

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD DEVILLIER, ET AL.,)
 Petitioners,)
 v.) No. 22-913
TEXAS,)
 Respondent.)

Pages: 1 through 88
Place: Washington, D.C.
Date: January 16, 2024

HERITAGE REPORTING CORPORATION
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4 Petitioners,)

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6 TEXAS,)

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8 - - - - -

9

10 Washington, D.C.

11 Tuesday, January 16, 2024

12

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United
15 States at 11:10 a.m.

16

17 APPEARANCES:

18 ROBERT J. McNAMARA, ESQUIRE, Arlington, Virginia; on
19 behalf of the Petitioners.

20 AARON L. NIELSON, Solicitor General, Austin, Texas; on
21 behalf of the Respondent.

22 EDWIN S. KNEEDLER, Deputy Solicitor General,
23 Department of Justice, Washington, D.C.; for the
24 United States, as amicus curiae, supporting the
25 Respondent.

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P R O C E E D I N G S

(11:10 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 22-913, Devillier versus Texas.

Mr. McNamara.

ORAL ARGUMENT OF ROBERT J. McNAMARA
ON BEHALF OF THE PETITIONERS

MR. McNAMARA: Mr. Chief Justice, and may it please the Court:

The question presented in this case is resolved by the text of the Fifth Amendment, which, unlike any other provision of the Constitution, imposes on the government a -- an explicit duty to pay money.

It's also answered by this Court's decision in First English, which holds that the just compensation remedy is mandatory and that the Fifth Amendment itself furnishes a basis on which a court can award just compensation in an inverse condemnation case.

And this right of property owners to sue in inverse condemnation to obtain just compensation for an alleged taking is at the heart of modern American takings law. It's at

1 the heart of inverse condemnation claims filed
2 against state and local governments nationwide.
3 And it's also at the heart of every takings
4 claim filed against the federal government under
5 the Tucker Act.

6 The Tucker Act provides no cause of
7 action, no substantive entitlement to a remedy.
8 The cause of action, the substantive entitlement
9 to a remedy in every Tucker Act takings case, is
10 the self-executing Fifth Amendment, the same
11 cause of action recognized in First English, the
12 same cause of action pled here.

13 To reject that cause of action now is
14 to upend the way lower courts, both state and
15 federal, understand the Takings Clause to work
16 and also to abandon this Court's consistent
17 explanations of that clause not just in First
18 English but in more recent cases like Knick
19 v. Township of Scott.

20 And there's no reason to make that
21 kind of drastic change. This Court has already
22 recognized that money-mandating legal
23 obligations logically come along with the right
24 to file a lawsuit to enforce those obligations.

25 That's true as to statutes, which is

1 what this Court held in Maine Community Health
2 Options. It should be at least as true as to
3 the Constitution, and this Court's precedents
4 consistently teach that it is.

5 I welcome the Court's questions.

6 JUSTICE THOMAS: In your reply brief,
7 you say that the 19th Century federal courts
8 were faced with a bedrock property right and no
9 way to enforce it directly. Doesn't that seem
10 to be at odds -- the fact that the courts there
11 had to resort to extra-constitutional causes of
12 action, isn't that at odds with your argument
13 now?

14 MR. McNAMARA: I don't think so, Your
15 Honor, because the primary problem facing
16 federal courts in the early part of the 19th
17 Century was a lack of jurisdiction. And I think
18 the question of jurisdiction is just
19 conceptually distinct from the question of
20 whether there's a cause of action, whether
21 there's a right to a remedy.

22 Congress could tomorrow amend
23 Section 1331 to reimpose an
24 amount-in-controversy limit. And if it did
25 that, that would prevent a number of people from

1 bringing Ex parte Young actions in federal
2 court. Those claims wouldn't cease to exist.
3 Congress would just have eliminated the
4 jurisdiction over them.

5 And so I think there's a difference
6 between jurisdictional limits which limited
7 takings claims and even pleading requirements
8 like the limits to the forms of action, which
9 also limited plaintiffs' abilities to bring
10 certain kinds of claims, and the core question
11 presented here, which is just whether there is
12 an entitlement to relief.

13 There's only one modern form of
14 action, which just takes the shape of saying,
15 I'm entitled to this remedy for that reason.
16 The remedy is just compensation. The reason is
17 the Fifth Amendment as applied through the
18 Fourteenth. And once the jurisdictional
19 problems and the pleading problems are removed,
20 as they have been in this case, the only
21 question remains whether the Fifth Amendment
22 mandates compensation, whether it mandates that
23 remedy, which this Court has already answered.
24 First English says that the just compensation
25 remedy is mandatory.

1 And I think contrasting the -- the
2 arguments of the other side with the rule
3 adopted by the California Supreme Court in Agins
4 is actually a useful illustration here. The
5 California Supreme Court's decision in Agins
6 said, we as a common law court don't want to
7 recognize a claim for just compensation in a
8 regulatory takings case. We think that intrudes
9 on the legislature's prerogative. We don't
10 recognize that cause of action.

11 And First English says that doesn't
12 matter. The cause of action, the entitlement to
13 relief, flows directly from the Fifth Amendment.
14 So too here. The complaint here pleads a cause
15 of action directly under the Fifth Amendment --

16 JUSTICE BARRETT: Counsel --

17 MR. McNAMARA: -- that says our
18 property was taken and the Fifth Amendment --
19 yes, Your Honor?

20 JUSTICE BARRETT: Counsel, I agree
21 that jurisdiction and a cause of action are
22 distinct, but it's a little bit hard to see how
23 in 1791 -- I mean, I think your argument is,
24 when the Fifth Amendment was ratified, those who
25 ratified it had to see the Fifth Amendment as

1 itself supplying the cause of action because
2 this was the crucial way to vitiate the takings
3 right, the right to just compensation.

4 But Congress didn't provide for
5 federal question jurisdiction until 1875, so
6 that kind of languished on the vine for a pretty
7 long time if you're right that the founding
8 generation or the -- you know, the ratifying
9 generation in 1791 viewed it that way.

10 Moreover, you know, the historical
11 evidence of private bills runs contrary to your
12 argument because, yes, there was a right to just
13 compensation, but we have all of this time,
14 throughout the 19th Century, of Congress
15 enacting private bills to give just
16 compensation.

17 And I think you have to contend with
18 that because, I mean, I get that this is against
19 Texas, against the state, but if the Fourteenth
20 Amendment incorporated the Fifth Amendment as it
21 was, there's kind of a mountain of historical
22 evidence, you know, that you've got to contend
23 with.

24 MR. McNAMARA: So I -- I don't think
25 that mountain does quite the work that Texas

1 needs it to, Your Honor. And I think one
2 problem here is the difficulty in mapping the
3 modern conception of cause of action onto 1791
4 visions of the court. I think, if you asked a
5 lawyer in 1791 whether the Fifth Amendment
6 contained a cause of action, they probably
7 wouldn't understand the question.

