No. 22-52

In The
Supreme Court of the United States

ARIYAN INCORPORATED, DOING BUSINESS AS DISCOUNT CORNER, *ET AL.*,
Petitioners,

v.

SEWERAGE & WATER BOARD OF NEW ORLEANS, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF *AMICI CURIAE* REASON FOUNDATION, SOUTHEASTERN LEGAL FOUNDATION, NATIONAL ASSOCIATION OF REVERSIONARY PROPERTY OWNERS, AND PROFESSOR JAMES W. ELY, JR., IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the Fifth Amendment's self-executing command that the government justly compensate an owner when the government takes private property mean the government must promptly pay the owner or does the owner's right to compensation depend upon the legislature appropriating funds to compensate the owner?

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES -- Continued

Page

TABLE OF AUTHORITIES -- Continued

Page

TABLE OF AUTHORITIES -- Continued

Page

Constitutions, Statutes, and Rules

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Reason Foundation is a nonpartisan public policy think tank, founded in 1978. Reason's mission is to advance a free society by developing and promoting libertarian principles and policies — including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing *Reason* magazine, online commentary, and policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason files briefs on significant constitutional issues.

Southeastern Legal Foundation (SLF), founded in 1976, is a national, nonprofit legal organization dedicated to defending liberty and Rebuilding the American Republic. In particular, SLF advocates to protect individual rights and the framework set forth to protect such rights in the Constitution, including the Fifth Amendment's guarantee of just compensation. This aspect of its advocacy is reflected in the regular representation of those challenging government overreach and guarding individual liberty. See, *e.g.*, *Utility Air Regulatory Group* v. *EPA*, 573 U.S. 302 (2014); *National Ass'n of Mfrs.* v. *Department of Defense*, 138 S.Ct. 617 (2018).

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[1] In accordance with this Court's Rule 37.2(a), all counsel of record for the parties received timely notice of the intention to file this brief, and both petitioners and respondents have consented to the filing of this brief. Pursuant to Rule 37.6, no counsel for any party authored any part of this brief, and no person or entity other than *amici curiae* made a monetary contribution intended to fund its preparation or submission.

National Association of Reversionary Property Owners (NARPO) is a Washington State not-for-profit educational foundation whose purpose is to educate property owners concerning the defense of their property rights. NARPO has assisted thousands of property owners nationwide and has been involved in litigation protecting an individual's constitutional right to due process and just compensation as guaranteed by the Fifth Amendment. See, *e.g.*, *Preseault* v. *Interstate Commerce Comm'n*, 494 U.S. 1 (1990) (*amicus curiae*); *NARPO* v. *Surface Transportation Board*, 158 F.3d 135 (DC Cir. 1998).

Professor James W. Ely, Jr., is the Milton R. Underwood Professor of Law Emeritus at Vanderbilt University Law School. Professor Ely is a renowned property law expert and legal historian who is the co-author *The Law of Easements & Licenses in Land* (revised ed. 2021), and the author of *The Guardian of Every Other Right: A Constitutional History of Property Rights* (3rd ed. 2008), *Railroads & American Law* (2001), and *The Contract Clause: A Constitutional History* (2016). The U.S. Supreme Court and twenty-one other federal courts have relied upon Professor Ely's scholarship. See *Brandt Revocable Trust* v. *United States*, 572 U.S. 93, 96 (2014), *United States Forest Service* v. *Cowpasture River Preservation Ass'n*, 140 S.Ct. 1837, 1844 (2020), and *Sveen* v. *Melin*, 138 S.Ct. 1815, 1828 (2018) (Gorsuch, J., dissenting). Courts in forty-one states and territories have cited Professor's Ely's work, including twenty-nine state supreme courts.

