No. 22-913

IN THE
Supreme Court of the United States

RICHARD DEVILLIER, ET AL.,

Petitioners,

v.

STATE OF TEXAS,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR *AMICI CURIAE* NATIONAL ASSOCIATION OF REALTORS®, AMERICAN PROPERTY OWNERS ALLIANCE, AND TEXAS REALTORS® IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL AND STATUTORY AUTHORITIES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

The National Association of REALTORS® is a national trade association, representing 1.53 million members, including its institutes, societies, and councils involved in all aspects of the residential and commercial real estate industries. Members are residential and commercial brokers, salespeople, property managers, appraisers, counselors, and others engaged in the real estate industry. Members belong to one or more of the approximately 1,200 local and 54 state and territory associations of REALTORS®, and support private property rights, including the right to own, use, and transfer real property. REALTORS® adhere to a strict Code of Ethics, setting them apart from other real estate professionals for their commitment to ethical real estate business practices.

The American Property Owners Alliance is a nonprofit advocacy organization dedicated to representing the rights and interests of property owners throughout the country.

Texas REALTORS® is a statewide trade association made up of approximately 70 local associations and over 160,000 members, including 153,000 REALTORS®, located across the state. Texas REALTORS® represents REALTORS®' interests and advocates for private property rights throughout the state.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* and their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

Amici submit this brief because the decision below provides the government with a roadmap to take private property without providing just compensation. That practice threatens to eviscerate the real property interests of homeowners as well as the industries that drive homeownership nationwide. In light of Texas's misguided assertion that petitioners are seeking the judicial creation of a cause of action for just compensation, *amici* write to set the record straight.

SUMMARY OF ARGUMENT

The Takings Clause guarantees that "private property" shall not "be taken for public use, without just compensation." U.S. Const. amend. V. By promising "just compensation" in the event of a taking, this constitutional provision ensures property owners may seek this remedy in court without a legislature's blessing. Both Texas and the decision below nevertheless analogize this text-based cause of action to the implied rights of action of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and its progeny. But history shows that just-compensation suits have a different pedigree from the implied constitutional torts fashioned in the 1970s.

Although there was little need for federal courts to address whether the Takings Clause provided a cause of action for just compensation for much of the 19th Century, state courts came to this conclusion as to analogous provisions in their own state constitutions beginning in the 1870s. By the 1930s, this Court had joined their ranks, holding that actions "to recover just compensation" are "founded upon the Constitution." *Jacobs v. United States*, 290 U.S. 13, 16 (1933).

By contrast, in creating implied constitutional torts to enforce other constitutional provisions during the 1970s, this Court did not draw on any reference to a remedy in the constitutional text. Rather, it simply assumed that allowing damages for violations of constitutional rights would advance the Constitution's substantive guarantees.

As this Court has since recognized, that is a lawmaking enterprise off limits to federal courts, as nothing about a general constitutional prohibition indicates that it should be enforced by a particular remedy. The Takings Clause, by contrast, already specifies the appropriate relief for a taking of property—"just compensation"—a fact that critics of the *Bivens* regime at the time recognized. This Court can therefore adhere to its longstanding precedents on the Takings Clause without extending *Bivens* an inch.

ARGUMENT

The Takings Clause provides that "private property" shall not "be taken for public use, without just compensation." U.S. Const., amend. V. By commanding the payment of "just compensation" if a taking occurs, the Clause authorizes a cause of action to pursue that relief. The Fifth Circuit and Texas nevertheless compare that straightforward reading to the abandoned practice of creating new "causes of action in a common-law manner" exemplified by *Bivens*. Br. in Opp. 15; *see* Pet. App. 2a n.1 ("'A federal court's authority to recognize a damages remedy must rest … on a statute enacted by Congress.'"); Pet. Supp. App. 51a (Higginson, J., concurring in denial of rehearing en banc) ("This case is about whether there is an implied cause of action").

History says otherwise. The tradition of just-compensation suits intersects with the experiment of implied constitutional torts only as a point of *contrast*, and the bogeyman of *Bivens* should not obscure what the Constitution requires.

A. Constitutional Just-Compensation Actions Long Predate The *Bivens* Regime

Recognition that the Takings Clause provides a cause of action for just compensation was not something cooked up in the 1970s. Rather, that form of relief dates from at least a century earlier, when state courts in the 1870s held that the Clause's state analogs independently provided a mechanism to pursue just compensation in court. And this Court followed suit decades before *Bivens* created damages actions to enforce other constitutional rights.