8 But, if you asked them can a property
9 owner sue to enforce just compensation, the
10 answer absolutely would have been yes. It would
11 have been a suit in trespass. It would perhaps
12 have been a suit in ejectment. But there was an
13 understanding at the framing that this was an
14 enforceable right, and if you --

15 JUSTICE GORSUCH: Well, that -- that
16 establishes at most, it seems to me, that the
17 Fifth Amendment envisioned some remedial
18 mechanism would be available. And the common
19 law trespass, as you point out, might have been
20 it, or conversion might have been it. It -- it
21 doesn't necessarily mean that there is itself an
22 independent cause of action under the Fifth
23 Amendment.

24 MR. McNAMARA: I think it does, Your
25 Honor, once the forms --

1 JUSTICE GORSUCH: Why? You've just
2 conceded that the cause of action that -- that
3 the Framers would have understood would have
4 been in trespass.

5 MR. McNAMARA: Well, Your Honor, I
6 think, in -- in modern terms, what the Court
7 means when it says "cause of action" --

8 JUSTICE GORSUCH: Well, no. But we're
9 talking about the original meaning, and you're
10 asking us to appeal to the original meaning and
11 say they would have understood there would have
12 been a cause of action. Perhaps, but what would
13 that cause of action look like?

14 MR. McNAMARA: I think they would have
15 understood that there was an entitlement to a
16 remedy.

17 JUSTICE GORSUCH: Some remedy.

18 MR. McNAMARA: An entitlement to just
19 compensation as a remedy.

20 JUSTICE GORSUCH: Some -- some way to
21 get that?

22 MR. McNAMARA: Yes, and I think --

23 JUSTICE GORSUCH: Fair enough. That
24 doesn't necessarily mean there's a federal cause
25 of action. It could mean it happens under state

1 common law, right?

2 MR. McNAMARA: Well, Your Honor, two

3 --

4 JUSTICE GORSUCH: I mean, you -- you
5 would admit that a state common law cause of
6 action did and could fully vindicate the Fifth
7 Amendment?

8 MR. McNAMARA: Yes, Your Honor, I
9 think there could be a state common law action
10 that vindicated the First Amendment, but I also
11 think --

12 JUSTICE GORSUCH: Fifth. Fair enough.

13 MR. McNAMARA: Yes, Your Honor, or --
14 or the First.

15 JUSTICE GORSUCH: And that that would
16 -- that would be enough. No -- nothing more
17 would be required.

18 MR. McNAMARA: Well --

19 JUSTICE GORSUCH: And, in fact, that's
20 how it operated for a long time.

21 MR. McNAMARA: Well, certainly, Your
22 Honor, if compensation is provided through any
23 mechanism, there's no longer a Fifth Amendment
24 injury to be remedied.

25 JUSTICE GORSUCH: Ah. Okay. I

1 understand that argument. That's not the
2 argument you're -- you're pressing, though.

3 MR. McNAMARA: That's because, here,
4 compensation hasn't been paid. The Plaintiffs
5 in this case continue to suffer the ongoing
6 Fifth Amendment injury.

7 JUSTICE GORSUCH: Well, maybe that's
8 because you -- you -- you -- you allowed this
9 case to be removed, which I -- and -- and, you
10 know, I'm -- I'm surprised you didn't oppose
11 removal on that ground and said there's no
12 federal question that we need to resolve here
13 because it's really a state common law cause of
14 action we're pursuing. That would have been one
15 option.

16 Or maybe in federal court you might
17 have said we want a declaratory judgment, which
18 everyone concedes you can get under the Fifth
19 Amendment, and take pendent jurisdiction over
20 our state common law cause of action, which
21 would adequately vindicate our Fifth Amendment
22 rights.

23 You didn't pursue either of those
24 courses here.

25 MR. McNAMARA: So two responses, Your

1 Honor. One, I don't think there was a
2 good-faith grounds to oppose Texas's removal
3 because what the complaint says on its face is
4 we are entitled to just compensation under the
5 Fifth Amendment.

6 JUSTICE GORSUCH: Well, but it -- it
7 then pleads state causes of action to do so.

8 MR. McNAMARA: No, Your Honor. It --
9 it pleads a claim directly under the Fifth
10 Amendment.

11 JUSTICE GORSUCH: Well, maybe that's
12 another problem you face is it -- if you had an
13 adequate common law -- do you dispute that Texas
14 has an adequate common law remedy to -- for --
15 for your problem?

16 MR. McNAMARA: I do, Your Honor. And
17 this is actually an important point. That --

18 JUSTICE GORSUCH: Is that argument in
19 your brief, that -- that the -- that the common
20 law of Texas or state law has no mechanism to
21 enforce the Fifth Amendment?

22 MR. McNAMARA: Well, Your Honor, Texas
23 asserts --

24 JUSTICE GORSUCH: If it did, I'd --
25 that one I'd take seriously, but I didn't see

1 it.

2 MR. McNAMARA: So Texas asserts, Your
3 Honor, that there is a Texas common law
4 mechanism to vindicate the Fifth Amendment, but
5 there is no Texas decision saying we sitting as
6 a common law court invoke our common law powers
7 to create a cause of action.

8 JUSTICE GORSUCH: No trespass, no
9 conversion?

10 MR. McNAMARA: Texas hears inverse
11 condemnation claims arising under the Fifth
12 Amendment. That's what the Texas Supreme Court
13 said most recently in City of Baytown
14 v. Schrock, and it cites the Fifth Amendment.
15 It doesn't invoke its common law powers.

16 JUSTICE GORSUCH: Fair enough. I get
17 all of that now. All right. That's clarifying.
18 But you -- you -- the -- the nature of the
19 argument before us isn't that Texas lacks a
20 common law cause of action. It's whether or not
21 Texas has such a thing, we're entitled to
22 another remedy under federal law.

23 MR. McNAMARA: I -- I don't think
24 that's right, Your Honor. What the Fifth
25 Circuit said is that the complaint that alleges

1 an entitlement to just compensation flowing from
2 the Fifth Amendment doesn't state a claim, that
3 that claim is dead.

4 JUSTICE GORSUCH: Let -- let -- let --
5 let's suppose we -- it did create a cause of
6 action. Would -- would it also waive sovereign
7 immunity? And what would the statute of
8 limitations be?

9 MR. McNAMARA: It wouldn't necessarily
10 waive sovereign immunity, Your Honor. I think
11 that's a distinct question. And the statute of
12 limitations would be the statute of limitations
13 that is applied by lower courts when people
14 actually bring these claims.

15 There's a robust Court of Federal
16 Claims jurisprudence, federal district courts
17 here claims arising under the Fifth Amendment,
18 sometimes looking to state law to set the
19 statute of limitations.

20 JUSTICE GORSUCH: Ah, they look to
21 state law, don't they, yeah?

22 MR. McNAMARA: But the claim itself,
23 Your Honor, comes from the Fifth Amendment not
24 just in Texas but in states nationwide. And I
25 think this is an important point.

1 Take Oregon, for example. Oregon
2 signed on to the state's amicus brief in support
3 of Texas, but the reason that Oregon pays just
4 compensation for takings under the Fifth
5 Amendment is the Oregon courts, citing First
6 English, have said it must pay just
7 compensation. And so answering the question
8 presented --

9 JUSTICE BARRETT: If we don't read
10 First English the way you do, I mean, I think
11 that footnote's pretty difficult to decipher, do
12 you lose?