INTRODUCTION

The Sewerage & Water Board of New Orleans (Sewerage Board) took private property from seventy owners. The Sewerage Board did not pay the owners but forced the owners to go to court and sue for compensation.[2] The owners won. Two Louisiana state courts held the Sewerage Board took these owners' private property and must pay the owners $10.5 million in compensation. *Ariyan, Inc.* v. *Sewerage & Water Board of New Orleans*, 29 F.4th 226, 228 (5th Cir. 2022). There is no dispute about this. But, instead of paying the owners, the Sewerage Board said, "sorry, we didn't appropriate the money."[3]

The owners went to federal court to enforce their Fifth Amendment right to compensation. But the district court dismissed the owners' claim, and a panel of the Fifth Circuit affirmed, contrary to this Court's holding in *Knick* v. *Township of Scott*.[4] The Fifth

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[2] Justice Thomas concurred in *Knick* v. *Township of Scott* to emphasize, "[t]his 'sue me' approach to the Takings Clause is untenable. The Fifth Amendment does not merely provide a damages remedy to a property owner willing to shoulder the burden of securing compensation after the government takes property without paying for it. Instead, it makes just compensation a prerequisite to the government's authority to take property for public use." 139 S.Ct. 2162, 2180 (2019) (internal quotations and citations omitted).

[3] The Sewerage Board, in effect, adopted Judge Smails' dictum from *Caddyshack*, "you'll get nothing and like it."

[4] "[A] property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it. *** And the property owner may sue the government at that time in federal court for the 'deprivation' of

Circuit panel wrongly supposed the Fifth Amendment guarantee of "just compensation" depends upon legislative grace. The Fifth Circuit wrongly premised its opinion upon a misreading of this Court's decision in *Folsom* v. *City of New Orleans*, 109 U.S. 285 (1883), condemning these owners to a "*Folsom* Prison"[5] in which the government may take their property but never pay.

SUMMARY OF ARGUMENT

This Court should grant the petition for certiorari to resolve a conflict with the First Circuit[6] and affirm this Court's jurisprudence holding the Fifth Amendment guarantee of "just compensation" is self-executing, and as such, does not depend upon an act of legislative grace any more than the other provisions of the Bill of Rights. As articulated by Chief Justice Marshall in *Marbury* and in dissent in *Folsom* by this Court's "Great Dissenter,"[7] an unenforceable judgment is no judgment at all.

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a right 'secured by the Constitution.' 42 U.S.C. § 1983." 139 S.Ct. at 2170.

[5] Johnny Cash, *Folsom Prison Blues* (1957) ("I'm stuck in Folsom prison, and time keeps draggin' on *** Well I know I had it coming, I know I can't be free/But those people keep a-movin'/And that's what tortures me.").

[6] See *In re Financial Oversight & Management Board* v. *Cooperativa de Ahorro*, 41 F.4th 29, 43 (1st Cir. 2022) (holding "Fifth Amendment right to receive just compensation [cannot be changed] into a mere monetary obligation that may be dispensed with by statute").

[7] Peter S. Canellos, *The Great Dissenter: The Story of John Marshall Harlan, America's Judicial Hero* (2021), pp. 2-3.

The Fifth Amendment provides, "No person shall *** be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." It "*does not say:* 'Nor shall private property be taken for public use, *without an available procedure that will result in compensation*.'"[8] And as this Court even more recently declared, "taking cases are easily resolved "using a simple *per se* rule: The government must pay for what it takes."[9]

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[8] *Knick*, 139 S.Ct. at 2170 (emphasis added).

[9] *Cedar Point Nursery* v. *Hassid*, 141 S.Ct. 2071, 2072 (2021). See also *Horne* v. *Department of Agriculture*, 576 U.S. 350, 367 (2015) ("Any physical taking of [private property] for public use must be accompanied by just compensation."); *In re Board*, 41 F.4th at 46 ("The Fifth Amendment provides that if the government takes private property, it must pay just compensation.").

ARGUMENT

I. This Court should grant certiorari to resolve the split between the circuits.

A. Contrary to the Fifth Circuit, the First Circuit correctly applied this Court's Fifth Amendment jurisprudence, which holds, "if the government takes private property, it must pay just compensation."[10]

Government will always be tempted to take private property and avoid paying the owner. See, *e.g.*, *Brandt*, 572 U.S. at 100 (holding United States violated Just Compensation Clause for imposing a recreational trail easement across owner's land when the government attempted to avoid paying compensation by suing landowners "seeking *** an order quieting title in the United States"). Both the Sewerage Board and Puerto Rico have attempted to do just that.

