

No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A fundamental element of just compensation is “certain payment of the compensation without unreasonable delay.” *Bragg v. Weaver*, 251 U.S. 57, 62 (1919). In 2013, the Sewerage & Water Board of New Orleans inversely condemned the properties of 70 home and business owners for a flood control project. The property owners obtained state court judgments starting in 2018. Louisiana law prohibits enforcement of judgments against state and local governments—even just compensation judgments—which go unpaid unless government voluntarily appropriates the funds. The Sewerage Board has refused to do so, in some cases for years. The question presented is:

May the government, consistent with the Fifth and Fourteenth Amendments’ self-executing command of Just Compensation for takings of private property, indefinitely delay paying just compensation?

PARTIES TO THE PROCEEDING

Petitioners Ariyan, Inc. (doing business as Discount Corner), M. Langenstein & Sons, Inc., Prytania Liquor Store, Inc., West Prytania Inc. (doing business as Prytania Mail Service / Barbara West), British Antiques, L.L.C. / Bennet Powell, Fine Arts Management, L.L.C. (doing business as Prytania Theatre), Superior Seafood & Oyster Bar, L.L.C., The Magic Box, Ltd. (doing business as Magic Box Toys), Mark Defelice, Savare Defelice, Jr., Esteff Defelice, and Virginia Defelice (on behalf of the entity f/k/a Pascal Manale Restaurant), Arlen Brunson, Kristina Dupre, Brett Dupre, Gail Marie Hatcher, Betty Price, Bojan Ristic, Patsy Searcy, Helen Green, Theada Thompson, Kim Alvarez, Allan Basik, Jill Bossier, John Bossier, Jr., David Engles, Estate of Louise Stewart, Cathleen Hightower, Ruth Hinson, Leon Hinson, Margaret Leche, Harry Leche, George Mouledoux, Elizabeth Sewell, William Sewell, Patricia Wynn, Geraldine Baloney, Abbrica Callaghan, Burnell Cotlon, Eirinn Erny, Gregory Kozlowski, Larry Hameen, Noella Hayes, Stephen Hogan, Fransisca Medina-Hogan, Keeba McAllister, Gaylin McAllister, Cody Myers, Heather Weathers, Elio Brancaforte, Charlotte Brancaforte, Benito Brancaforte, Dr. Josephine S. Brown, Richard Parke Ellis, Nancy Ellis, Mark Hamrick, Dr. Robert Link, Charlotte Link, Ross McDiarmid, Laurel McDiarmid, Jerry Osborne, Jack Stolier, Dr. William B. Taylor, III, Watson Memorial Spiritual Temple of Christ (doing business as Watson Memorial Teaching Ministries), George Duessing, Beth Duessing, David Epstein, Faye Lieder, Thomas Ryan, Judith Jurisich, Dorothy White, Thomas Lowenburg, Judith

Lowenburg, Dr. John Ochsner, Jr., Lori Ochsner, Ronald Ruiz, Anne Lowenburg, Sarah A. Lowman, Barbara H. West, Nanette Colomb, Mary Kearney, Clary Kearney, Michael T. Gray, Mark Kurt, Anna Kurt, The American Insurance Company (as subrogee of Mark and Anna Kurt), Virginia Carter Stevens Molony, Dat Dog Enterprises, LLC, Dat Dog Properties, LLC, Superior Bar & Grill, Inc., The Fresh Market, Inc., K&B Corporation (doing business as Rite Aid Corporation), 1900 Collin, LLC, and 1901 Collin, LLC were the plaintiffs-appellants below.

Respondents the Sewerage & Water Board of New Orleans and Ghassan Korban (in his capacity as Executive Director of Sewerage & Water Board of New Orleans) were defendants-appellees below.

CORPORATE DISCLOSURE STATEMENT

Ariyan, Inc. (doing business as Discount Corner), is a Louisiana corporation and has no parent corporations. No publicly held company owns 10% or more of its stock.

M. Langenstein & Sons, Inc., is a Louisiana corporation with no parent corporations. No publicly held company owns 10% or more of its stock.

Prytania Liquor Store, Inc., is a Louisiana corporation with no parent corporations. No publicly held company owns 10% or more of its stock.

West Prytania Inc. (doing business as Prytania Mail Service / Barbara West), is a Louisiana corporation with no parent corporations. No publicly held company owns 10% or more of its stock.

British Antiques, L.L.C. / Bennet Powell, is a Louisiana corporation with no parent corporations. No publicly held company owns 10% or more of its stock.

Fine Arts Management, L.L.C. (doing business as Prytania Theatre), is a Louisiana corporation with no parent corporations. No publicly held company owns 10% or more of its stock.

Superior Seafood & Oyster Bar, L.L.C., is a Louisiana corporation with no parent corporations. No publicly held company owns 10% or more of its stock.

The Magic Box, Ltd. (doing business as Magic Box Toys), is a Louisiana corporation with no parent corporations. No publicly held company owns 10% or more of its stock.

Pascal Manale Restaurant is a Louisiana corporation with no parent corporations. No publicly held company owns 10% or more of its stock.

Watson Memorial Spiritual Temple of Christ (doing business as Watson Memorial Teaching Ministries), is a Louisiana corporation with no parent corporations. No publicly held company owns 10% or more of its stock.

The American Insurance Company (as subrogee of Mark and Anna Kurt) is an Ohio corporation. Its parent company is Allianz Insurance Group. No other publicly held company owns 10% or more of its stock.

Dat Dog Enterprises, LLC, is a Louisiana corporation with no parent corporations. No publicly held company owns 10% or more of its stock.

Dat Dog Properties, LLC, is a Louisiana corporation with no parent corporations. No publicly held company owns 10% or more of its stock.

Superior Bar & Grill, Inc., is a Louisiana corporation with no parent corporations. No publicly held company owns 10% or more of its stock.

The Fresh Market, Inc., is a Delaware corporation with no parent corporations. No publicly held company owns 10% or more of its stock.

K&B Louisiana Corporation (doing business as Rite Aid Corporation), is a Louisiana corporation. Its parent company is Rite Aid Corporation. No other publicly held company owns 10% or more of its stock.

1900 Collin, LLC, is a Louisiana corporation with no parent corporations. No publicly held company owns 10% or more of its stock.

1901 Collin, LLC, is a Louisiana corporation with no parent corporations. No publicly held company owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

Ariyan, Inc. d/b/a Discount Corner v. Sewerage & Water Board of New Orleans, CDC No. 15-10789 (Orleans Parish Civil District) (consisting of Ariyan, Inc. d/b/a Discount Corner, M. Langenstein & Sons, Inc., Prytania Liquor Store, Inc., West Prytania, Inc. d/b/a Prytania Mail Service/Barbara H. West, and British Antiques, L.L.C./Bennett Powell) (judgment issued February 27, 2018).

M. Langenstein & Sons, Inc., et al. v. Sewerage & Water Board of New Orleans, CDC No. 15-11971 (Orleans Parish Civil District) Consolidated With *K&B Louisiana Corporation d/b/a Rite Aid Corporation v. Sewerage & Water Board of New Orleans*, CDC 15-11394 (Orleans Parish Civil District) (consisting of Fine Arts Management, L.L.C. d/b/a

Prytania Theatre, Superior Seafood & Oyster Bar, L.L.C., The Magic Box, Ltd. d/b/a Magic Box Toys, and Pascal-Manale Restaurant, Inc.¹) (judgment issued January 2, 2019).