13 MR. McNAMARA: No, Your Honor. I -- I
14 don't think it's just the footnote in First
15 English. I think it's the broader holding that
16 the remedy is required.

17 But I think there's no dispute here
18 that there is an entitlement to relief. And,
19 certainly, by the time of the ratification of
20 the Fourteenth Amendment, courts across the
21 country had converged on how that kind of
22 entitlement would be enforced.

23 And it's enforced by a lawsuit
24 directly against the entity that took the
25 property that takes the form of saying, you have

1 this duty to provide just compensation, you have
2 not fulfilled it, and I'd like the court to
3 order you to fulfill it.

4 JUSTICE SOTOMAYOR: Can I have just a
5 small point of information? Your case was
6 dismissed in federal court. Did you ask for a
7 remand on your claims under the Texas
8 Constitution?

9 MR. McNAMARA: No, Your Honor. The
10 district court is keeping pendent jurisdiction
11 over the claims under the Texas cause.

12 JUSTICE SOTOMAYOR: So you -- you have
13 a pending suit on the state law claim?

14 MR. McNAMARA: Yes, Your Honor, but
15 there is a dispute about the scope of the
16 takings law that governs that question. Texas
17 has taken the position in the lower courts that
18 the Texas constitution has a narrower definition
19 of what counts as a taking than the federal
20 courts.

21 JUSTICE SOTOMAYOR: Well, then First
22 English comes in too because First English was
23 about a state court claim and when it started,
24 whether a temporary claim was a taking or not,
25 and we said yes, it's a taking, and so the state

1 court had to pay for that taking.

2 How is it different than First English
3 in that respect?

4 MR. McNAMARA: I -- I don't think it's
5 different from First English, Your Honor, except
6 that, here, it was removed into federal court
7 and then the Fifth Amendment aspect of the case
8 was dismissed on the merits.

9 JUSTICE SOTOMAYOR: Oh, I -- I -- I
10 don't disagree with you, but First English is
11 about what the substantive law of Texas is and
12 what Texas has to pay.

13 And so that issue should be resolved
14 even in the district court, correct?

15 MR. McNAMARA: I -- I don't think so,
16 Your Honor, because the backstop in First
17 English is the Fifth Amendment that -- that says
18 that the met -- the just compensation --

19 JUSTICE SOTOMAYOR: No, the backstop
20 in the Fifth -- yes, it's the Fifth Amendment
21 that provides the substantive law, but not
22 necessarily -- we didn't address whether it
23 provides a cause of action.

24 MR. McNAMARA: I -- I think the Court
25 did, Your Honor. The United States' amicus

1 brief --

2 JUSTICE SOTOMAYOR: All right. We're
3 -- we're going to -- we're going to go into --

4 JUSTICE JACKSON: Can I just ask --
5 I -- I mean, this is similar to what Justice
6 Sotomayor was just getting into. Are you saying
7 that we don't have three separate concepts,
8 right, remedy, and cause of action? I thought
9 those were three different things. And perhaps
10 First English only covered two of them?

11 MR. McNAMARA: I -- I'm not sure
12 they're distinct concepts, Your Honor. I think
13 the simplest way to understand cause of action
14 is an entitlement to a particular remedy, which
15 is why it's coherent to say someone might have a
16 cause of action for an injunction.

17 JUSTICE JACKSON: I thought it had to
18 do with the forum, that you have a cause of
19 action that is recognized in the judicial forum
20 as opposed to, say, going to the legislature
21 through -- through private bills.

22 MR. McNAMARA: Well, Your Honor, I --
23 I think, to the extent that's the definition of
24 "cause of action," we would have a cause of
25 action under the clear import of the history

1 that the --

2 JUSTICE JACKSON: Not -- not the
3 history. I guess I'm just trying to understand,
4 is there -- does it make sense to think about
5 the Fifth Amendment as providing the right and
6 the remedy but not speaking to where you're
7 going to get that remedy from or what is the
8 enforcement mechanism?

9 That's how I sort of am
10 conceptualizing this, and -- and I think we
11 differ about that, so I'd like to hear your
12 opinion on it.

13 MR. McNAMARA: I -- I'm not sure
14 that's a correct reading of the Fifth Amendment,
15 Your Honor, in part because I think that reading
16 -- everyone agrees there are some judicial
17 remedies for the Fifth Amendment.

18 As I understand my friend's argument,
19 we'd be entitled to sue for injunctive relief or
20 for ejectment in the absence of a -- a path to a
21 Fifth Amendment compensation remedy.

22 So everyone agrees there's some
23 judicial remedy. And I think the form of that
24 judicial remedy depends on the scope of the
25 government's obligation.

1 There are two visions of the Fifth
2 Amendment. One is that the Fifth Amendment just
3 provides a precondition. The government is
4 required to pay and it can be enjoined from
5 taking the property if it doesn't pay.

6 The other division that's adopted in
7 First English that's reiterated in Knick is that
8 the Fifth Amendment creates an obligation to pay
9 just compensation. And if that's the ongoing
10 obligation, the government has taken property,
11 it owes just compensation today, will owe just
12 compensation tomorrow, courts are empowered to
13 cure that ongoing obligation.

14 It's not a question of damages for a
15 past violation. It's a question of the
16 government's obligation as it stands in court
17 today.

18 JUSTICE BARRETT: Mr. McNamara, can I
19 go back to Justice Sotomayor's question and just
20 ask for a point of clarification? I understood
21 Texas law to provide a cause of action for
22 vitiating the federal Fifth Amendment right.

23 I took your answer to Justice
24 Sotomayor to be saying that Texas courts say --
25 you were talking about how Texas courts define a

1 taking for purposes of the Texas constitution.

2 So am I wrong in thinking that Texas
3 allows you to bring a state cause of action for
4 the federal Fifth Amendment claim?

5 MR. McNAMARA: I -- I'm not sure
6 whether that's right to be honest, Your Honor.
7 And I think two things flow from this. One, if
8 it's true that there is a Texas common law cause
9 of action under which we could have -- we can
10 vindicate our Fifth Amendment rights, then the
11 Fifth Circuit still has to be reversed because
12 it held that that substantive claim should be
13 dismissed on the merits.

14 JUSTICE BARRETT: Okay. Well, let me
15 just -- just -- it's important for me to be able
16 to understand this procedural point. Does Texas
17 have -- provide a state cause of action to
18 vitiate the state takings right from the Texas
19 constitution?

20 MR. McNAMARA: Yes, Your Honor.

21 JUSTICE BARRETT: Okay. It seems to
22 me then it can't discriminate against the
23 federal claim anyway.

24 MR. McNAMARA: I -- I think that's
25 true, Your Honor, but Texas doesn't -- Texas

1 isn't trying to discriminate against the -- this
2 federal claim. What Texas says, like other
3 state courts, is it's not doing -- it doesn't
4 say we're doing common law analysis and creating
5 a cause of action.