1. The question whether the Takings Clause itself provides a cause of action was not adjudicated until after the Civil War. That was not because this section of the Bill of Rights was a dead letter upon ratification, but because just-compensation claims against the federal government were instead addressed by Congress. *See United States v. Mitchell*, 463 U.S. 206, 212-14 (1983); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 794 n.69 (1995).

Federal courts, by contrast, had little occasion to resolve cases involving the Takings Clause during much of the 19th Century. For one thing, this Court initially held that the Clause was "not applicable to the legislation of the states" and thus "solely" relevant to the federal government. *Barron v. Mayor & City Council of Baltimore*, 32 U.S. (7 Pet.) 243, 250-51

(1833). It was not until the tail end of the 19th Century that this Court recognized that the Takings Clause had been incorporated against the states through the Fourteenth Amendment. *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 238-41 (1897).

For its part, the federal government did not exercise eminent domain within a state's borders "until after the Civil War." Treanor, *supra*, at 794 n.69. Rather, it "relied on the states to condemn the property that would be used by the federal government." *Id.*; *see* William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1761-91 (2013) (discussing this history). A federal eminent domain power was not recognized until the 1870s. *Kohl v. United States*, 91 U.S. 367 (1875).

Moreover, until the Tucker Act's passage in 1887, there was no federal statute waiving the United States' sovereign immunity and providing jurisdiction over claims against the federal government for uncompensated takings. *Knick v. Township of Scott*, 139 S. Ct. 2162, 2176 (2019); *see Langford v. United States*, 101 U.S. 341, 343 (1879) ("It is to be regretted that Congress has made no provision by any general law for ascertaining and paying the just compensation" required in the event of a taking.). Nor did Congress provide for general federal-question jurisdiction until 1875. *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 377 (2012). Given all this, it would have been surprising for federal courts to have addressed the cause-of-action question here during the first century of the Republic.

2. Rather, the first tribunals to recognize that a constitutional guarantee of just compensation came with a cause of action were state courts interpreting state constitutions in the 1870s. *See Knick*, 139 S. Ct. at 2176; Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57, 109-32 (1999). Before then, state courts had little reason to address this question, as other forms of relief were readily available.

For starters, state legislatures would frequently include procedures to obtain just compensation in the acts that authorized the takings. *See Knick*, 139 S. Ct. at 2176; James W. Ely, Jr., *"That Due Satisfaction May Be Made:" The Fifth Amendment and the Origins of the Compensation Principle*, 36 AM. J. LEGAL. HIST. 1, 12-15 (1992); *see, e.g.*, *Stevens v. Proprietors of the Middlesex Canal*, 12 Mass. 466, 468 (1815). If a state effectively took property but refused to comply with the necessary condemnation procedures, a court could issue a writ of mandamus compelling it to do so. Brauneis, *supra*, at 69-70; *see, e.g.*, *People ex rel. Utley v. Hayden*, 6 Hill 359, 361-62 (N.Y. Sup. Ct. 1844).

When no statutory procedures were available, aggrieved property owners could enforce state takings clauses by bringing common law trespass suits against those who had taken their property. If the defendant responded that the taking had been authorized by a statute or ordinance, the plaintiff would reply that the law was unconstitutional. *Knick*, 139 S. Ct. at 2175-76; *see, e.g.*, *Callender v. Marsh*, 18 Mass. 418, 437-38 (1823).

Either way, the state complied with its constitutional duty "to provide some tribunal for the assessment of the compensation or indemnity, before which each party may meet and discuss their claims on equal terms." 2 James Kent, COMMENTARIES ON AMERICAN LAW 339 n.b (3d ed. 1836). As Chancellor Kent emphasized, "[a] provision for compensation is a necessary attendant on the due and constitutional exercise of the power of the law-giver to deprive an individual of his property without his consent." *Id.* at 339.

In the 1870s, however, states began to adopt "damagings clauses"—amendments to their takings clauses providing that property "'shall not be taken *or damaged* for public use without just compensation.'" Maureen E. Brady, *The Damagings Clauses*, 104 VA. L. REV. 341, 356 (2018). Various state statutory compensation procedures, however, still limited relief "to cases in which property had been *taken*." Brauneis, *supra*, at 120. Moreover, the only relief available to a property owner in a common law trespass action—namely, "retrospective damages" and "an injunction ejecting the government from his property going forward," *Knick*, 139 S. Ct at 2176—was inadequate when it came to government actions that had caused permanent property damage, such as the construction and operation of railroad on an abutting street. *See* Brauneis, *supra*, at 97-100, 133; *see, e.g.*, *City of Denver v. Bayer*, 2 P. 6, 15 (Colo. 1883) ("Unlike actions for trespass to realty, where the plaintiff can only recover for the injury done up to the commencement of the suit; in suits of this kind a single recovery may be had for the whole damage to result from the act, the injury being continuing and permanent.").