Puerto Rico argued that this Court, in *Knick*, held that "a Takings Clause violation is keyed only on the actual taking of property rather than on any subsequent denial of just compensation." *In re Board*, 41 F.4th at 42 ("The Board would thus have us understand just compensation as an entitlement to payment that is untethered from the substantive Takings Clause violation itself."). The First Circuit rejected Puerto Rico's argument, explaining,

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[10] *In re Board*, 41 F.4th at 46.

> nothing in *Knick's* holding casts doubt on the Fifth Amendment's requirement that just compensation be paid. Recognizing that the "right to full compensation arises at the time of the taking" does not imply that the subsequent denial of that compensation does not also raise Fifth Amendment concerns. We decline to read *Knick* as changing the Fifth Amendment right to receive just compensation into a mere monetary obligation that may be dispensed with by statute.

Id. at 43.[11]

The First Circuit explained that Puerto Rico could not claim "that any laws enacted pursuant to [Congress' Article I] powers would trump the constitutional requirement to pay just compensation for taken property merely by nature of their mention in the Constitution. Otherwise, Congress might largely do away with the requirement to pay just compensation altogether." *In re Board*, 41 F.4th at 42. "[A]s the Supreme Court has explained," the First Circuit stated, "Just compensation [ ] does not serve only as a remedy for a constitutional wrong; it serves also as a structural limitation on the government's very authority to take private property for public use." *Id.* at 44 (citing *First English Evangelical Lutheran Church of Glendale* v. *Los Angeles County*, 482 U.S. 304, 314 (1987)). "Simply put, the Fifth Amendment

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[11] Cf. *Cobb* v. *City of Stockton*, 909 F.3d 1256, 1267 (9th Cir. 2018) (holding "asserting an unconstitutional taking [does not] make [a claim] immune from evaluation on the merits in bankruptcy").

contemplates a '*constitutional obligation to pay just compensation*.'" *Id.* (quoting *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960)) (emphasis added).[12]

The First Circuit continued, "[a]s the [Supreme] Court has stated, 'where the government's activities have already worked a taking *** *no subsequent action by the government can relieve it of the duty to provide compensation*.' Simply put, the Fifth Amendment contemplates a "constitutional obligation to pay just compensation."' *In re Board*, 41 F.4th at 44.[13] Indeed, the First Circuit explained, "in the case of the Takings Clause, the Constitution clearly spells out both a monetary remedy and even the necessary quantum of compensation due. Accordingly, the denial of adequate (read: just) compensation for a taking is itself constitutionally prohibited." *Id.* at 45 (citing *First English*, 482 U.S. at 316 ("reaffirming the Supreme Court's 'frequently repeated' view that 'in the event of a taking, *the compensation remedy is required by the Constitution*'") (emphasis added).

The First Circuit correctly and appropriately applied this Court's holdings in *Knick* and *Cedar Point Nursery* to Puerto Rico, holding, "the issue we decide is rather simple. The Fifth Amendment provides that if the government takes private

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[12] See also *Armstrong*, 364 U.S. at 49 ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

[13] Emphasis added; quoting *First English*, 482 U.S. at 315, 321 (quoting *Armstrong*, 364 U.S. at 49).

property, *it must pay* just compensation." *In re Board*, 41 F.4th at 46 (emphasis added). This Court should grant the petition for certiorari to correct the Fifth Circuit's error and affirm this Court's Fifth Amendment jurisprudence.

B. The Sewerage Board violated its "categorical duty" to justly compensate these landowners.

The legitimacy of government's eminent domain power is premised upon the government's "categorical" duty to justly compensate the owner. See *Arkansas Game and Fish Comm'n* v. *United States*, 568 U.S. 23, 31 (2012) ("[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner.");[14] *Horne*, 576 U.S. at 358, 367 ("The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home. *** Any physical taking of [private property] for public use must be accompanied by just compensation.").