6 What Texas seems to be doing is
7 constitutional analysis, just like the other
8 state courts that specifically cite First
9 English and say: Ah, there is a cause of
10 caution here. I'm not familiar with any state
11 case saying we are using our powers as a common
12 law court to create a cause of action to
13 vindicate the Fifth Amendment.

14 What they say is we're looking at the
15 Fifth Amendment. We see it creates the
16 obligation. Frequently they cite First English
17 directly and they say that's what gives rise to
18 the caution of action.

19 And that, I think, is what's dangerous
20 about the question presented here. As -- as I
21 understand Texas's argument, the complaint we
22 filed in state court was perfectly valid and
23 could be adjudicated, and the Fifth Amendment
24 could have been adjudicated in state court.
25 Once it was removed, Texas moved to dismiss and

1 sought an interlocutory appeal and has
2 successfully extinguished that.

3 But my concern is that adopting
4 Texas's arguments here tells all of these state
5 courts that have pointed to First English and
6 said this is the source of -- the Fifth
7 Amendment is the source of the cause of action
8 would look to a decision in this case adopting
9 Texas's arguments and say: Okay. We were
10 wrong. The Constitution does not, in fact,
11 require a remedy. There is no federal
12 constitutional cause of action. And that would
13 eliminate the federal takings remedy in state
14 courts across the nation.

15 JUSTICE ALITO: Mr. McDowell, the
16 language of the Takings Clause is quite similar
17 to the language of the Due Process Clause in the
18 Fifth Amendment, which immediately precedes it.
19 No person shall be deprived of life, liberty, or
20 property without due process of law, nor shall
21 private property be taken for public use without
22 just compensation.

23 So why should they be read differently
24 with respect to the creation of a cause of
25 action?

1 MR. McNAMARA: I don't think they have
2 to be read differently, Your Honor. I think, if
3 there's an ongoing due process violation, a
4 plaintiff could bring an Ex parte Young action.
5 Ex parte Young was not a 1983 action. It was --

6 JUSTICE ALITO: No, not an Ex parte
7 Young, but a claim for damages?

8 MR. McNAMARA: Well, I -- I think
9 that's the difference here, that we're not
10 seeking damages; we're seeking just
11 compensation. We're not saying there was a past
12 completed violation of the Constitution and we
13 want something to offset that. We're saying the
14 government has taken property, which gives rise
15 to a present duty to pay just compensation. And
16 we want the present obligation enforced, not a
17 backwards-looking damages remedy concocted or
18 created. And I think that entitlement to just
19 compensation is how the Framers would have
20 understood the Fifth Amendment.

21 The alternative view, the idea that
22 all you get are injunctions, I don't think
23 squares with either the text or how contemporary
24 commentators talked about the clause.

25 Saint George Tucker and John Jay wrote

1 about the Takings Clause in the context of the
2 Army seizing horses and military supplies. But,
3 if the Army is seizing horses, the Army's going
4 to get the horses. The understanding would not
5 have been that you could stop the Army in the
6 moment from seizing your horses.

7 What Saint George Tucker is writing
8 about is the ongoing duty to provide
9 compensation for the horses, which is also how
10 contemporary courts wrote about the just
11 compensation requirement, even constrained as
12 they were by the forms of action.

13 I -- I think a great example of this
14 is the Massachusetts Supreme Court's decision in
15 -- excuse me, the Massachusetts Supreme Court's
16 decision in evaluating an action brought as a
17 writ of debt in *Gedney v. Inhabitants of*
18 *Tewksbury*, where the justices -- the judges of
19 the Massachusetts Supreme Court there said:
20 This isn't the right forum. This isn't an
21 action in debt. You can't state it using that
22 form. You have to go to a different forum to
23 get your just compensation. But, if that other
24 forum denies you compensation, you can return
25 here, in the statement of one of the judges, and

1 ask for that remedy again, which will not
2 probably be refused if --

3 JUSTICE ALITO: If the Fifth Amendment
4 confers a right to sue for just compensation in
5 and of itself, is that right unqualified? And
6 if it is not unqualified, what qualifications do
7 you recognize?

8 MR. McNAMARA: Oh, I -- I certainly
9 don't think it's unqualified, Your Honor. It --

10 JUSTICE ALITO: What qualifications do
11 you recognize?

12 MR. McNAMARA: It -- it requires a
13 court of competent jurisdiction, and so,
14 certainly, Congress is free to channel
15 jurisdiction however it likes. Texas is
16 similarly free to create courts of jurisdiction
17 as it pleases.

18 But the underlying -- all we're saying
19 is that there is an underlying entitlement to
20 receive just compensation and that when that
21 entitlement is denied, a court of competent
22 jurisdiction can order that that just
23 compensation be paid.

24 JUSTICE ALITO: Well, does it make
25 sense to view the Fifth Amendment as providing a

1 right to sue for compensation, but your ability
2 to vindicate that right is totally dependent on
3 Congress's discretionary choice to create lower
4 federal courts and to give them jurisdiction to
5 entertain such claims? That sounds like a very
6 weak right if that -- if it's subject to
7 limitation in that way.

8 MR. McNAMARA: I think the same could
9 be said of the entire Bill of Rights, though,
10 Your Honor. The -- the entire stratum of
11 federal constitutional rights depends on
12 Congress to create lower federal courts, courts
13 where these rights can be vindicated.

14 Once Congress does create those
15 courts, and when a state defendant deliberately
16 chooses to avail itself of those courts, the
17 only question is whether that court can enforce
18 the ongoing obligation to require the payment of
19 just compensation.

20 And I think that's ultimately what
21 distinguishes this case from the Court's Bivens
22 cases where Bivens cases are about the policy
23 question of whether to create a remedy. They
24 don't engage in constitutional text, history,
25 and tradition analysis, which is why Justice

1 Rehnquist could dissent in cases like Carlson v.
2 Green and Davis v. Passman and then, less than a
3 decade later, Chief Justice Rehnquist could
4 write First English, because we're not talking
5 about a damages remedy; we're talking about the
6 power of the federal courts to, when their
7 jurisdiction is competently invoked and when the
8 state has waived its sovereign immunity, require
9 the state to comply with its ongoing
10 constitutional duty.

11 I think that matches both with the
12 history, it matches with the tradition, and it
13 matches particularly with the Fourteenth
14 Amendment context itself. It's worth
15 remembering that when this Court incorporated
16 the Fifth Amendment against the states in
17 Chicago, Burlington & Quincy Railroad, it
18 specifically incorporated the right to
19 compensation, not the right not to have the
20 property taken but the right to receive money,
21 that the due process of law necessarily included
22 as a matter of first principles -- Chicago
23 Burlington actually doesn't cite the Fifth
24 Amendment -- but, as a matter of first
25 principles, it includes the right to receive

1 compensation for the property taken.

2 These -- these cases rarely appear in
3 federal court, in part because, before Knick, no
4 takings case could be filed ab initio, but also
5 because, as the magistrate judge's opinion in
6 this case points out, it's relatively rare for a
7 state to choose to remove this federal claim --
8 this federal right into a federal forum. But,
9 once it does so, once Texas has decided it wants
10 the scope of our rights under the Fifth
11 Amendment to be litigated in federal court, that
12 can't change the scope of the claim we make.