These amendments to state takings clauses therefore "forced many courts to consider the basis" of "non-statutory actions" to enforce guarantees of just compensation "for the first time." Brauneis, *supra*, at 120. And in doing so, state courts began "to hold that just compensation provisions were themselves the source of property owners' rights of action for damages." *Id.* at 109.

In *City of Elgin v. Eaton*, 83 Ill. 535 (1876), for instance, the Supreme Court of Illinois ruled that the state's amended takings clause provided a cause of action against a city to recover for property damage caused by street grading. *Id.* at 536-37. As the court explained, "the right to recover damages was given by the constitution" and "can not be altered by subsequent legislation." *Id.*

Riding circuit, Justice Miller reached a similar conclusion in construing Missouri's takings clause. He reasoned that "since the positive declaration of the constitution is that private property shall not be taken or damaged for public use without just compensation," "the law shall compel" an entity responsible for a taking "to make that just compensation." *Blanchard v. City of Kansas*, 16 F. 444, 446 (C.C.W.D. Mo. 1883).

3. After "Congress enabled property owners to obtain compensation for takings in federal court" by passing "the Tucker Act in 1887," this Court "joined the state courts in holding that the compensation remedy is required by the Takings Clause itself." *Knick*, 139 S. Ct. at 2176. Specifically, in 1933, it held in *Jacobs* that lawsuits seeking "just compensation for property taken" are "founded upon the Constitution of the United States." 290 U.S. at 16.

When a dam constructed by the federal government flooded their farms, the petitioners in *Jacobs* sued the United States under the Tucker Act "to recover compensation for the property taken." *Id.* at 15. The Fifth Circuit ruled that because "no right of action existed" under the statutes authorizing the dam's construction, the property owners could only recover under a theory of "implied contract." 63 F.2d 326, 327 (5th Cir. 1933). And because the United States had not waived sovereign immunity for interest on implied-contract claims, the Fifth Circuit concluded that the petitioners could not recover interest on their losses. *Id.*

This Court reversed. Writing for a unanimous Court, Chief Justice Hughes explained that the property owners could pursue their suits without relying on either "[s]tatutory recognition" or a theory of "implied contract." 290 U.S. at 16. That was because their "suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain" and thus "rested upon the Fifth Amendment." *Id.* And as the suits were "brought to enforce the constitutional right to just compensation," the petitioners could recover interest notwithstanding the limits on that remedy for actions "which rested upon an implied contract." *Id.* at 18.

Texas is therefore mistaken in asserting *Jacobs* involved "no question of the cause of action." Br. in Opp. 19. Because "the Tucker Act simply opens th[e] courts to plaintiffs already possessed of a cause of action," the petitioners could only prevail if *another* source of law served that role. *Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 594 n.22 (1949).

And because *Jacobs* ruled that the suits were not based on a theory of implied contract, the only possible source of a cause of action was the Constitution itself. *See Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827, 878 (1957) (noting that "the language of the *Jacobs* case indicates that the fifth amendment creates a right to just compensation," as "[t]he only other possible source of a right in these cases is the Tucker Act itself," but "its language deals only with jurisdiction"). Confirming the point, this Court would later distinguish *Jacobs* and other "cases centering in the Just Compensation Clause" from those analyzing statutory rights of action under the Tucker Act on the ground that the former "are tied to the language, purpose, and self-executing aspects of that constitutional provision." *United States v. Testan*, 424 U.S. 392, 401 (1976).

B. The *Bivens* Regime Sharply Contrasts With Constitutional Just-Compensation Actions

The creation of implied constitutional torts in *Bivens* is an entirely different story. Both the history of *Bivens* and this Court's later precedents make clear that the judicial fashioning of new causes of action to enforce other constitutional rights has nothing to do with claims under the Takings Clause.