Neither the federal government, nor a state or local government, may escape its "categorical duty" to compensate landowners by creating a scheme denying owners the ability to obtain just compensation. See *Seaboard Air Line Railway* v. *United States*, 261 U.S. 299, 304 (1923) ("Just compensation is provided for by the Constitution and the right to it cannot be taken away by statute."). See also *Cedar Point Nursery*, 141

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[14] Quoting *Tahoe-Sierra Preservation Council* v. *Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002).

S.Ct. at 2072 ("taking cases are easily resolved "using a simple *per se* rule: The government must pay for what it takes").

A landowner has been justly compensated – and the owner's Fifth Amendment right to "just compensation" satisfied – *only* when the government actually pays the owner an amount sufficient to put the owner in "as good position pecuniarily as he would have occupied if his property had not been taken." *United States* v. *Miller*, 317 U.S. 369, 373 (1943) (citing, 261 U.S. at 304).

In *Knick*, this Court held that "because the [constitutional] violation is complete at the time of the taking, pursuit of a remedy in federal court need not await any subsequent state action. Takings claims against local governments should be handled the same as other claims under the Bill of Rights." 139 S.Ct. at 2177. As Justice Harlan wrote in dissent in *Folsom*,

> It is also said by my brethren that plaintiffs are not deprived of their property in these judgments because at the time they are unable to collect them. No state shall "deprive any person of life, liberty, or property without due process of law," is the mandate of the constitution. Could a state law depriving a person of his liberty be sustained upon the ground that such deprivation was only for a time?
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> 109 U.S. at 295.

Knick ends any debate, wherein this Court explained, "[t]he [Just Compensation] Clause provides: '[N]or shall private property be taken for public use, without just compensation.' *It does not say:* 'Nor shall private property be taken for public use, *without an available procedure that will result in compensation*.'" *Knick*, 139 S.Ct. at 2170 (emphasis added). The Sewerage Board and the Fifth Circuit wrongly concluded the government needn't pay these landowners because these landowners have "an available procedure that will [someday] result in compensation." As this Court declared in *Knick*,

> If a local government takes private property without paying for it, that government has violated the Fifth Amendment – just as the Takings Clause says – without regard to subsequent state court proceedings. And the property owner may sue the government at that time in federal court for the "deprivation" of a right "secured by the Constitution."
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> *Id.* (quoting 42 U.S.C. §1983).

II. This Court should grant the petition for certiorari to affirm the principle that the Fifth Amendment is self-executing.

A. The Fifth Amendment's guarantee of "just compensation" is self-executing.

The Fifth Circuit condemned these owners to a *Folsom* Prison, ignoring this Court's subsequent, clear, and well-established Fifth Amendment jurisprudence. *Folsom* is not a Fifth Amendment case but statutory case. 109 U.S. at 287 (The city's "liability for the damages is created by a law of the legislature, and can be withdrawn or limited at its pleasure."). Yet the Fifth Circuit wrongly read *Folsom* as limiting the Fifth Amendment's constitutional right of compensation guaranteed by the Just Compensation Clause.

In *Folsom*, Justice Harlan wrote that "[t]o withhold from the citizen who has a judgment for money the judicial means of enforcing its collection *** is to destroy the value of the judgment as property." *Folsom*, 109 U.S. at 294, 297 (Harlan, J., dissenting). Justice Harlan explained that "[s]ince the value of the judgment, as property, depends necessarily upon the remedies given for its enforcement, the withdrawal of all remedies for its enforcement, and compelling the owner to rely exclusively upon the generosity of the judgment debtor, is, I submit, to deprive the owner of his property. *Id.* at 295. Justice Harlan continued, "it is said that the plaintiffs are not deprived of their judgments, so long as they continue to be existing liabilities against the city. My answer is, that such

liability upon the part of the city is of no consequence, unless, when payment is refused, it can be enforced by legal proceedings." *Id.* (citing *Pumpelly* v. *Green Bay & Mississippi Canal Co.*, 80 U.S. 166, 177 (1871)).[15]

Justice Brennan followed Justice Harlan's example, dissenting in *San Diego Gas & Electric* v. *San Diego*, 450 U.S. 621, 654 (1981), where he explained that the Fifth Amendment guarantee of just compensation is self-executing:

> *As soon as private property has been taken*, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has already suffered a constitutional violation, and *the self-executing character of the constitutional provision with respect to compensation is triggered.* This Court has consistently recognized that the just compensation requirement in the Fifth Amendment is not precatory: *once there is a "taking" compensation must be awarded.*[16]

Although Justice Brennan's view in *San Diego Gas* was stated in dissent, this Court later recognized its

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[15] Fourteen years following his dissent in *Folsom*, Justice Harlan would write the opinion for this Court in the landmark case of *Chicago, Burlington & Quincy Railroad Co.* v. *Chicago*, 166 U.S. 226, 241 (1897), applying the Fifth Amendment to the states.