13 What the Fifth Circuit opinion below
14 says is that we cannot state a claim invoking
15 our rights under the Fifth Amendment, full stop.
16 If Texas is right that, in fact, we have that
17 right as a matter of Texas common law, then the
18 Fifth Circuit was wrong to say that we only have
19 that right under Section 1983. That counsels in
20 favor of reversal.

21 But this Court has also squarely held
22 and again repeated in Knick that the Fifth
23 Amendment does furnish a basis on which a court
24 can award just compensation. In the mine run of
25 cases, that's going to be a state court awarding

1 just compensation. But, when the state wishes
2 to be in federal court, I don't think there's a
3 good-faith basis for the plaintiff to say, I'm
4 invoking my rights under the Fifth Amendment, I
5 want the full scope of compensation that I'm
6 entitled to under the Fifth Amendment, but I
7 refuse to allow this claim that arises under my
8 rights under the Fifth Amendment to be in
9 federal court.

10 It is the defendant's choice to have
11 this federal claim that turns on federal law
12 heard in federal court. That's the choice that
13 Texas made, and that choice can't, on the
14 merits, extinguish our Fifth Amendment remedy.
15 What Texas has effectively accomplished here by
16 making the unusual decision to remove is that
17 it's eliminated the Fifth Amendment question
18 from this case and given itself what it believes
19 -- I'm not conceding that they're right about
20 Texas law -- but what it believes is a more
21 favorable rule of Texas law.

22 But, if First English is right and the
23 just compensation remedy is mandatory, then the
24 just compensation remedy is mandatory, and Texas
25 can't extinguish it through procedural maneuvers

1 like removing this case to federal court. The
2 -- a claim for just compensation simply takes
3 the form of saying the government has taken a
4 property interest and I as the former owner am
5 entitled to the fair market value of that
6 property interest.

7 JUSTICE JACKSON: Can I just be clear,
8 are you arguing that through Texas's maneuvering
9 that claim is no longer available to you?

10 MR. McNAMARA: Yes, Your Honor. I
11 think that's what Judge Oldham points out in his
12 dissent below.

13 JUSTICE JACKSON: I understand not in
14 federal court, but are you claiming that Texas
15 has prevented you from making this claim in
16 state court?

17 MR. McNAMARA: Yes, Your Honor. There
18 -- there will be no remand in this case. This
19 case is staying in federal district court. And
20 as Judge Oldham correctly pointed out, the
21 upshot of the panel opinion below is that this
22 case will proceed without any federal takings
23 claim in it because --

24 JUSTICE JACKSON: If you had sought
25 remand and it went back to Texas court, are you

1 saying that there wouldn't be the opportunity to
2 make this claim in state court? I'm just trying
3 to understand if the claim is totally gone as --
4 as a general matter here.

5 MR. McNAMARA: So I -- I think -- I
6 see my light is on. Thank you, Your Honor.

7 CHIEF JUSTICE ROBERTS: No, go ahead.

8 MR. McNAMARA: So I think, Your Honor,
9 first, I don't know that we would have had
10 grounds to fight remand because the claim does
11 invoke our entitlement under federal law. But,
12 if the case were remanded, I think the question
13 in Texas state court would be exactly the
14 question presented here: Are we entitled,
15 without the 1983 vehicle, to invoke our rights
16 under the Fifth Amendment?

17 Texas courts have said yes, we are
18 entitled to invoke our rights under the Fifth
19 Amendment. But, again, they just cite the Fifth
20 Amendment. They're not invoking some special
21 cause of action that they have created. They,
22 like other courts, look to the Constitution, to
23 this Court's analysis of the Constitution, and
24 say the Constitution provides the entitlement to
25 just compensation, not, as far as I'm aware, an

1 independent common law cause of action.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Let's suppose you bring -- the state
5 takes some action, you claim that as a taking,
6 you bring that claim for just compensation. In
7 the state court, they decide yes, it was a
8 taking, and so the government owes you \$3
9 million.

10 And the government says: Wow, we
11 didn't think it was worth that much. Here, take
12 it back.

13 And can they do that?

14 MR. McNAMARA: To -- to a point, Your
15 Honor. I think saying here take it back runs
16 afoul of what Justice Brennan identified in his
17 San Diego Gas and Electric dissent that ending
18 the taking just creates an uncompensated
19 temporary taking.

20 And that is why, as this Court noted
21 in Knick, Justice Brennan's dissent became the
22 law in First English, that just stopping the
23 taking creates an uncompensated temporary
24 taking.

25 Certainly, the state is within its

1 rights to cease a taking if it wants to cease a
2 taking, and it may be that evidence at trial
3 shows Texas has chosen to cease the taking here,
4 but the question is and always based on the full
5 factual record what property interest has Texas
6 actually taken or has the defendant actually
7 taken --

8 CHIEF JUSTICE ROBERTS: So they can
9 claim what we've taken is a temporary, you know,
10 right, so we owe you rent, that -- and that's
11 just compensation?

12 MR. McNAMARA: Exactly, Your Honor.
13 The -- the defendant is always free to say this
14 is -- this is just a temporary easement or maybe
15 this is a temporary partial easement.

16 CHIEF JUSTICE ROBERTS: And they can
17 say that after the fact?

18 MR. McNAMARA: I -- I think --

19 CHIEF JUSTICE ROBERTS: We took the
20 whole thing, we found out we were taking more
21 than we could -- we're biting off more than we
22 could chew, and so we're going to give it back
23 to you?

24 MR. McNAMARA: I -- I think that would
25 be a valid ground for going back to the district

1 court and saying that the facts have changed.

2 The way --

3 CHIEF JUSTICE ROBERTS: Okay. Thank
4 you.

5 MR. McNAMARA: Thank you, Your Honor.

6 CHIEF JUSTICE ROBERTS: Justice
7 Thomas?

8 Justice Alito?

9 JUSTICE ALITO: Well, suppose that
10 going forward they find a way to divert the
11 water so that it doesn't cause flooding in the
12 future. Then what claim would you have?

13 MR. McNAMARA: I -- I think that would
14 just be a -- a claim for a temporary easement,
15 Your Honor. Ultimately, the property interest
16 in this case would be some kind of flooding
17 easement. The trial court would have to decide
18 whether it's a permanent easement, a partial
19 easement, a temporary easement, and this is the
20 kind of determination courts make in takings
21 cases every day.

22 JUSTICE ALITO: Yeah, and if it's --
23 so, if it's completely eliminated going forward,
24 your -- your property is not going to be flooded
25 going forward, what would the remedy be?

1 MR. McNAMARA: The -- the remedy --
2 so, to the extent the Court found on the facts
3 that Texas had taken a temporary easement, it
4 would be the fair market value of that temporary
5 easement.

6 JUSTICE ALITO: Would that be
7 different from damages?

8 MR. McNAMARA: Yes, Your Honor, and --

9 JUSTICE ALITO: In what way would it
10 be different from damages?

11 MR. McNAMARA: So damages are an
12 attempt to rectify a wrongful act. And so a
13 plaintiff seeking damages can seek consequential
14 damages. I would have had -- if you had paid me
15 on time, I would have had this business
16 opportunity that I had before.