Anne Lowenburg, et al. v. Sewerage & Water Board of New Orleans, CDC No. 2016-621 (Orleans Parish Civil District) (consisting of Elio, Charlotte, and Benito Brancaforte, Dr. Josephine Brown, Richard Parke Ellis, Nancy Ellis, Mark Hamrick, Dr. Robert and Charlotte Link, Ross and Laurel McDiarmid, Jerry Osborne, Jack Stolier, and Dr. William Taylor & Watson Memorial Spiritual Temple of Christ d/b/a Watson Memorial Teaching Ministries) (judgment issued March 21, 2019; judgment affirmed on appeal July 29, 2020; no writ filed with Louisiana Supreme Court).

Anne Lowenburg, et al. v. Sewerage & Water Board of New Orleans, CDC No. 2016-621 (Orleans Parish Civil District) (consisting of Anne P. Lowenburg, Sarah A. Lowman, Barbara H. West, Nanette Colomb, Mary and Clay Kearney, Michael T. Gray, Mark and Anna Kurt, The American Insurance Company, and Virginia Carter Stevens Molony) (judgment issued November 19, 2020).

Anne Lowenburg, et al. v. Sewerage & Water Board of New Orleans, CDC No. 2016-621 (Orleans Parish Civil District) (consisting of Thomas and Judith Lowenburg, John and Lori Ochsner, and Ronald Ruiz) (judgment issued November 19, 2020).

¹ Mark Defelice, Savare Defelice, Jr., Esteff Defelice, and Virginia Defelice are appearing individually herein on behalf of the entity f/k/a Pascal Manale Restaurant, Inc.

M. Langenstein & Sons, Inc., et al. v. Sewerage & Water Board of New Orleans, CDC No. 15-11971 (Orleans Parish Civil District) (consisting of Dat Dog Enterprises, LLC, Dat Dog Properties, LLC, Superior Bar & Grill, Inc., The Fresh Market, Inc., K&B Corporation d/b/a Rite Aid Corporation, and 1900 & 1901 Collin, LLC) (judgment issued November 19, 2020).

Elizabeth Sewell, et al. v. Sewerage & Water Board of New Orleans, CDC No. 15-4501 (Orleans Parish Civil District) (Group E & F plaintiffs: consisting of Arlen Brunson, Kristina and Brett Dupre, Gail Marie Hatcher, Betty Price, Bojan Ristic, Patsy Searcy, Helen Green, Theada Thompson, Kim Alvarez and Allan Basik, John, Jr. and Jill Bossier, David Engles, Estate of Louise Stewart, Cathleen Hightower, Ruth and Leon Hinson, Margaret and Harry Leche, George Mouledoux, Elizabeth and William Sewell, and Patricia Wynn) (judgment issued April 25, 2018; judgment reissued August 3, 2020).

Elizabeth Sewell, et al. v. Sewerage & Water Board of New Orleans, CDC No. 15-4501 (Orleans Parish Civil District) (Group G plaintiffs: consisting of Geraldine Baloney, Abbrica Callaghan, Burnell Cotlon, Eirrin Erny and Gregory Kozlowski, Larry Hameen, Noella Hayes, Stephen Hogan and Fransisca Medina-Hogan, Keeba and Gaylin McAllister, Cody Meyers, and Heather Weathers) (judgment issued April 25, 2018; no appeal filed).

Elizabeth Sewell, et al. v. Sewerage & Water Board of New Orleans, CDC No. 15-4501 (Orleans Parish Civil District) (Group A plaintiffs: consisting of George and Beth Duessing, David Epstein, Faye Lieder, Thomas Ryan, Judith Jurisch, and Dorothy White)

(judgment issued April 25, 2018; judgment affirmed on appeal May 29, 2019; writ application denied by Louisiana Supreme Court on October 16, 2019).

Ariyan, Inc., et al. v. Sewerage & Water Board of New Orleans, No. 2:21-cv-00534, 543 F. Supp. 3d 373 (E.D. La. 2021) (judgment entered June 9, 2021).

Ariyan, Inc. v. Sewerage & Water Board of New Orleans, No. 21-30335, 29 F.4th 226 (5th Cir. 2022) (opinion issued March 21, 2022; rehearing en banc denied April 19, 2022).

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PETITION FOR WRIT OF CERTIORARI

Petitioners Ariyan Inc., *et al.* respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit opinion is published at 29 F.4th 226, reprinted in Petitioners' Appendix (App.) A. The district court order dismissing the complaint is published at 543 F. Supp. 3d 373, reprinted at App.C. The Fifth Circuit's order denying rehearing *en banc* is reprinted at App.E.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. The district court granted defendants' motion to dismiss and entered final judgment on June 9, 2021. App.C-1, D-1. Petitioners filed a timely appeal on March 21, 2022, and a panel of the Fifth Circuit affirmed. App.A-2, B-1. Petitioners filed a timely petition for rehearing *en banc* that was denied on April 19, 2022. App.E-1. This petition is timely filed and the Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Just Compensation Clause of the Fifth Amendment:

[N]or shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

The Due Process Clause of the Fourteenth Amendment:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]

U.S. Const. amend. XIV.

Section 1 of the Civil Rights Act of 1871 provides in part:

Every person who, under color of any statute, ordinance regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

42 U.S.C. § 1983.

Article XII of the Louisiana Constitution:

Notwithstanding Paragraph (A) or (B) or any other provision of this constitution, the legislature by law may limit or provide for the extent of liability of the state, a state agency, or a political subdivision in all cases, including the circumstances giving rise to liability and the kinds and amounts of recoverable damages. It shall provide a procedure for suits against the state, a state

agency, or a political subdivision and provide for the effect of a judgment, but no public property or public funds shall be subject to seizure. The legislature may provide that such limitations, procedures, and effects of judgments shall be applicable to existing as well as future claims. No judgment against the state, a state agency, or a political subdivision shall be exigible, payable, or paid except from funds appropriated therefor by the legislature or by the political subdivision against which the judgment is rendered.

La. Const. art. XII, § 10(C). The entirety of section 10 is reproduced at App.F.

INTRODUCTION

The Sewerage & Water Board of New Orleans (Sewerage Board) took Petitioners' private property for public use, but steadfastly refuses to pay just compensation—even in the face of state court judgments ordering it to do so. Yet when Petitioners sought to vindicate their federal constitutional right to reasonably prompt just compensation, the Fifth Circuit concluded there's nothing federal courts can do.

This Court should resolve the conflict between the Fifth Circuit and rulings of this Court, and confusion among lower courts, by granting certiorari and holding that the Just Compensation Clause is self-executing and assures compensation without unreasonable delay, and requires an “adequate provision for enforcing the pledge” to pay. *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 677 (1923); *Hays v. Port of Seattle*, 251 U.S. 233, 238 (1920). It has been nearly four decades since this Court last provided guidance on the Just Compensation Clause. *See United States v. 50 Acres of Land*, 469 U.S. 24 (1984). The decision below makes painfully clear that the Court's long silence has enabled rulings starkly divergent from just compensation principles, with bizarre and inequitable results.

After ruling that the Sewerage Board inversely condemned Petitioners' properties for a flood control project, Louisiana's courts entered just compensation judgments. App.G; App.H; App.I; App.K. But the Sewerage Board did not satisfy the judgments and has

not made even the first step towards doing so. Its refusal to pay compensation has not been a matter of days, weeks, or months—but *years* in some cases. Although a waiver of sovereign immunity is not necessary to sue Louisiana governments for takings, *Angelle v. State*, 34 So.2d 321, 327 (La. 1948), (state constitution’s just compensation clause is “self-executing” and not subject to sovereign immunity), governments have not waived immunity from enforcement of resulting judgments. La. Const. art. XII, § 10(C).² It is entirely up to government when to pay—even judgments ordering just compensation—and all a condemnee can do is wait for the condemnor to appropriate the funds. The Sewerage Board has not done so and has made no indication that it *ever* intends to.