1. *Bivens* "broke new ground by holding that a person claiming to be the victim of an unlawful arrest and search could bring a Fourth Amendment claim for damages against the responsible agents even though no federal statute authorized such a claim." *Hernandez v. Mesa*, 140 S. Ct. 735, 741 (2020). Despite admitting that "the Fourth Amendment does not in so many words provide for its enforcement by an award

of money damages for the consequences of its violation," the *Bivens* Court held that the Judiciary could redress a Fourth Amendment violation "through a particular remedial mechanism normally available in the federal courts"—"money damages." 403 U.S. at 396-97. Rather than wait for Congress to create this action, *Bivens* flipped the baseline: Provided there was "no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages," federal courts were free to "'use any available remedy to make good the wrong done.'" *Id.* It was enough, in Justice Harlan's words, to create a cause of action when "damages are necessary to effectuate" the policy "underpinning the substantive provisions." *Id.* at 402 (Harlan, J., concurring in the judgment).

Over the next decade, the Court twice extended *Bivens* to craft new causes of action in other areas of constitutional law—namely, a sex-discrimination claim under the Fifth Amendment, *Davis v. Passman*, 442 U.S. 228 (1979), and an inadequate-prison-care claim under the Eighth Amendment, *Carlson v. Green*, 446 U.S. 14 (1980). In a nutshell, the Court held that damages remedies were available so long as (i) there was a constitutional violation, (ii) damages could in theory compensate for it, and (iii) there was no particular reason why this remedy would be inappropriate. *See Carlson*, 446 U.S. at 18-19; *Davis*, 442 U.S. at 246-47. The default became that damages were available for any violation of constitutional rights, with the "possibility that 'the Court would keep expanding *Bivens* until it became the substantial equivalent of 42 U.S.C. § 1983.'" *Ziglar v. Abbasi*, 582 U.S. 120, 132 (2017) (plurality op.).

This trio of opinions was the product of "'the heady days in which this Court assumed common-law powers to create causes of action.'" *Egbert v. Boule*, 596 U.S. 482, 491 (2022). Under "this *ancien regime*" of the 1960s and 1970s, "the Court assumed it to be a proper judicial function to provide such remedies as are necessary to make effective a statute's purpose" and therefore would "imply causes of action not explicit in the statutory text itself." *Hernandez*, 140 S. Ct. at 741 (cleaned up); *see, e.g.*, *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964) ("[I]t is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose"). "*Bivens* extended this practice to claims based on the Constitution itself." *Hernandez*, 140 S. Ct. at 741; *see Bivens*, 403 U.S. at 397 (citing *Borak*).

Since then, this Court has "come 'to appreciate more fully the tension between' judicially created causes of action and 'the Constitution's separation of legislative and judicial power,'" which is why it "has not implied additional causes of action under the Constitution" in the wake of the *Bivens* trilogy. *Egbert*, 596 U.S. at 491. Because "[n]o law pursues its purposes at all costs … a lawmaking body that enacts a provision that creates a right or prohibits specified conduct may not wish to pursue the provision's purpose to the extent of authorizing private suits for damages." *Hernandez*, 140 S. Ct. at 741-42 (cleaned up). For a court to hold that "a damages remedy is implied by a provision that makes no reference to that remedy" therefore "may upset the careful balance of interests struck by the lawmakers." *Id.* at 742. Indeed, as Justice Harlan candidly observed in *Bivens*, in determining "whether compensatory relief is necessary or appropriate to the

vindication of the interest asserted, … the range of policy considerations we may take into account is at least as broad as the range of those a legislature would consider with respect to an express statutory authorization of a traditional remedy." 403 U.S. at 407 (Harlan, J., concurring in the judgment).

2. The "judicially created causes of action" in *Bivens* and its extensions, *Egbert*, 596 U.S. at 491, stand poles apart from constitutional just-compensation actions. Unlike implied constitutional torts, the latter suits raise no separation-of-powers concerns. Because the Constitution itself specifies that "just compensation" is required for a taking, U.S. Const., amend. V, recognizing that the Takings Clause provides a cause of action to obtain just compensation poses no risk of the judicial creation of "remedy" for "a provision that makes no reference to that remedy," *Hernandez*, 140 S. Ct. at 741-42.

Nor do courts have to "evaluate a range of policy considerations at least as broad as the range a legislature would consider" in concluding that the Takings Clause provides a mechanism to obtain just compensation in court. *Egbert*, 596 U.S. at 491 (cleaned up). Rather, the Constitution has already settled what the appropriate remedy should be. As Judge Higginson admitted below, "unlike other provisions in the Bill of Rights, the Takings Clause refers to 'compensation,'" so "[it] may be that an implied cause of action against the federal government in the Takings Clause is not 'implied' as that term has been used in the Supreme Court's post-*Bivens* decisions." Pet. Supp. App. 54a n.1 (Higginson, J., concurring in denial of rehearing en banc).