17 JUSTICE ALITO: Yeah, I understand
18 that. So how would you put a value on the
19 temporary taking?

20 MR. McNAMARA: It would be --
21 generally speaking, there is testimony from
22 dueling appraisers who talk about at fair market
23 value what rent someone would pay for -- for
24 that kind of easement, what a -- a willing
25 seller would have sold that kind of easement

1 for, but it's limited to the fair market value.
2 It's limited to what the government took as
3 distinct from what the property owner may have
4 lost.

5 JUSTICE ALITO: Okay. Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Sotomayor?

8 Justice Kagan?

9 Justice Barrett?

10 Justice Jackson?

11 Okay. Thank you, counsel.

12 MR. McNAMARA: Thank you, Your Honor.

13 CHIEF JUSTICE ROBERTS: Mr. Nielson.

14 ORAL ARGUMENT OF AARON L. NIELSON

15 ON BEHALF OF THE RESPONDENT

16 MR. NIELSON: Mr. Chief Justice, and
17 may it please the Court:

18 The Court will be hard-pressed to find
19 any government more committed to property than
20 Texas. The Texas constitution is more
21 protective than the federal Constitution, and
22 Texas courts under a Texas cause of action
23 adjudicate takings claims under both
24 constitutions.

25 This appeal thus isn't about

1 substantive rights. All Petitioners had to do
2 was use Texas's cause of action. Instead,
3 Petitioners insist they can bring a cause of
4 action directly under the federal Takings Clause
5 itself. This argument is wrong for many
6 reasons.

7 For one, it ignores what the
8 Constitution says. Governments must provide
9 just compensation, but the Takings Clause says
10 nothing about how they must do it, whether
11 through commissions, private bills, or
12 litigation.

13 For another, this Court held in
14 Williams that Congress may constitutionally --
15 and I'm going to quote here -- "retain for
16 itself the power to hear and determine
17 controversies respecting claims against the
18 United States." It follows that, again, a
19 quote, "there is no constitutional right to a
20 judicial remedy."

21 As Petitioners concede, Congress did
22 just that for nearly a century. We don't see
23 how this Court could hold for Petitioners
24 without overruling Williams.

25 And as this Court explained in Knick,

1 states didn't start recognizing state causes of
2 action until after the Fourteenth Amendment's
3 ratification.

4 Petitioners argue none of this matters
5 because of First English, but the Court went out
6 of its way in First English to emphasize that
7 its decision was about substance, not procedure.

8 And if first Williams somehow did
9 include a procedural holding, Texas satisfies
10 it. We have a cause of action for federal
11 takings claims. Petitioners simply refused to
12 use it.

13 We welcome the Court's questions.

14 JUSTICE THOMAS: How would that cause
15 of action -- what would it look like?

16 MR. NIELSON: So I would point the
17 Court to the Texas Supreme Court's decision in
18 City of Baytown, and they say, we hear claims
19 under both the Texas constitution and under the
20 federal Constitution, and then they resolve the
21 claim under Penn Central, which, of course, is a
22 decision of this Court.

23 JUSTICE THOMAS: Let's say we affirm
24 here. Can Petitioners' constitutional right be
25 vindicated now in Texas courts?

1 MR. NIELSON: Well, in federal court.
2 The problem is they hadn't pleaded the claim.
3 So, at this point, you'd have to have leave from
4 the district court to amend their complaint if
5 they wanted to bring a claim under the Texas
6 cause of action.

7 There's still live claims here.
8 There's still a claim under the Texas
9 constitution itself and they have federal due
10 process claims. This is an interlocutory
11 appeal.

12 So they would have to get leave from
13 the district court to amend their complaint to
14 bring a claim under Texas common law. They've
15 just never done it because they say they don't
16 have to.

17 JUSTICE SOTOMAYOR: I'm --

18 CHIEF JUSTICE ROBERTS: Counsel, in
19 just a couple of quotes from cases. In Cedar
20 Point, we said that the Court in First English
21 concluded categorically that the government must
22 pay just compensation for physical invasion.

23 In Knick, it said First English
24 rejects the view that the Constitution does not
25 of its own force furnish a basis for a court to

1 award money damages against the government.

2 Now we've -- we've said those in many
3 cases. Those are just two recent ones --

4 MR. NIELSON: Correct, Your Honor.

5 CHIEF JUSTICE ROBERTS: -- where I
6 wrote the opinions, so --

7 (Laughter.)

8 MR. NIELSON: Correctly wrote the
9 opinions.

10 CHIEF JUSTICE ROBERTS: -- so do you
11 have any dispute with those -- those holdings?

12 MR. NIELSON: We do not, Your Honor.
13 That's a question of the substantive right,
14 which Texas does not dispute, and you could
15 pursue that claim under the Texas cause of
16 action in a Texas court or here --

17 CHIEF JUSTICE ROBERTS: But it -- it's
18 --

19 MR. NIELSON: -- in federal court --
20 yes, Your Honor.

21 CHIEF JUSTICE ROBERTS: -- it's the
22 statement of the -- the right, and that's a
23 federal right, right?

24 MR. NIELSON: Yes, Your Honor.

25 CHIEF JUSTICE ROBERTS: So you can

1 require that a federal assertion of rights like
2 that be brought in state court and not in
3 federal court?

4 MR. NIELSON: Well, it's brought under
5 a -- a state cause of action. So, I mean, you
6 can remove -- there's diversity jurisdiction or
7 something like that, like any other sort of
8 cause of action, but the cause of action itself
9 is created by -- by Texas.

10 And that's how it's been -- as this
11 Court explained in Knick, that's how state
12 courts have always done it. Since 1870s, this
13 Court said and onwards --

14 CHIEF JUSTICE ROBERTS: Well, it said
15 -- what we said in --

16 MR. NIELSON: -- that's how we've done
17 it.

18 CHIEF JUSTICE ROBERTS: -- what we
19 said in Knick is that the Constitution of its
20 own force furnishes the basis for a court to
21 award money damages. And you think what we had
22 in mind is a -- a basis to -- to -- in state
23 court but not federal court?

24 MR. NIELSON: When the claim is
25 against a state, in Knick, the Court said 19

1 times by our count 1983. Every time the Court
2 states the holding in Knick, they tie it to
3 Section 1983 because there's a difference
4 between the substantive right and the cause of
5 action.

6 In Knick, the cause of action was
7 Section 1983 because Congress said, if you're
8 going to sue municipalities or cities, there you
9 go, there's the cause of action.

10 CHIEF JUSTICE ROBERTS: Well, you
11 removed to federal court, where you couldn't
12 bring an action under 1983, right?

13 MR. NIELSON: Correct, Your Honor. We
14 did remove to federal -- federal court. Two
15 reasons for that. One, this is not just one
16 case. These are four separate cases, all
17 putative class actions. They say there's more
18 than a hundred plaintiffs here.

19 Texas -- these are filed in different
20 counties. Texas has no way to put all of them
21 in a single Texas court. So, if the cases were
22 going to be in a single court, it had to be
23 through removal and put them in -- in that
24 court.