Being told to wait for government to voluntarily satisfy a judgment does not, in most circumstances, raise constitutional concerns. If government must consent before it may be sued, it may also reserve its power to decide when to pay resulting judgments. But just compensation judgments are not ordinary tort or contract judgments. The judiciary’s authority to

² “Sovereign immunity,” government’s common-law immunity from civil lawsuits, describes a “fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution.” *Alden v. Maine*, 527 U.S. 706, 713 (1999). For this reason, government may not be sued without its consent. *Weinstein, Bronfin & Heller v. LeBlanc*, 192 So.2d 130, 132 (La. 1966) (The “basic premise of this proposition that the State does enjoy immunity from suit and may not be sued without its consent.... derives from and is inherent in the most elementary concepts of governmental sovereignty[.]”).

ensure compensation for takings is not conditioned on a waiver of sovereign immunity, but is commanded by the Constitution itself: the obligation to provide compensation, as this Court has consistently concluded, is “self-executing.” *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2171 (2019). If government takes property, it must *pay* compensation.

Payment may not be required *before* a taking, *at the time of* a taking, or even *immediately after* a taking. But government’s obligation to compensate within a reasonable time after it takes property is not an “empty formality, subject to modification at the government’s pleasure.” *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2077 (2021). The Just Compensation Clause’s self-executing character means that government does not retain the sovereign power to refuse to pay compensation indefinitely. The Fifth Amendment authorizes federal judicial inquiry into whether government’s delay in *actually* paying compensation is reasonable. Characterizing the Just Compensation Clause as “self-executing” rings hollow if government may take property and need only hand the owner an IOU payable solely at a time of the government’s choosing, if ever.

The Fifth Circuit, however, dismissed as dicta this Court’s description of the Just Compensation Clause as “self-executing.” App.A-9. It held the Sewerage Board must consent to enforcement of just compensation judgments. Thus, Petitioners must “rely exclusively upon the generosity” of the Sewerage Board to satisfy the judgments, because Louisiana law alone controls the right to timely compensation, and

does not create a right to receive it at any particular time (even years after the takings). App.A-6. The court sympathized with Petitioners' plight but held the Sewerage Board has reserved its authority to pay judgments when it pleases, and federal courts therefore have no authority to ensure Petitioners receive just compensation within a reasonable time.

Federal courts, of course, are not in the business of enforcing state court judgments. But it is no answer to say, as the Fifth Circuit concluded, that Louisiana courts entered a just compensation judgment, so let them enforce it. Petitioners' right to compensation within a reasonable time is not created and shaped exclusively by Louisiana law, but inheres in the terms "private property" and "just compensation" in the Fifth Amendment. It is not necessary for government to consent before federal courts may ensure compliance with a self-executing constitutional right.

Under the Fifth Circuit's ruling, all property owners can do is hope for the condemnor's grace. Without this Court's intervention, property owners are left with no remedy if government takes property, and decides to not pay just compensation judgments.

STATEMENT OF THE CASE

I. Facts

A. The Sewerage Board Took Petitioners' Homes and Small Businesses

In the early 1990s, the Sewerage Board, a political subdivision of the State of Louisiana, in partnership with the Army Corps of Engineers, began the “South Louisiana Urban Drainage Project or the Southeast Louisiana Urban Flood Control Program” to mitigate the periodic flooding that occurred throughout the city in decades past. App.J-8–9, J-12; App.K-4. As part of the project, the Sewerage Board constructed massive underground drainage canals to store and transport storm water. App.K-5. It recognized construction would damage nearby properties, and promised to compensate the owners. The project damaged and destroyed homes and businesses, and caused serious harm to the lives and livelihoods of nearby property owners. *See, e.g.*, App.H-16–21 (describing physical damage to property and related injuries to the health and well-being of elderly property owners); App.J-49–99 (detailed findings of damage and disturbance based on plaintiffs’ and experts’ testimony). The property damage can be summarized as including damaged foundations, shifting porches, broken floors, cracked interior and exterior walls, broken and shifting fireplaces, leaking roofs, plumbing, and sewer lines, cracked sidewalks, patios, and decks, and inoperable and leaky doors and windows. App.K-9. Petitioners also suffered constant vibrations, noise, dust, and restricted access to their properties, for years. *Id.*

When it came time to provide the promised compensation, the Sewerage Board reneged. App.K-10–11. It recognized little to no damage and denied Petitioners’ properties were taken or damaged. *Id.*

B. Louisiana Courts Ordered the Sewerage Board to Compensate Petitioners

Required by then-controlling authority to pursue their federal takings claims in state court, Petitioners brought lawsuits in Louisiana courts to compel the Sewerage Board to provide just compensation. App.J-36. Inverse condemnation claims “derive from the Takings Clauses contained in both the Fifth Amendment of the U.S. Constitution and Art. I, § 4, of the Louisiana Constitution.” *Robert v. State*, 327 So.3d 546, 558 (La. App. 2021) (citation omitted). The Sewerage Board does not enjoy sovereign immunity for takings, and may be sued to compel compensation when it takes property. *See Angelle*, 34 So.2d at 327 (state constitution’s just compensation clause is “self-executing” and not subject to sovereign immunity). Trials determined that the Sewerage Board had taken and damaged Petitioners’ properties. The courts entered final judgments ordering the Sewerage Board to provide just compensation. App.G; App.H; App.I; App.K.³ The Sewerage Board allowed some trial court judgments to become final; others were affirmed by

³ The Fifth Circuit noted that the “state court judgments were for violations of Louisiana law, not for violations of the Fifth Amendment Takings Clause,” but held it did not matter: “even if the underlying judgments were based on violations of federal rights, we are not sure why that distinction would make a difference.” App.A-7.

Louisiana appellate courts. See *Lowenburg v. Sewerage & Water Bd. of New Orleans*, Nos. 2019-CA-0524, 2019-CA-0525, 2019-CA-0526, 2019-CA-0527, ___ So.3d ___, 2020 WL 4364345 (La. App. July 29, 2020); *Sewell v. Sewerage & Water Bd. of New Orleans*, No. 2018-CA-0996, 2019 WL 2305673 (La. App. May 29, 2019), *writ denied*, 280 So.3d 612 (2019).

C. Invoking Sovereign Immunity, the Sewerage Board Refused Compensation

In the usual case, a judgment debtor lacks discretion to *not* satisfy a civil judgment. Of course, the debtor may refuse to *voluntarily* satisfy a judgment, but the judgment creditor—with the law’s backing—may satisfy it herself by, for example, a debtor examination (La. Code Civ. Proc. art. 2451), seizure of the debtor’s property (art. 2291), or garnishment of debtor’s property held by others (art. 2411). But state and local governments are not subject to the usual judgment-satisfaction process because Louisiana has not waived sovereign immunity for that purpose. App.A-2 (“The Louisiana Constitution bars the seizure of public funds or property to satisfy a judgment against the state or its political subdivisions.”) (citing La. Const. art. XII, § 10(C)). Although the State has waived local government immunity to be sued, it has reserved the discretion to satisfy judgments how and when it chooses, including just compensation judgments. *Dep’t of Transp. & Dev. v. Sugarland Ventures, Inc.*, 476 So.2d 970, 975–76 (La. App.) (“The legislature may, on the authority of Art. 12, Sec. 10(c), refuse to pay judgments for which the state has been held liable by a court of law” and

judgments rendered in expropriation suits can be satisfied by no procedure other than appropriation of funds by legislature or political subdivision.), *writ denied*, 478 So.2d 909 (La. 1985); *State ex rel. Dep't of Highways v. Ponder*, 342 So.2d 1190, 1191 (La. App. 1977) (just compensation judgment could not be executed against the state). All an owner whose property has been taken can do is wait for the government.