Indeed, this Court has long understood that the Judiciary, rather than Congress, plays a key role in ensuring an appropriate remedy for a taking. While "[t]he legislature may determine what private property is needed for public purposes"—for "that is question of a political and legislative character"—"the question of compensation is judicial," for "[t]he constitution has declared that just compensation shall be paid." *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 327 (1893); *see Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. (11 Pet.) 420, 571 (1837) (explaining that a "legislature" cannot "constitutionally … assess the amount of compensation to which the complainants are entitled" in a "bind[ing]" fashion because they "are entitled to an adequate compensation for the property taken").

The history of *Bivens* confirms that actions under the Takings Clause are a different animal from implied constitutional torts. While "the courts and litigants in *Bivens* … disagree[d] about whether individual rights provisions generally (and the Fourth Amendment in particular) could serve as swords rather than shields," they "all agreed on one thing: the Just Compensation Clause was a sword." Brauneis, *supra*, at 59. For example, in refusing to create a damages action for Webster Bivens, the Second Circuit relied on *Jacobs* to distinguish the Takings Clause from other constitutional provisions on the ground that this portion of "the Fifth Amendment [is] self-executing, creating a duty to pay upon the government even in the absence of specific statutory authorization for suits to enforce the right to just compensation." 409 F.2d 718, 723 (2d Cir. 1969), *rev'd*, 403 U.S. 388.

In defending that judgment, the federal government agreed that the Takings Clause was a special case. As the Solicitor General explained, *Jacobs* "held that under the Fifth Amendment a private party had a right of action against the government for just compensation for the taking of his property" based on "the very language of the Fifth Amendment." Br. for the Respondents at 15-16, *Bivens*, 403 U.S. 388 (No. 301), 1970 WL 122211 (*Bivens* Resp. Br.). But "[u]nlike the Fifth Amendment," he observed, "there is nothing in the Fourth Amendment that contemplates any payment of money." *Id.* at 16. In fact, the Solicitor General went so far as to analogize *Jacobs* to *Ex Parte Young*, 209 U.S. 123 (1908), observing that the remedy in both cases "was essential to protect against infringement of secured rights." *Bivens* Resp. Br. 18.[2]

Then-Justice Rehnquist drew the same distinction in his dissent from the last entry in the *Bivens* trilogy, where he condemned "the lack of a textual constitutional foundation or any precedential or other historical support" for this line of cases. *Carlson*, 446 U.S. at 35 (Rehnquist, J., dissenting). Specifically, in observing that "[n]o similar authority of federal courts

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[2] The federal government has continued to maintain that the Takings Clause is distinct from other constitutional provisions. More recently, it explained that while "this Court has never held that a provision of the Constitution confers an express or implied right of action against the United States based merely on a conclusion that a constitutional provision is 'money-mandating,'" this Court has recognized "an express right of action under the Takings Clause." U.S. Reply Br. at 20, *United States v. Elkhorn Mining Co.*, 553 U.S. 1 (2008) (No. 07-308), 2008 WL 727812 (discussing *Testan*, 424 U.S. 392); *see id.* at 19 ("Only a very small number of constitutional provisions can be construed to create private causes of action of their own force.").

to award damages for violations of constitutional rights had ever been recognized prior to *Bivens*," he explained that "[t]he Just Compensation Clause … is not an exception here because the express language of that Clause requires that 'compensation' be paid for any governmental taking." *Id.* at 43 & n.9. And seven years later, the same Justice Rehnquist—now serving as Chief Justice—would author this Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), which confirmed that "it has been established at least since *Jacobs v. United States*, 290 U.S. 13 (1933), that claims for just compensation are grounded in the Constitution itself." *Id.* at 315.

That one of *Bivens*'s sharpest critics could find it "clear that it is the Constitution that dictates the remedy for interference with property rights amounting to a taking" only underscores that the two frameworks are independent. *Id.* at 316 n.9 Because the Takings Clause by its terms operates "to secure *compensation* in the event of otherwise proper interference amounting to a taking," *id.* at 315, there is no need for this Court to embrace the legislative "task of evaluating the pros and cons of creating judicial remedies for particular wrongs" to reverse the decision below, *Carlson*, 446 U.S. at 36 (Rehnquist, J., dissenting). Rather, this Court can simply adhere to text, history, and precedent by reaffirming that "a landowner is entitled to bring an action in inverse condemnation as a result of the self-executing character of the constitutional provision with respect to compensation." *First English*, 482 U.S. at 315 (cleaned up).

CONCLUSION

The judgment below should be reversed.

November 20, 2023 Respectfully submitted,

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