25 The second reason for that was Texas

1 courts don't have a lot of experience with
2 implied rights of action, alleged implied rights
3 of action under federal law. This is the bread
4 and butter of this Court's -- you guys' court --
5 resolves factual -- those types of issues all of
6 the time, so we thought let's just get it there,
7 we'll get everybody in one case, and we can take
8 out this, you know, putative federal cause of
9 action, which we think is flatly irreconcilable.

10 CHIEF JUSTICE ROBERTS: So, under what
11 basis would they proceed against the state
12 under -- under 1983?

13 MR. NIELSON: They -- they couldn't,
14 Your Honor. There is no such claim. Congress
15 has said that you can bring claims against
16 cities and municipalities. You cannot sue the
17 states under Section 1983.

18 They say they can. So, under *Bell*
19 *v. Hood*, they've claimed there is a federal
20 cause of action. When someone asserts that a
21 federal cause of action exists, the federal
22 courts have jurisdiction to decide whether that
23 is true, and then they can decide on the merits
24 whether the cause of action exists.

25 CHIEF JUSTICE ROBERTS: Well, isn't

1 that a -- a Catch-22 or -- I mean, you say they
2 have to proceed in -- in state court. They
3 can't proceed in federal court. And as soon as
4 they do, you remove it to federal court under
5 1983, where you say they can't proceed?

6 MR. NIELSON: Well, we would make the
7 same argument in state or federal court that
8 there is no federal cause of action directly
9 under the Fifth Amendment. That is not --

10 CHIEF JUSTICE ROBERTS: Well, but
11 that's what was rejected in -- in the two cases
12 that I read you, Cedar Point and Knick.

13 MR. NIELSON: With respect, Your
14 Honor, I don't read either of those cases as
15 saying there is a federal cause of action.
16 There's certainly a federal substantive right to
17 relief, but as this Court said in all of the
18 Bivens line of cases or all the implied right of
19 action cases, the right to, you know, a -- a
20 substantive right does not therefore mean that
21 there is a cause of action.

22 JUSTICE KAGAN: But, General, do you
23 agree with Mr. McNamara that if a state takes a
24 person's property and doesn't give compensation,
25 that state is violating the Constitution every

1 day? It's an ongoing violation. Do you agree
2 with that?

3 MR. NIELSON: That's not how the Court
4 has -- I -- I -- I believe -- I certainly agree
5 that's a violation of the Constitution. I don't
6 think this Court's cases have ever --

7 JUSTICE KAGAN: But that's what I want
8 to know. It's an ongoing violation of the
9 Constitution, right? I've taken Mr. McNamara's
10 property. I haven't paid him. Every day I'm
11 violating the Constitution, correct?

12 MR. NIELSON: Yes, Your Honor.

13 JUSTICE KAGAN: Okay. So aren't
14 courts supposed to do something about that?

15 MR. NIELSON: Yes, Your Honor. And
16 what this Court said in Knick is, when there's
17 not a cause of action, which remember there
18 wasn't a cause of action, there were -- you have
19 -- there's no remedies.

20 JUSTICE KAGAN: Yeah.

21 MR. NIELSON: What is injunctive
22 relief --

23 JUSTICE KAGAN: But this is -- this is
24 very different.

25 MR. NIELSON: Sure.

1 JUSTICE KAGAN: You know, in the usual
2 case, we have a constitutional -- let's take a
3 Fourth Amendment case. You know, it's you've
4 searched somebody's home illegally.

5 MR. NIELSON: Mm-hmm.

6 JUSTICE KAGAN: It's happened, and
7 then it's over, and then the question is what
8 remedy are you going to be giving for that
9 violation.

10 But this is a different kind of
11 violation. It's not -- it's not even clear that
12 the word "remedy" is appropriate here. It's a
13 right to compensation. And the state, by taking
14 the land and not compensating, is violating that
15 right every day. It's not that the state --

16 MR. NIELSON: Mm-hmm.

17 JUSTICE KAGAN: -- is failing to
18 provide a remedy. The state is violating the
19 right to be paid.

20 MR. NIELSON: Sure, Your Honor. And I
21 -- I just -- and the answer would be, if there's
22 not a cause of action, that's why I went back to
23 Knick.

24 JUSTICE KAGAN: Well, if it's not a
25 cause of action, I mean, in the --

1 MR. NIELSON: Sure.

2 JUSTICE KAGAN: -- usual case, suppose
3 that a state violates Mr. McNamara's First
4 Amendment rights.

5 MR. NIELSON: Yep.

6 JUSTICE KAGAN: Could he bring a suit
7 about that?

8 MR. NIELSON: Yes, Your Honor, for
9 injunctive relief.

10 JUSTICE KAGAN: Yes. And what Mr.
11 McNamara I believe is saying is that -- that the
12 usual distinction that we draw, you can bring a
13 right for injunctive relief, but you can't --
14 that you can bring a suit for injunctive relief,
15 but you can't bring a suit for damages, that's
16 the usual distinction.

17 But it sort of falls apart in this
18 case because the right is a right to be paid.

19 MR. NIELSON: Yes, Your Honor. And so
20 I -- I -- I come at this from maybe the other
21 direction. Let's imagine that some government
22 said, you know what, we're not going to pay.
23 We're telling everybody now. Now you are on
24 notice we are not paying.

25 Well, then what happens? Before they

1 could do anything, you would rush to court and
2 you would say: Injunction. They can't do it.
3 They've promised they're not going to pay.
4 They're not going to provide that. And the
5 Constitution says, if they don't, they're out --
6 they're violating their rights. That's Eastern
7 Enterprises v. Apfel, where if there's -- clear
8 that there's not going to be a right to judicial
9 -- to payment, there are no -- no monies coming,
10 not -- not judicial, but no payments coming, you
11 can get that injunction right away.

12 JUSTICE KAGAN: I mean, General, let
13 me make the point another way.

14 MR. NIELSON: Sure.

15 JUSTICE KAGAN: I mean, it's sort of
16 backwards to say that Mr. McNamara's client can
17 sue for an injunction, meaning like, you know,
18 give me back my property. Actually, the state
19 has a right to take his property or a
20 prerogative to take --

21 MR. NIELSON: Yeah.

22 JUSTICE KAGAN: -- his property. If
23 the state wants to use his property for a
24 railroad, it doesn't really matter that the -- a
25 person doesn't want to sell. The state has the

1 ability to take it. The only thing that the
2 state does not have the prerogative to do and
3 the thing that the landowner has a right to have
4 is payment.

5 MR. NIELSON: Yes, Your Honor.

6 JUSTICE KAGAN: So to say, well, look,
7 you can sue for an injunction but you can't sue
8 for payment just doesn't understand the nature
9 of this right.

10 MR. NIELSON: Well, so our first-line
11 argument is, you know, the way the United States
12 did it for a hundred years is correct. But, if
13 the Court disagrees with that, if the Court
14 says, you know what, actually --

15 JUSTICE KAGAN: So, General, I kind of
16 agree with that. Your best argument is like
17 what happened between the time of the
18 Constitution and, you know, someplace in the
19 late 19th Century.