Despite having the funds available, App.K-24 (Sewerage Board's "latest financial statements indicate that it possesses assets exceeding \$3 billion"), the Sewerage Board made no effort whatsoever to pay the compensation judgments. To this day, the Sewerage Board has not provided one penny of compensation to a single Petitioner, nor has it taken any steps to do so even though in some instances Petitioners have waited four years and counting since their judgments became final.

II. Proceedings Below

A. District Court: No Federal Claim for Unreasonable Delay Paying Just Compensation

Petitioners' complaint alleged the state court just compensation judgments are property, and the Sewerage Board's failure to provide compensation within a reasonable time after those judgments were final violates the Just Compensation Clause. *See* App.K-27-29 (Complaint); App.A-5 (Petitioners "claim that the government's failure to timely pay just compensation once the compensation was determined

and awarded” is a “second taking” without just compensation).

The district court dismissed for failure to state a claim and did not consider whether the Sewerage Board’s delay was unreasonable. It adopted the rationale in *Violet Dock Port Inc., LLC v. Heaphy*, No. 19-11586, 2019 WL 6307945 (E.D. La. Nov. 23, 2019), which dismissed a claim that a Louisiana local government unconstitutionally delayed paying compensation after it expropriated a private dock facility. There, the district court held that a “delay in paying ... the state court’s judgment [does] not give[] rise to a Fifth Amendment violation,” because “the property right created by a judgment against a government entity is not a right to payment at a particular time, but merely the recognition of a continuing debt of that government entity.” *Id.* at *2 (citing *Guilbeau v. Par. of St. Landry*, 2008 WL 4948836, at *10 (W.D. La. Nov. 19, 2008), *aff’d*, 341 F. App’x 974 (5th Cir. 2009) (citing *Minton v. St. Bernard Par. Sch. Bd.*, 803 F.2d 129, 132 (5th Cir. 1986)); *Davis v. Cantrell*, No. 18-231, 2018 WL 6169255, at *5 (E.D. La. Nov. 26, 2018)).⁴

The district court also rejected Petitioners’ claims because they arose from state court judgments, and “state courts can enforce their own judgments.” App.C-11. The court denied leave to amend, and Petitioners appealed.

⁴ After briefing and argument in the Fifth Circuit, the *Violet Dock* case settled.

B. Fifth Circuit: No Right To Timely Just Compensation

The Fifth Circuit affirmed dismissal of Petitioners' claims for just compensation for two main reasons.

First, it held that Petitioners' state court judgments awarding just compensation do not constitute property, either as a matter of state law, or "based on federal constitutional rights." App.A-7. Louisiana bars judgment creditors from executing against the government, and therefore a judgment is merely an unenforceable recognition of "existing liability." App.A-6. The court also concluded Petitioners lack an "additional property interest" grounded in the self-executing nature of just compensation, App.A-7, because this Court's characterization of the Just Compensation Clause as "self-executing" is dicta and plays no part in the analysis. App.A-9. That is, the court asserted that just compensation judgments are not "something special" and "there is no property right to timely payment on a judgment." App.A-7; App.A-2 (relying on *Louisiana ex rel. Folsom v. City of New Orleans*, 109 U.S. 285, 295 (1883)).

Second, the court held that because Petitioners' judgments merely represent the Sewerage Board's "existing liability," conceptually distinct from its recovery," any delay paying compensation took nothing. App.A-6. The court distinguished *Vogt v. Bd. of Comm'rs of Orleans Levee Dist.*, 294 F.3d 684, 697 (5th Cir. 2002), asserting *Vogt's* conclusion that

government's failure to pay a state court just compensation judgment could be a taking was dicta. App.A-8. Finally, even though the judgment in *Vogt* was in part a money judgment vindicating a property owner's right to compensation for a taking, the Fifth Circuit distinguished it because the state court judgments in *Vogt* included a declaratory judgment. App.A-8 ("This situation, where the judgment debtor is in possession of property determined to belong to the creditor, is different from a judgment wherein the debtor owes compensation to the creditor.").

The court held that Petitioners are compelled "to rely exclusively upon the generosity of the judgment debtor." App.A-10 (quoting *Folsom*, 109 U.S. at 295 (Harlan, J., dissenting)). It also affirmed the district court's denial of leave to amend the complaint, concluding it would be futile because "the core of Plaintiffs' claims is so clearly foreclosed by settled law." App.A-10.

REASONS TO GRANT THE PETITION

I. The Fifth Circuit Conflicts With Rulings of This Court

A. Just Compensation's Self-Executing Character Is Not "Dicta"

1. "Self-Executing" Means Enforceable

This Court consistently describes the Just Compensation Clause as "self-executing." *See, e.g., Knick*, 139 S. Ct. at 2171; *United States v. Clarke*, 445 U.S. 253, 257 (1980). In other words, the Constitution "of its own force" ... "furnish[es] a basis for a court to award money damages against the government," notwithstanding sovereign immunity. *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty*, 482 U.S. 304, 316 n.9 (1987) (quotation omitted). *See also Phelps v. United States*, 274 U.S. 341, 343 (1927) ("Under the Fifth Amendment plaintiffs were entitled to just compensation ... the claim is one founded on the Constitution."); 1 Laurence H. Tribe, *American Constitutional Law* § 6–38, at 1272 (3d ed. 2000) (observing, based on *First English*, that the Takings Clause "trumps state (as well as federal) sovereign immunity").

The Constitution's command to provide just compensation is a hollow one if all it demands is that, in return for surrendering property to the public, the owner receives an unenforceable judgment. *See Archbold-Garrett v. City of New Orleans*, 893 F.3d 318, 322 n.1 (5th Cir. 2018) (city allocates funds to pay just compensation only "as they see fit"); *Vogt v. Bd. of Comm'rs of Orleans Levee Dist.*, 814 So.2d 648, 653–

55 (La. App. 2002) (judgment creditors of levee district board could not obtain writ of seizure to satisfy just compensation judgment); *Sugarland*, 476 So.2d at 976 (just compensation judgments may only be satisfied by appropriation of funds by state or municipal legislature). Compensation delayed too long may mean no compensation. *See People ex rel. Wanless v. City of Chicago*, 38 N.E.2d 743, 746 (Ill. 1941) (“Where there is delay in the payment of a condemnation judgment it cannot reasonably be said that its payment at some later date will amount to just compensation, because the owner in such case is deprived of the full and beneficial use and enjoyment of his property without legal process or compensation.”). Several petitioners in this case are in their 70s and 80s, App.H-16–21; unreasonable delay effectively means they will never receive compensation.

After all, the term “self-executing” implies an *enforceable* right. *Davis v. Burke*, 179 U.S. 399, 403 (1900) (“A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.”) (citation omitted); *cf. Medellin v. Texas*, 552 U.S. 491, 505 (2008) (treaty stipulations that are *not* self-executing are enforceable only pursuant to implementing legislation) (citation omitted). Here, the Fifth Amendment explicitly commands payment of just compensation

when government takes property for public use. This is a “sufficient rule” as evidenced by courts’ ability to apply it since the earliest days of the United States. The judgments awarding just compensation in this case did not transform Petitioners’ homes and businesses into a lesser form of property unworthy of constitutional protection. As Justice Harlan put it: “Since 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.” *Folsom*, 109 U.S. at 295 (Harlan, J., dissenting).⁵ Consequently, the Constitution guarantees “certain payment,” *Bragg*, 251 U.S. at 62, and an “adequate provision for enforcing the pledge” of compensation represented in a judgment. *Joslin*, 262 U.S. at 677.