[16] Emphasis added.

wisdom, expressly adopting it in *First English*, 482 U.S. at 315.[17] As this Court explained in *Knick*,

> In holding that a property owner acquires an irrevocable right to just compensation immediately upon a taking, *First English* adopted a position Justice Brennan had taken in an earlier dissent. In that opinion, Justice Brennan explained that "once there is a 'taking,' compensation *must* be awarded" because "[a]s soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has *already* suffered a constitutional violation."
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> 139 S.Ct. at 2172 (emphasis in original).

B. The Fifth Amendment's self-executing guarantee of "just compensation" is a principle recognized before the founding of the Republic.

The Fifth Amendment's self-executing guarantee of payment of "just compensation," rooted in Magna Carta, mandates that the determination of the compensation due an owner is an "inherently judicial"

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[17] This Court in *First English* held, "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.'" 482 U.S. at 315 (quoting *United States* v. *Clarke*, 445 U.S. 253, 257 (1980) (emphasis added).

responsibility that cannot be assumed or barred by the legislature.[18]

Blackstone instructed, "The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisition, without any control or diminution, save only by the laws of the land."[19]

Kent similarly observed the constitutional protection of property is a "principle in American constitutional jurisprudence, [that] is founded in natural equity, and is laid down by jurists as an acknowledged principle of universal law."[20] "As Chancellor Kent explained when granting a property owner equitable relief, the Takings Clause and its analogs in state constitutions required that 'a fair compensation must, in all cases, be *previously* made

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[18] Chief Justice Roberts explained that the Fifth Amendment right of compensation arises from Magna Carta, stating, "The principle reflected in the [Just Compensation] Clause goes back at least 800 years to Magna Carta ***. Clause 28 of that charter forbade any 'constable or other bailiff' from taking 'corn or other provisions from any one without immediately tendering money therefor ***.' The colonists brought the principles of Magna Carta with them to the New World, including that charter's protection against uncompensated takings of personal property." *Horne*, 576 U.S. at 358. See also *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 327-28 (1893).

[19] William Blackstone, *Commentaries on the Law of England* (1768), Book I §§191-92 (the three rights are: "the right of personal security, the right of personal liberty, and the right of private property").

[20] James Kent, *Commentaries on American Law*, Lecture XXXIV.

to the individuals affected.'" *Knick*, 139 S.Ct. at 2176.[21] Thus, this Court continued, at the founding,

> [i]f a government took property without payment, a court would set aside the taking because it violated the Constitution and order the property restored to its owner. The Framers meant to prohibit the Federal Government from taking property without paying for it. Allowing the government to keep the property pending subsequent compensation to the owner, in proceedings that hardly existed in 1787, was not what they envisioned.
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> *Id.*

Indeed, a landowner's right to be secure in his property is one of the primary objects for which the national government was formed. In *United States* v. *Jones*, 565 U.S. 400, 405 (2012), this Court recalled Lord Camden's famous holding in *Entick* v. *Carrington*, 95 Eng. Rep. 807 (K.B. 1765), a "case we have described as a 'monument of English freedom' 'undoubtedly familiar' to 'every American statesman' at the time the Constitution was adopted ***." Quoting Lord Camden, this Court stated, "[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; *** if he will tread upon his neighbour's ground, he must justify it by law. *Jones*,

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[21] Quoting *Gardner* v. *Newburgh*, 2 Johns, Ch. 162, 166 (N.Y. 1816) (emphasis added by this Court in *Knick*).

