it consents to suits brought by its residents for just compensation money judgments. *Cf. Murphy v. NCAA*, 138 S. Ct. 1461, 1478 (2018) (citation omitted) (noting anti-commandeering principles apply only when a rule "regulate[s] the States' sovereign authority 'to regulate their own citizens.'"). Moreover, although state courts generally have common law authority to recognize implied causes of action under their own constitutions for state constitutional claims, only about a third of States have done so. *Burnett v. Smith*, 990 N.W.2d 289, 294 n. 3 (Iowa 2023) (identifying jurisdictions with implied causes of action for state constitutional claims and declining to recognize implied claim under Iowa Constitution); *Mack v. Williams*, 522 P.3d 434, 451 (Nev. 2022) (recognizing private right of action under Nevada Constitution). Recognition of an implied federal cause of action here would undermine States' traditional authority to decide the nature, scope, and proper forum for damages remedies.

Petitioners' position could also have unintended consequences for the federal government and federal courts. Petitioners' argument in a nutshell is that takings claims against States are founded on the Constitution and district courts have "jurisdiction of all civil actions arising under the Constitution" pursuant to 28 U.S.C. § 1331 regardless of the States' sovereign immunity. Pet. Br. at 16. Following that same reasoning, however, claims against the federal government, which are also founded on the Constitution, could be heard in every district court. Notably, the Tucker Act does not state that the Court of Federal Claims is the exclusive forum for such claims;

it simply states that tribunal "shall have jurisdiction." 28 U.S.C. § 1491(a)(1). In fact, the word "exclusive" appears only once, discussing the exclusive jurisdiction of a different tribunal, the Court of Internal Trade. *Id.* § 1491(c).

Additionally, States would be the only sovereign that could be sued twice for the same taking. Because federal courts are without authority to order state officials to conform their conduct to state law, state-law just compensation claims could only be heard in state court. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 124-35 (1984). A plaintiff would be able to bring suit in federal court, obtain discovery, and litigate to judgment on a federal taking claim. If they were not satisfied with the result, they could sue in state court and force the State to litigate the same takings claim under state law.

States ought to be on the same footing as every other sovereign in the federal system and have claims for money damages against them heard in their own courts. *See Alden*, 527 U.S. at 750 (recognizing that federal government retains its own sovereign immunity and finding States are entitled to a "reciprocal privilege"). "That a litigant's choice of forum is reduced has long been understood to be a part of the tension inherent in our system of federalism." *Pennhurst*, 465 U.S. at 123.

**CONCLUSION**

Petitioners' position necessarily intrudes on state sovereignty and undermines decades of this Court's case law. Petitioners and their amici have given this Court no good reason to depart from this long line of precedent. This Court should reject Petitioners' arguments and affirm the decision of the Fifth Circuit.

Respectfully submitted,

KEITH ELLISON
*Attorney General of Minnesota*

LIZ KRAMER*
*Solicitor General*
MICHAEL GOODWIN
COLIN O'DONOVAN
*Assistant Attorneys General*
445 Minnesota Street, Suite 1100
St. Paul, MN 55101
(651) 757-1010
liz.kramer@ag.state.mn.us

*Counsel for Amici Curiae*

December 20, 2023

**Additional Amici States**

STEVE MARSHALL
Attorney General of Alabama

TREG TAYLOR
Attorney General of Alaska

RAÚL LABRADOR
Attorney General of Idaho

THEODORE E. ROKITA
Attorney General of Indiana

JEFF LANDRY
Attorney General of Louisiana

LYNN FITCH
Attorney General of Mississippi

MICHAEL T. HILGERS
Attorney General of Nebraska

MATTHEW J. PLATKIN
Attorney General of New Jersey

JOSH STEIN
Attorney General of North Carolina

DREW WRIGLEY
Attorney General of North Dakota

DAVE YOST
Attorney General of Ohio

GENTNER DRUMMOND
Attorney General of Oklahoma

ELLEN F. ROSENBLUM
Attorney General of Oregon

ALAN WILSON
Attorney General of South Carolina

SEAN REYES
Attorney General of Utah

JASON S. MIYARES
Attorney General of Virginia