Yet the Fifth Circuit brushed off the self-executing nature of compensation as dicta, concluding that the Sewerage Board may have waived immunity from *lawsuits* asserting Just Compensation Clause claims, but has not done so for the resulting just compensation *judgments*. Thus, it concluded, the right to compensation cannot be judicially enforced. But describing the Just Compensation Clause as self-

⁵ The Fifth Circuit noted that Petitioners focused on the judgments as the property allegedly taken, and not Petitioners’ homes and businesses. But this is a distinction without a difference because the former is intended to compensate for the loss of the latter—they are thus interchangeable.

executing is not “hortatory fluff.”⁶ It means that Louisiana cannot reserve the authority to indefinitely delay paying just compensation judgments, and that a federal court need not defer to the Sewage Board’s assertions of sovereign immunity. Whether viewing the Just Compensation Clause as an affirmative waiver of common-law immunity, or simply a textual affirmation that the sovereign power of eminent domain does not include the power to unreasonably delay compensation, this Court has emphasized, “[t]he government’s post-taking actions ... cannot nullify the property owner’s existing Fifth Amendment right[,]” and where it has taken property, “no subsequent action by the government can relieve it of the duty to provide compensation.” *Knick*, 139 S. Ct. at 2171. The judiciary’s duty to enforce the Constitution by inquiring whether government is unreasonably delaying compensation cannot be conditioned on the condemnor’s consent. The Sewerage Board’s common-law sovereign immunity must yield to the Constitution’s compensation imperative.

Federal courts are naturally reluctant to intrude on state procedures. But any reluctance must give way to the self-executing Just Compensation Clause, which necessarily implicates civil rights. *First*

⁶ See *Kelo v. City of New London*, 545 U.S. 469, 497 (2004) (O’Connor, J., dissenting) (“[W]ere the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff. An external, judicial check on how the public use requirement is interpreted, however limited, is necessary if this constraint on government power is to retain any meaning.”).

English, 482 U.S. at 316 n.9. (“[I]t is the Constitution that dictates the remedy for interference with property rights amounting to a taking.”).⁷ Without a judicial willingness to act when presented with plausible allegations that a condemnor has unreasonably delayed, describing the Just Compensation Clause as “self-executing” is meaningless. The Fifth Circuit’s rationale abdicates the judiciary’s duty to ensure that just compensation is timely.

2. States May Not Thwart Reasonably Timely Payment of Just Compensation

The Fifth Circuit fails to align with the Fourteenth Amendment’s empowerment of federal courts to ensure that states do not violate individual rights. *Mitchum v. Foster*, 407 U.S. 225, 238–39 (1972) (recognizing the role of the Amendment in elevating “the Federal Government as a guarantor of basic federal rights against state power”); Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 268 (1998) (the Amendment was adopted in part to protect “citizens of the United States, whose property, by State legislation, has been wrested from them”). Before the foundational shift in constitutional thinking in the aftermath of the Civil War, the Fifth Amendment’s condition on government’s exercise of

⁷ Unlike other civil actions, claims for just compensation do not determine culpability—the owner merely has property needed for a public use and the judgment establishes the amount representing the full and perfect equivalent for the property taken.

eminent domain power was only a limitation on the federal government. *See Barron v. Mayor & City Council of Baltimore*, 32 U.S. (7 Pet.) 243, 250–51 (1833).

It wasn't until the Fourteenth Amendment (and the civil rights statutes adopted to give it teeth), however, that federal courts protected property and other constitutional rights from state and local governments. When Congress enforces a Fourteenth Amendment right without violating state immunity, it is because the Amendment itself overrides any state action that purports to render a right immune from judicial enforcement. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976); Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 Nw. U. L. Rev. 144, 199 (1996) (“It is a proposition too plain to be contested that the Just Compensation Clause of the Fifth Amendment is ‘repugnant’ to sovereign immunity and therefore abrogates the doctrine[.]”).

**B. The Fifth Circuit Conflicts With
This Court’s Decisions Requiring
Compensation “Without Unreasonable
Delay”**

The Fifth Circuit’s conclusion that a condemnor retains the choice of whether and when to pay compensation—and federal courts are powerless to do anything about it even in light of unreasonable delays—conflicts with more than 100 years of this Court’s jurisprudence. In *Bragg*, the Court concluded that when the government takes private property, it

must provide just compensation “without unreasonable delay.” 251 U.S. at 62. Four years later in *Joslin*, this Court further explained that “the requirement of just compensation is satisfied when the public faith and credit are pledged to a reasonably prompt ascertainment *and payment*.” 262 U.S. at 688 (emphasis added).⁸ This Court should grant the petition to resolve the conflict and establish that the term “just” in the Just Compensation Clause means more than fair value for the property taken, and includes a temporal element requiring actual payment without unreasonable delay.⁹

⁸ The Fifth Circuit labeled the “right to compensation immediately upon an uncompensated taking” as dicta, App.A-9, apparently referencing *Bragg* and *Joslin*, both of which were briefed by Petitioners although neither is cited in the Fifth Circuit’s opinion.

⁹ This Court developed factors for determining whether government action is “reasonably prompt” in cases involving the constitutional right to a speedy trial that would be equally applicable in this context. *See, e.g., Barker v. Wingo*, 407 U.S. 514, 530–32 (1972) (setting out four factors for determining when a delay exceeds constitutional bounds: length of delay, the reason for the delay, the assertion of the right, and prejudice to the person asserting a constitutional injury); *United States v. Marion*, 404 U.S. 307, 334 (1971) (government may not deliberately delay) (Brennan, J., concurring).

1. The Fifth Amendment Requires “Assured Payment” of Compensation and “Enforcement of the Pledge”

The Just Compensation Clause does not require compensation in advance of a taking, or even contemporaneous compensation. *Crozier v. Fried. Krupp Aktiengesellschaft*, 224 U.S. 290, 306 (1912). But never has this Court afforded condemnors unlimited and unreviewable discretion to decide when to pay after a taking.

The recognition that reasonably timely compensation is essential originated in *Sweet v. Rechel*, 159 U.S. 380 (1895), where this Court held that “[p]ayment need not precede the seizure, but the means for securing indemnity must be such that the owner will be put to no risk of unreasonable delay.” *Id.* at 401 (quoting *Haverhill Bridge Proprietors v. Essex Cnty. Comm’rs*, 103 Mass. 120, 123–24 (1869)). Two decades later, the Court confirmed:

[I]t is settled by the decisions of this court that 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.

Bragg, 251 U.S. at 62 (emphasis added) (citing *Branson v. Gee*, 36 P. 527, 529 (Or. 1894) (pre-

condemnation compensation unnecessary because courts may enforce judgment post-condemnation).

This Court reaffirmed the “reasonably prompt” compensation principle the following year, holding that a statute’s requirement of giving security for costs “constitutes an adequate provision for assured payment of any compensation due to complainant without unreasonable delay[,]” which is necessary to satisfy due process of law. *Hays*, 251 U.S. at 238. Three years later, this Court again confirmed that compensation is not required at or before a taking, as long as there is adequate provision for enforcing the pledge to provide it reasonably promptly after a taking: “[T]he 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.*” *Joslin*, 262 U.S. at 677 (citations omitted) (emphasis added). Thus, it is not sufficient for compensation to be adjudicated (“ascertained”) and ordered (“pledged”). There must also be an “adequate provision for enforcing the pledge.” *Id.* The statute challenged in *Joslin* provided that “[a]s an additional guaranty that the judgment obtained will be paid,” “the owner under the statute may have execution issued against the city.” *Id.* at 677–78. The Court concluded that “[t]hese provisions adequately fulfill the requirement in respect of the ascertainment and payment of just compensation[.]” *Id.*

In short, the feature that saves an expropriation in which compensation is not provided at or before the taking is that there is some guaranty of actual

payment “without unreasonable delay” after the taking. *See also United States v. Klamath & Moadoc Tribes*, 304 U.S. 119, 123 (1938) (“The established rule is that the taking of property by the United States in the exertion of its power of eminent domain implies a promise to pay just compensation, i.e., value at the time of the taking plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking.”) (citation omitted).