565 U.S. at 405.[22] Evoking John Locke, Lord Camden further declared, "The great end, for which men entered into society, was to secure their property."[23]

The Framers drafted our Constitution embracing the Lockean view that "preservation of property [is] the end of government, and that for which men enter into society ***." John Locke, *Second Treatise on Civil Government*, Ch. XI §138. Madison declared, "Government is instituted to protect property of every sort ***. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*."[24] In *Lynch* v. *Household Fin. Corp.*, 405 U.S. 538, 552 (1972), this Court rightly observed, "the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights ***. That rights in property are basic civil rights has long been recognized."[25]

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[22] Quoting *Entick*, 95 Eng. Rep. at 817.

[23] *Entick*, 95 Eng. Rep. at 817. See also James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* (3rd ed. 2008), p. 4 ("The framers of the Constitution were deeply concerned with the need to safeguard property rights.").

[24] Saul K. Padover, ed., *The Complete Madison* (1953), pp. 267-68 (published in *National Gazette* (March 29, 1792)) (emphasis in original).

[25] Citations omitted. See also Ely, *supra*, note 23, p. 9 ("given the framers' concern with protecting property as well as the nearly 150 years of Supreme Court activity in this field, the relegation of property rights to a lesser constitutional status is not historically warranted. The framers did not separate property and personal rights.").

This Court has long-held the Fifth Amendment guarantee of compensation does not depend on the good graces of Congress, explaining landowners are "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. This Court has "frequently repeated *** that, in the event of a taking, *the compensation remedy is required by the Constitution*." *Id.* at 316.[26]

In *Monongahela*, the federal government acquired a privately-owned lock and dam. The parties disputed the value of that property the government took. The government argued that Congress determined the amount of compensation the owner was entitled to be paid when Congress passed the legislation authorizing the taking and appropriated a specific sum for compensation. This Court rejected the government's argument and held the determination of "just compensation" is an exclusively judicial inquiry. This Court further held that private property may not be taken "unless a full and exact equivalent for it be returned to the owner." 148 U.S. at 326.

Only after the owner has been compensated for the "true value" of his property can "it be said that just compensation for the property has been made." *Id.* at 337. In *Monongahela*, this Court further explained,

> The right of the legislature of a state by law to apply the property of the citizen to a public

[26] Emphasis added; citations omitted; quoting *Clarke*, 445 U.S. at 257.

> use, and then to constitute itself the judge of its own case, to determine what is the "just compensation" it ought to pay therefore *** *cannot for a moment be admitted or tolerated under our constitution.*
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> 148 U.S. at 327-28 (emphasis added).

In *Seaboard*, this Court, citing *Monongahela,* held a landowner is "entitled [to] the full and perfect equivalent of the property taken," and the owner must be put "in as good position pecuniarily as he would have been if his property had not been taken."[27] 261 U.S. at 304. A state cannot take an owner's land and then the legislature determine the compensation the owner is due. The determination of "just compensation" is exclusively a function of the judicial branch. *Monongahela*, 148 U.S. at 327.[28]

In *Cedar Point Nursery*, this Court, quoting John Adams, reaffirmed the foundational tenet that "[p]roperty must be secured, or liberty cannot exist." *Cedar Point Nursery*, 141 S.Ct. at 2071. This Court "noted that protection of private property rights is 'necessary to preserve freedom' and 'empowers persons to shape and to plan their own destiny in a

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[27] The Fifth Amendment requires that "when [an owner] surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him." *Monongahela*, 148 U.S. at 325.

[28] Cf. *Ariyan*, 29 F.4th at 228 ("Louisiana courts lack the power to force another branch of government to make an appropriation, the prevailing plaintiff has no judicial mechanism to compel the defendant to pay.").

world where governments are always eager to do so for them.'" *Id.*[29] Put simply, "[t]he government must pay for what it takes." *Id.*

III. This Court should grant the petition for certiorari because the Sewerage Board denied these landowners a remedy that is guaranteed by the Constitution.