But here, the Sewerage Board makes no “guaranty” of “assured payment.” *Ponder*, 342 So.2d at 125–28 (creditor may not execute just compensation judgment). It affirmatively *refuses* to do so. Louisiana reserves the sovereign power to decide when—and whether—to pay judgments awarding just compensation, La. Const. art. XII, § 10(C), and the Fifth Circuit firmly refuses to permit owners whose property has been taken from invoking the usual means of enforcing judgments, and bars judicial enforcement. All an owner whose property has been taken can do is wait, apparently endlessly, for the legislature to appropriate compensation. *Sugarland*, 476 So.2d at 976 (sole method of satisfying judgments is appropriation).

2. Reasonably Prompt Compensation Is a Fundamental Property Right

States enjoy latitude to define “property.” *Cedar Point*, 141 S. Ct. at 2075–76 (“As a general matter, it is true that the property rights protected by the Takings Clause are creatures of state law.”). But this

Court has never countenanced state law defining property to eliminate “fundamental elements” of “central importance to property ownership.” *See, e.g., id.* at 2073 (rejecting California’s argument that state regulations limited the fundamental right to exclude). Core property rights such as the right to exclude are not “empty formalit[ies], subject to modification at the government’s pleasure.” *Id.* at 2077.¹⁰ Similarly, in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), Justice Marshall emphasized that property includes a “normative dimension” insulated by the Fifth Amendment from state tampering. These fundamental rights protect individual autonomy:

I do not understand the Court to suggest that rights of property are to be defined *solely* by state law, or that there is no federal constitutional barrier to the abrogation of common law rights by Congress or a state government. The constitutional terms “life, liberty, and property” do not derive their meaning solely from the provisions of positive law. They have a normative dimension as well, establishing a sphere of private

¹⁰ Other examples include the right to transfer property, *Babbitt v. Youpee*, 519 U.S. 234, 243–45 (1977); interest following principal, *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162 (1980); littoral owners obtaining title to accretion, *County of St. Clair v. Lovington*, 90 U.S. 46, 68 (1874); and making reasonable use of land, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

autonomy which government is bound to respect.

Id. at 93 (Marshall, J., concurring) (emphasis added). See Leonard W. Levy, *Origins of the Bill of Rights* 252–253 (2001) (“no matter how defined [in the Fifth Amendment], property rights nourished individual autonomy”). For this reason, a state’s abolition of “certain categories of common-law rights in some general way” raises “[q]uite serious constitutional questions.” *PruneYard*, 447 U.S. at 93 (Marshall, J., concurring). Moreover “there are limits on governmental authority to abolish ‘core’ common-law rights, including rights against trespass, at least without a compelling showing of necessity or a provision for a reasonable alternative remedy.” *Id.* at 93–94 (Marshall, J., concurring). Receiving compensation within a reasonable time after property is taken is one of those normative dimensions, to prevent its relegation to an “empty formality.”

The “core” nature of the right to be actually compensated without unreasonable delay is reflected in its lineages as long as any in western law. Over eight centuries ago, suffering under the practice of purveyance—where the Crown “took goods, crops, horses, and carts for the king’s use without (or intending to pay) for them”¹¹—the barons realized that it was not enough for King John to *promise* to provide compensation for these takings, he must also guarantee prompt payment. Consequently, in Magna

¹¹ Dan Jones, *Magna Carta – The Birth of Liberty* 138 (2015).

Carta, the king not only agreed to pay for property taken, but also to provide payment “*statim*” (immediate or instantly). Only an owner’s consent could delay it:

No constable, or any of our bailiffs, shall take anyone’s corn or any other chattels, unless he immediately [*statim*] pays for them in cash, or else he can agree with the seller to postpone payment.

Magna Carta art. XXVIII (1215), *quoted in Jones, supra*, at 209. This was not merely an aspirational guideline—a medieval Pirate’s Code¹²—but one with a potent enforcement mechanism: if John failed to live up to these promises, the barons could abandon their feudal obligations and revolt. History tells us that they did just that, after John almost immediately repudiated his promises.

But this essential limitation on sovereign power endured. Ten years after Runnymede, Henry III reissued Magna Carta which slightly modified article 28, but left intact the requirement of immediate or “instant” compensation, or setting a deadline of forty days if the king’s agent was nearby (presumably because if they failed to pay prompt compensation, an owner could more easily enforce the right):

(XIX.) No Constable, nor his Bailiff, shall take the corn or other goods of any one,

¹² “The [pirate’s] code is more what you’d call *guidelines* than actual rules.” *Pirates of the Caribbean: The Curse of the Black Pearl* (Walt Disney Pictures and Jerry Bruckheimer Film 2003).

who is not of that town where his Castle is, without *instantly* paying money for them, unless he can obtain a respite from the free will of the seller; but if he be of that town wherein the Castle is, he shall give him the price within forty days.

Magna Carta art. XIX (1225) (emphasis added), *quoted in The Roots of Liberty* 263 (Ellis Sandoz, ed. 1993).

**a. Compensation Delayed Is Not “Just”
Compensation**

This Court has long recognized that property rights are “necessary to preserve freedom[,]” *Cedar Point*, 141 S. Ct. at 2071, and Magna Carta’s requirement to compensate “*statim*” continues. *See Horne v. Dep’t of Agric.*, 576 U.S. 350, 358–359 (2015) (the “categorical” duty to pay just compensation “goes back at least 800 years to Magna Carta” and the Takings Clause was included in the Bill of Rights in part because of Revolutionary War property seizures). The syntax of the great charter’s “takings clause” (“no constable shall take [property] ... without immediate payment”) is familiar, because the Fifth Amendment is phrased similarly (“nor shall private property be taken ... without just compensation”).

Just compensation lies at the heart of property rights, and this Court has emphasized its central role. *See Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 241 (1897) (just compensation was the first right in the Bill of Rights “incorporated” against states under the Fourteenth Amendment); *Lingle v. Chevron*

U.S.A., Inc., 544 U.S. 528, 536–37 (2005) (“As its text makes plain, the Takings Clause ... ‘is designed not to limit governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking.’”) (citation omitted). The sole measure of justice for most takings is compensation. *Wanless*, 38 N.E.2d at 746 (“It must be remembered that a landowner whose property is taken or damaged for public use through the exercise of the power of eminent domain is an involuntary creditor who has no right to prevent the city from taking or damaging his property.”).

Compensation is meant to indemnify—the “full and perfect equivalent” for property taken. *United States v. Miller*, 317 U.S. 369, 373 (1943) (“The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken.”) (citation omitted). But the “justness” of compensation is not only the value of the property taken, but includes *when* it is paid. See *United States v. 9.94 Acres of Land*, 51 F. Supp. 479, 483–84 (E.D.S.C. 1943) (just compensation means more than a property owner’s “estate or his children or his grandchildren are to receive installment payments and perhaps inherit a law suit in the far future”); *United States v. Bauman*, 56 F. Supp. 109, 115 (D. Or. 1943) (refusing to allow government to pay just compensation in installments over time); *id.* at 116 n.25 (“The duty imposed upon the United States by the amendment is to pay just compensation, and even the Congress of the United States could not excuse it from that

obligation or establish a standard of measurement which would necessarily deprive the citizen of any part of it.”) (citation omitted). The right to timely compensation reflects the normative (and intuitive) expectation that if property must be appropriated and surrendered to a public use, the owner will be made whole somewhere near in time.

Because the requirement to pay timely compensation is so fundamental, most processes to determine compensation for takings include the “additional guaranty that the judgment obtained will be paid.” *Joslin*, 262 U.S. at 677–78. In *Joslin* for example, the property owner could satisfy the compensation judgment by execution against the city. *Id.* Another example: in straight eminent domain takings, property is not “taken,” and title does not transfer to the condemnor, until it actually tenders payment of adjudicated compensation. See *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 4 (1984). Similarly, in “quick-takings,” the condemnor may take possession or title only after it deposits with the court an estimate of just compensation due the owner. See 40 U.S.C. § 3114(b). If the condemnor fails to pay the full amount after judgment, the owner recovers his property. *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 660 (1890) (“[I]f the result of that trial should be a judgment in its favor in excess of the amount paid into court, *the defendant must pay off the judgment* before it can acquire the title to the property entered upon, and, *failing to pay it within a reasonable time* after the compensation is finally determined, it will become a trespasser....”) (emphasis added).

The centrality of the right to timely compensation is also reflected by its widespread recognition by state constitutions and courts. *See, e.g.*, Cal. Const. art. I, § 19 (“Private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner.”); Ga. Const. art. I, § 3, ¶ I (“private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid”); *Fla. Dep’t of Agric. & Consumer Servs. v. Dolliver*, 283 So.3d 953, 955 (Fla. App. 2019) (invalidating Florida statute requiring condemnor to appropriate funds and prohibiting execution of just compensation judgment, because statute “undermined” self-executing state constitution); *Bromfield v. Treasurer and Receiver-General*, 459 N.E.2d 445, 448 (Mass. 1983) (property owners cannot be “relegated to standing idly by,” with compensation being “the vague hope that on some unascertainable future date their judgment will be satisfied”) (citation omitted); *Dep’t of Trans. v. Mixon*, 864 S.E.2d 67, 79 (Ga. 2021) (courts may enjoin road project if government has not paid compensation). Other states by statute establish a time limit to pay just compensation judgments, after which any property taken reverts to the owner. *E.g.*, Haw. Rev. Stat. § 101-25 (“The plaintiff shall within two years after final judgment pay the amount assessed as compensation or damages and upon failure so to do all rights which may have been obtained by the judgment shall be lost to the plaintiff[.]”).

The Sewerage Board withholding compensation for years after it finished the project is not the “turning of square corners” anyone expects of their government. *See Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021) (“If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them.”); *F.M.C. Stores Co. v. Borough of Morris Plains*, 495 A.2d 1313, 1317–18 (N.J. 1985) (“[I]n the condemnation field, government has an overriding obligation to deal forthrightly and fairly with property owners.”). Petitioners’ properties were taken, and they have been provided nothing but unenforceable pieces of paper in return.

b. Interest Does Not Compensate For Unreasonable Delay

Property “empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them.” *Cedar Point*, 141 S. Ct. at 2071 (quoting *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017)). But Petitioners—owners of modest homes and businesses—remain in personal and economic limbo because the Sewerage Board has already taken their properties but has not paid them, leaving them financially and mentally stressed. Timely compensation not only settles public debt and reduces uncertainty, paying owners for their properties provides a stable basis for investment, which results in greater prosperity.¹³ Delays in

¹³ Property promotes reliance on settled expectations. Christopher Serkin, *What Property Does*, 75 Vand. L. Rev. 891,

compensation leave homes in disrepair and businesses undercapitalized. Owners may be forestalled from acquiring replacement property (to continue their lives in a new home, or businesses in a new or repaired premises), or to avoid unnecessary taxes for failure to obtain replacement property within the time allotted by the tax code.

Reasonable delays are tolerated because interest is required until actual payment. *Seaboard Air Line Railroad Co. v. United States*, 261 U.S. 299, 306 (1923). Large or corporate property owners may have the resources to absorb long delays in compensation, so long as accrued interest eventually is paid. But even short interruptions in operations or cash flow can destroy small businesses and family finances—especially for owners on fixed incomes, and the fact that interest is accumulating is of scant comfort when homes remain unrepaired, and businesses fail in the interim. The past two years of compelled shutdowns have dramatically illustrated the myriad risks small business owners face, and how cash flow and timing can make all the difference between survival and failure. See, e.g., Leland D. Crane *et al.*, *Business Exit During the COVID-19 Pandemic: Non-Traditional Measures in Historical Context* at 4 (Bd. of Gov'rs of Fed. Res. Sys. Apr. 2021) (during first year of pandemic, business exit rate was “about one-quarter

893–94 (2022) (“[P]roperty law serves an underappreciated purpose: protecting reliance on resources by favoring slow changes over fast ones in the evolution of property rights. Property, in this view, is a stabilizing but not ossifying force.”).

to one-third above normal”).¹⁴ Many local businesses and neighborhood stores have gone under.

And while property owners wait and wait, government may go bankrupt, leaving just compensation awards unpaid and property owners holding the bag. Louisiana municipalities are not insulated from reverses in the economy. See KARD/KTVE, *20 Louisiana towns and cities on the brink of bankruptcy. Can they recover?* (Mar. 15, 2021).¹⁵ See also *In re City of Stockton*, 909 F.3d 1256, 1260 (9th Cir. 2018) (after city filed eminent domain action and obtained immediate possession, it ceased prosecution and failed to pay final compensation; owner later sued for inverse condemnation but claim was discharged in bankruptcy because condemnees must “share the pain” if a condemnor defaults). Smaller property owners simply do not have the luxury of waiting indefinitely for government grace that may never come.

c. Reasonably Prompt Compensation Benefits the Public

Enforcement of the prompt compensation requirement also benefits public processes. The overarching purpose of the Fifth Amendment is to bar government from concentrating the costs of public

¹⁴ <https://doi.org/10.17016/FEDS.2020.089r1>. See also Kate Rogers, *Main Street business failure fears rise again in pandemic whipsaw*, CNBC (Feb. 12, 2021) <https://www.cnbc.com/2021/02/12/main-street-business-failure-fears-rise-again-in-pandemic-whipsaw.html>.

¹⁵ <https://www.klfy.com/louisiana/20-louisiana-towns-and-cities-on-the-brink-of-bankruptcy-can-they-recover/>.

benefits on individuals whose property is pressed into public service. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Prompt compensation democratizes the costs of public benefits by ensuring a timely evaluation of the actual cost of beneficial government actions (whether by eminent domain or regulation), and how the economic burden is to be distributed among the benefitted public (by taxation or otherwise). The Just Compensation Clause guarantees that the public considers “do we want to bear the cost of doing this?”

However, taking property but *not* promptly paying compensation avoids that essential question and enables a spending spree with a private property owner’s money—taking now, maybe paying later somewhere down the road at an exponentially-greater cost, all the while lacking a sense of whether these additional acquisitions are truly affordable. For example, in *Commw. of the N. Marianas Islands v. Lot No. 281-5 R/W*, No. 2013-SCC-0006 (C.N.M.I. Dec. 28, 2016),¹⁶ the government took property by eminent domain, but failed to provide compensation for more than *twenty years*. One of its justifications for the delay was that its “land compensation funds are exhausted.” *Id.* at ¶ 21. And it kept on taking even more property, even while it asserted the funding well ran dry. *See also Stockton*, 909 F.3d at 1260 (inverse condemnation claim for uncompensated expropriation is dischargeable in municipal bankruptcy); Mark Ballard, *Flooded homeowners want federal court to*

¹⁶ <https://www.cnmilaw.org/pdf/supreme/2016-MP-17.pdf>.

force the state to pay 16-year-old judgment, The Advocate (Mar. 19, 2020)¹⁷ (flooding caused by dam project resulted in \$320 million award of just compensation to 1,200 landowners, none of whom had seen one dollar when they filed suit *sixteen years* after obtaining their judgments); *Robertson v. Louisiana*, No. 17-00138, 2018 WL 1077303, *4–*5 (M.D. La. Feb. 26, 2018) (refusing relief to these flooded landowners in federal court).