This case evokes the long-established legal principle, *ubi jus, ibi remedium*,[30] elucidated by Blackstone, applied by John Marshall in *Marbury* v. *Madison*,[31] and repeated by John Marshall Harlan in dissent in *Folsom*. By denying these private landowners the remedy guaranteed by the Fifth Amendment, the Sewerage Board nullified these landowners' fundamental constitutional right to "just compensation." As this Court explained, "[t]he word 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equity.'" *United States* v. *Commodities Trading Corp.*, 339 U.S. 121, 124 (1950). Just compensation indefinitely delayed is just compensation denied. This Court, in *First English* and *Armstrong*, "reaffirm[ed its] 'frequently repeated' view that 'in the event of a taking, the compensation *remedy is required* by the Constitution.'" *In re Board*, 41 F.4th at 45 (quoting *First English*, 482 U.S. at 316) (emphasis added).

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[29] Quoting *Murr* v. *Wisconsin*, 137 S.Ct. 1933, 1943 (2017).

[30] "Where there is a right, there must be a remedy." 3 William Blackstone, *Commentaries on the Laws of England* 23 (1768).

[31] 5 U.S. 137, 147 (1803) ("It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.").

The Fifth Circuit's premise – that the Constitution's guarantee of "just compensation" may be overcome by lack of appropriation – is incompatible with the fundamental nature of our Constitution. Chief Justice Marshall explained in *Marbury*:

> The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.
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> 5 U.S. at 176-77.

The right to just compensation under the Fifth Amendment demands a remedy. As Chief Justice Marshall further declared in *Marbury*,

> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right. *** [W]here a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who

> considers himself injured, has a right to resort to the laws of his country for a remedy.
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> 5 U.S. at 163, 166.

This Court later applied Chief Justice Marshall's declaration specifically to the Fifth Amendment, stating, "In any society the fullness and sufficiency of the securities which surround the individual in use and enjoyment of his property constitute one of the most certain tests of the character and value of government." *Monongahela*, 148 U.S. at 324.

While the government's power of eminent domain allows it to take private property without paying the owner up front, the payment must be certain and prompt. In *Bragg* v. *Weaver*, this Court stated, "where adequate provision is made for the certain payment of the compensation *without unreasonable delay* the taking does not contravene due process of law in the sense of the Fourteenth Amendment merely because it precedes the ascertainment of what compensation is just." 251 U.S. 57, 62 (1919). Likewise, in *Joslin Mfg. Co.* v. *City of Providence*, this Court explained, "the taking of property for public use *** need not be accompanied or preceded by payment, but that the requirement of just compensation is satisfied when the public faith and credit are pledged to a *reasonably prompt ascertainment and payment*, and there is adequate provision for enforcing the pledge." 262 U.S. 668, 677 (1923) (citing *Sweet* v. *Rechel*, 159 U.S. 380, 400, 404, 407 (1895) (emphasis added).

Sweet v. *Rechel* involved a Massachusetts statute enabling a city to condemn properties lacking

adequate drainage as a nuisance in order to protect public health. 159 U.S. at 393. The owner of a condemned lot argued the statute violated the state constitution because "it did not provide for compensation to be made to the owners of the property *in advance* of its actual appropriation by the commonwealth." *Id.* at 396 (emphasis added). This Court held, "it is a condition precedent to the exercise of [the government's eminent domain] power that the statute make provision for reasonable compensation to the owner." 159 U.S. at 399 (Harlan, J.).

The Massachusetts statute complied with the Fifth Amendment, this Court held, because it provided that "the owner became, *from the moment the property was taken, absolutely entitled to reasonable compensation*, the amount to be *ascertained without undue delay*, in the mode prescribed, and its *payment* to be *assured*, if necessary, *by decree against the city*, which could be *effectively enforced*." *Id.* at 407 (emphasis added). In so holding, Justice Harlan analyzed and followed, *inter alia*, a New York state court decision, where that court explained,

> It certainly was not the intention of the framers of the constitution to authorize the property of a citizen to be taken and actually appropriated to the use of the public, and thus to compel him to trust to the future justice of the legislature to provide him a compensation therefor. The compensation must be either ascertained and paid to him before his property is thus appropriated, or an appropriate remedy must be provided, and

> upon an adequate fund, whereby he may obtain such compensation through the medium of the courts of justice ***.[32]