Satisfying present liabilities and halting the accumulation of interest (often at a statutory prejudgment interest rate greater than the market interest rate) also allows the public to budget for the future, free of unsatisfied hanging liabilities clouding budgets. *See Bromfield*, 459 N.E.2d at 448 (“Delay is vexatious to the plaintiffs and likely to be costly to the Commonwealth, owing to sizable accumulations of interest.”). The just compensation awards related to the dam project noted above, affirmed by the Louisiana Supreme Court, were originally \$91 million before sixteen years’ worth of interest increased it to \$320 million. Ballard, *supra*.

The Sewerage Board’s continuing failure to live up to its fundamental constitutional obligation undermines confidence in government, and harkens back to the capriciousness of bad King John, where the sovereign’s power was employed as “legalized plunder of the citizen.” *In re Mayor*, 2 N.E. 642, 643 (N.Y. 1885) (“[I]t is necessary that the act which

¹⁷https://www.theadvocate.com/baton_rouge/news/politics/legislature/article_f4944238-6a32-11ea-b2a8-3bd6efaa54fe.html.

invades his ownership shall provide for a certain and definite and adequate source and manner of payment.... This necessity is vital and of the most essential character, since, if unheeded or disregarded, it transforms the right of eminent domain into a legalized plunder of the citizen.”). Louisiana’s population of more than 4.5 million people¹⁸ are doomed to wait—potentially forever—if government takes their property and refuses to pay judicially-ordered compensation. For example, the Fifth Circuit recently denied *en banc* review in *Lafaye v. City of New Orleans*, 35 F.4th 940 (5th Cir. 2022), which held:

Since 2019, the plaintiffs have been waiting for the City of New Orleans to return traffic fines that it illegally collected from them between 2008 and 2010. *They will have to keep waiting*. The plaintiffs allege a taking based on the city’s failure to honor a judgment of the Louisiana state courts, but we conclude that the failure to honor a judgment does not constitute a taking—even when that judgment calls for the return of personal property acquired by a government unlawfully.

Id. at 941 (emphasis added). *See also Violet Dock*, 2019 WL 6307945, at *2 (no federal relief when Louisiana government refused to pay a state court-ordered

¹⁸ *Louisiana’s population was 4,657,757 in 2020* (Aug. 25, 2021) <https://www.census.gov/library/stories/state-by-state/louisiana-population-change-between-census-decade.html>.

eminent domain compensation judgment). Only this Court can protect property owners who are being repeatedly forced to turn to federal court, hat-in-hand, to insist their government do something the Constitution requires it to do—and a court has already ordered it to do.

Finally, the Fifth Circuit’s decision encourages government to treat just compensation judgments merely as negotiating chips, with every unpaid day increasing the economic pressure on property owners to settle for less than the full amount of compensation already adjudicated. *See, e.g., id.* at *1 (owner settled for a lesser amount than judgment-plus-interest); App.K-13 (alleging improper handling of Petitioner’s claims to reduce the amount of compensation paid). Just compensation judgments are the *final* step in government compensating owners for takings, not the first step in government driving a harder bargain.

II. Other Lower Courts Treat Just Compensation as an Enforceable Right

The Fifth Circuit’s conclusion that the self-executing nature of compensation is “dicta” stands in stark contrast with state courts holding that “self-executing” means compensation must be timely paid.

For example, a Florida court recently invalidated a state statute which, like Louisiana, prohibits execution of just compensation judgments, and allows satisfaction only by voluntary appropriations. The court held the statute “undermined” the self-executing “guarantee of full compensation under our State Constitution an illusory promise with no guarantee of

compliance.” *Dolliver*, 283 So.3d at 955. Virginia holds that the condemnor must “pay off the judgment” before it can acquire the title to the property, and “failing within a reasonable time after the compensation is finally determined, it will become a trespasser[.]” *State Hwy. Comm’r v. Kreger*, 105 S.E. 217, 223 (Va. 1920) (relying on federal and state precedent). Massachusetts similarly concluded that just compensation judgment creditors “are [not] relegated to standing idly by, left only to consider, as reasonable compensation, the vague hope that on some unascertainable future date their judgment will be satisfied. It has long been established that no citizen ought to be compelled ‘to trust to the future justice of the Legislature’ to provide the compensation owing him.” *Bromfield*, 459 N.E.2d at 448 (citation omitted). Georgia allows owners to enjoin ongoing projects if the government has not provided compensation because Georgia’s takings clause is self-executing. *Mixon*, 864 S.E.2d at 79 (“[A] constitutional provision may waive sovereign immunity by necessary implication.”).

Only resolution by this Court can harmonize the divergent approaches of the lower courts on the meaning and implementation of the Constitution’s self-executing command for just compensation after a taking.

III. The Nature of Just Compensation Presents Issues of National Importance That Can Be Resolved Only by This Court

The “critical terms [in the Takings Clause] are ‘property,’ ‘taken’ and ‘just compensation.’” *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945). Recently, this Court has addressed all but one. The Court determined when a valuable interest qualifies as “private property.” *See, e.g., Cedar Point*, 141 S. Ct. at 2075–76 (right to exclude a fundamental attribute of property). It determined when a regulation restricts use of property and effects a “taking,” *Lingle*, 544 U.S. at 536 (clarifying regulatory takings), and when a taking is “for public use.” *Kelo*, 545 U.S. at 489–90.

But lower courts require guidance regarding the subject of the overwhelming majority of takings cases—just compensation. Since this Court’s last just compensation case, nearly four decades ago, *see 50 Acres*, 469 U.S. at 26–29, lower courts have strayed from the Just Compensation Clause’s foundational principles. *See, e.g., City of Milwaukee Post No. 2874 V.F.W. of U.S. v. Redev. Auth. of City of Milwaukee*, 768 N.W.2d 749 (Wis. 2009) (undivided fee rule avoids compensation for long-term leasehold interest), *cert. denied*, 561 U.S. 1006 (2010); *In re John Jay College of Crim. Justice of City Univ. of N.Y.*, 905 N.Y.S.2d 18 (N.Y. App. Div. 2010) (excluding evidence of deliberate government actions to depress the value of the taken property), *cert. denied sub nom., River Ctr. LLC v. Dormitory Auth. of State of N.Y.*, 566 U.S. 982 (2012).

The Just Compensation Clause again cries out for this Court's attention, as two Justices recently commented. *See Bay Point Props, Inc. v. Mississippi Transp. Comm'n*, 137 S. Ct. 2002 (2017) ("But [Mississippi's] decision seems difficult to square with the teachings of this Court's cases holding that legislatures generally cannot limit the compensation due under the Takings Clause of the Constitution.... Given all this, these are questions the Court ought take up at its next opportunity.") (statement of Gorsuch and Thomas, J.J.).

In times of expanding government budgets and record inflation, the imperative for compensation without unreasonable delay takes on ever greater importance. Waiting for more property owners to suffer delays in compensation will not frame the issue better and will only allow the harm Petitioners and others have already suffered to fester. More than two decades ago the Fifth Circuit reminded Louisiana local governments that property cannot "suddenly vanish behind a veil of sovereign immunity," and a failure to timely pay compensation is "untenable against a federal takings claim." *See Vogt*, 294 F.3d at 697. Yet they persist, and the Fifth Circuit's decision below only enables and emboldens further abuse behind the sovereign veil. The Sewerage Board cannot withhold compensation *forever*, can it? Under the Fifth Circuit's rationale, it can.

Only this Court can provide the remedy and allow property owners to access federal courts when they state a plausible federal claim that government has not been "reasonably prompt," and has deprived them

of just compensation by indefinitely delaying payment.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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