Sweet, 159 U.S. at 405-06 (quoting *Bloodgood* v. *Mohawk & Hudson Railroad Co.*, 18 Wend. 9, 17 (N.Y. 1837)).[33]

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[32] Writing for the New York court, Chancellor Walworth continued, "I hold that *before* the legislature can authorize the agents of the state and others to enter upon and occupy, or destroy or materially injure the private property of an individual, except in cases of actual necessity which will not admit of any delay, *an adequate and certain remedy must be provided whereby the owner of such property may compel the payment of his damages, or compensation; and that he is not bound to trust to the justice of the government to make provision for such compensation by future legislation*." *Bloodgood* v. *Mohawk & Hudson Railroad Co.*, 18 Wend. 9, 17, 1837 WL 2871, at *17 (N.Y. 1837) (emphasis added) (following Chancellor Kent's decision in *Rogers* v. *Bradshaw*, 20 Johns. R. 735 (N.Y. 1823), holding "it was sufficient if a certain and adequate remedy was provided by which the individual could obtain such compensation without any unreasonable delay.").

[33] Justice Harlan likewise quoted and followed the New York Supreme Court's decision in *People ex rel. Utley* v. *Hayden*, 6 Hill 359, 1844 WL 4447 (N.Y. Sup. Ct. 1844), holding that "[a]lthough it may not be necessary, within the constitutional provision, that the amount of compensation should be actually ascertained and paid before property is thus taken, it is *** the settled doctrine, *** that, at least, certain and ample provision must be first made by law, except in cases of public emergency, so that the owner *can coerce payment through the judicial tribunals or otherwise without any unreasonable or unnecessary delay*." *Sweet*, 159 U.S. at 406 (emphasis added). "Otherwise," the court concluded, "the law making the appropriation is no better than blank paper." *Hayden*, 6 Hill at 361.

This Court again reviewed the constitutionality of a Massachusetts condemnation statute, which limited the height of buildings in a certain part of Boston, under the federal and commonwealth's constitutions in *Williams* v. *Parker*, 188 U.S. 491, 503 (1903). In *Williams* this Court found that the Massachusetts statute supplied an "adequate provision for the payment of the damages sustained by the taking" because the statute provided "a direct and appropriate means of ascertaining *and enforcing* the amount of all such damage." 188 U.S. at 504 (emphasis added). See also *Crozier* v. *Fried. Krupp Aktiengesell-schaft*, 224 U.S. 290, 306 (1912) (payment of compensation need not be paid in advance, but it is "sufficient *** that adequate means be provided for a reasonably just and *prompt* ascertainment *and payment* of the compensation") (emphasis added).

Thus, this Court has consistently held that the government may take property without first paying compensation *only so long as* the government provides the means to enforce and compel prompt payment of the "just compensation."

Here, the Sewerage Board took these landowners' private property in 2013. An almost decade-long delay in payment defies any notion of promptness. Even the four-year delay since the first judgment became final utterly fails a "reasonably prompt" or "without unreasonable delay" standard.

The Sewerage Board denied these landowners a remedy for its violation of their vested constitutional right to "just compensation." Unless this Court acts to remedy this injustice, the government stands in

danger of "ceas[ing] to deserve th[e] high appellation of *** a government of laws, and not of men." *Marbury*, 5 U.S. at 163.

CONCLUSION

Contending that the state must provide an appropriation following a court judgment in order to honor a landowner's self-executing constitutional right to be justly compensated is to render the Fifth Amendment nothing more than a "parchment barrier,"[34] or worse, "blank paper."[35]

This Court should grant the petition for certiorari because allowing the Sewerage Board to avoid its constitutional obligation to pay these owners violates the Fifth Amendment, and the Fifth Circuit's affirmance of the Sewerage Board's action is contrary to the First Circuit's decision.

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[34] See Christopher Scalia and Edward Whelan, eds., *Scalia Speaks, Reflections on Law, Faith, and Life Well Lived* (2017), p. 217 ("If this be so, then our Constitution is 'nothing but words on paper – what our Framers would call a parchment barrier.'").

[35] See, *supra*, note 33.

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