20 But suppose that I'm not such an
21 originalist and I don't really care about that.

22 (Laughter.)

23 MR. NIELSON: Sure. All right. So
24 that's the answer I'm going to say. So, if we
25 -- if a court says we read First English and it

1 requires not just a substantive relief, it
2 requires some sort of judicial proceeding, which
3 we don't think is consistent with the history,
4 but let's assume, Texas does it. Texas provides
5 a cause of action for which they can bring a
6 federal takings claim.

7 So even if that is true, which we
8 don't believe as our first-line argument is
9 correct, Texas still wins. They --

10 JUSTICE BARRETT: What if Texas didn't
11 do it, though?

12 MR. NIELSON: So -- so that's where we
13 get interesting.

14 JUSTICE BARRETT: But I'm not -- and I
15 just want to be clear I'm not talking about the
16 hypothetical you gave where Texas announces in
17 advance --

18 MR. NIELSON: Yeah.

19 JUSTICE BARRETT: -- we're going to
20 take and we're not going to pay. Let's say that
21 Texas takes and just this one property owner
22 can't get the money, the -- Texas is being
23 intransigent about it.

24 MR. NIELSON: Mm-hmm.

25 JUSTICE BARRETT: And Texas says:

1 And, by the way, our state cause of action -- we
2 have no state cause of action for you to use in
3 our courts to get the money, no private bills.
4 We don't do that. There's no state --

5 MR. NIELSON: Sure.

6 JUSTICE BARRETT: -- law remedy. What
7 then?

8 MR. NIELSON: All right. So, you
9 know, if a state goes rogue, that's how we're
10 thinking about it, because we know from Knick
11 all the states don't do that, but let's assume
12 some state says, we're just not going to do
13 that. Well, you have injunctive relief. I
14 realize that might not be a perfect relief --

15 JUSTICE BARRETT: Doesn't work in this
16 hypothetical.

17 MR. NIELSON: It doesn't work because
18 of that. Then the answer is exactly what the
19 Constitution says. Congress -- Section 5 of the
20 Fourteenth Amendment says, if a state is
21 violating the Constitution, which would be
22 happening in this scenario, that's precisely
23 what Section 5 is for.

24 Congress has never done that --

25 JUSTICE BARRETT: So they have to wait

1 for Congress to enforce it through legislation?
2 Would there be some sort of due process
3 violation or an argument that the state has to
4 provide some sort of forum?

5 MR. NIELSON: Well, that's what I'm
6 trying to say. If you read First English that
7 way to say that not only is it there's a
8 substantive obligation, but there has to be some
9 sort of judicial forum for -- for, you know,
10 vindication of that --

11 JUSTICE BARRETT: Not a judicial
12 forum. It could be --

13 MR. NIELSON: Sure.

14 JUSTICE BARRETT: -- an administrative
15 forum. I mean, I'm taking --

16 MR. NIELSON: Okay. Sure. Sure.

17 JUSTICE BARRETT: -- your argument
18 about that.

19 MR. NIELSON: Okay.

20 JUSTICE BARRETT: You're -- you're
21 really saying that the state could shut down and
22 give no administrative forum, no legislative
23 forum, no judicial forum, and because the Fifth
24 Amendment doesn't create an implied cause of
25 action, then the property owner would have to

1 say, Congress, can you please use your Section 5
2 power?

3 MR. NIELSON: The answer would be
4 first try to get an injunction. That doesn't
5 always work for the reasons that you say. In
6 that scenario, yeah, that's what the
7 Constitution says.

8 CHIEF JUSTICE ROBERTS: Well, but
9 we're talking --

10 JUSTICE GORSUCH: Why --

11 JUSTICE ALITO: Why --

12 JUSTICE GORSUCH: I'm sorry, Chief.

13 CHIEF JUSTICE ROBERTS: Those are two
14 governments. I mean, we're talking about the
15 ability of the government to take property
16 without paying for it. The states and Congress
17 may have common cause on that. And the idea
18 that, well, you look to a different government
19 --

20 MR. NIELSON: Mm-hmm.

21 CHIEF JUSTICE ROBERTS: -- to tell
22 this government that that's not something
23 governments can do, that's not much of a remedy.

24 MR. NIELSON: Well, this Court has
25 cases that says we trust that Congress takes

1 itself seriously. We trust that the states take
2 their oath seriously. That's one of the
3 premises of *Alden v. Maine*, that they're going
4 to do that. But --

5 JUSTICE GORSUCH: Well, we also -- we
6 also assume people act in their self-interest.

7 MR. NIELSON: Sure.

8 JUSTICE GORSUCH: And our whole system
9 of separated powers is premised on that idea.
10 And the self-interest here that would be created
11 isn't a rogue state but an incentive for
12 governments not -- not -- to -- to withdraw
13 their -- their existing causes of action. I
14 think that's the thrust --

15 MR. NIELSON: Yeah.

16 JUSTICE GORSUCH: -- of Justice
17 Barrett and the Chief's questions.

18 MR. NIELSON: What we --

19 JUSTICE GORSUCH: And I guess I'm
20 wondering --

21 MR. NIELSON: Sorry.

22 JUSTICE GORSUCH: -- why wouldn't the
23 injunction order the state to pay?

24 MR. NIELSON: So that's a question
25 that has not been litigated, whether you could

1 have injunctive relief to pay.

2 JUSTICE GORSUCH: Say you have to
3 provide --

4 MR. NIELSON: Correct.

5 JUSTICE GORSUCH: -- just
6 compensation. We're not telling you how.

7 MR. NIELSON: Yeah.

8 JUSTICE GORSUCH: We're not telling
9 you in what forum.

10 MR. NIELSON: And --

11 JUSTICE GORSUCH: But the Constitution
12 commands it.

13 MR. NIELSON: Sure. As I said, that's
14 -- if you want to read First English that way,
15 Texas has no quarrel with that because we
16 provide it. And we don't just provide through a
17 commission, though I think we have the
18 constitutional right to do so. We do it in
19 court. We --

20 JUSTICE BARRETT: But you have to
21 answer -- I'm sorry. You have to answer the
22 hypothetical.

23 MR. NIELSON: Yeah.

24 JUSTICE BARRETT: I think Justice
25 Gorsuch's premise is that Texas isn't doing

1 this.

2 MR. NIELSON: Okay. So, if we say
3 that a Texas doesn't or -- or some state doesn't
4 have a -- a court proceeding and you don't have
5 any other sort of commission, you still can get
6 an injunction. And if you know the state
7 doesn't have any of those things, you can get
8 that injunction very, very, very early.

9 JUSTICE GORSUCH: And wouldn't the
10 injunction say, Texas, you have an obligation --

11 MR. NIELSON: Mm-hmm.

12 JUSTICE GORSUCH: -- to pay?

13 MR. NIELSON: And this is where I'm
14 not quarreling because Texas --

15 JUSTICE GORSUCH: Okay.

16 MR. NIELSON: -- as a matter of --

17 JUSTICE KAVANAUGH: You don't want to
18 concede that?

19 MR. NIELSON: -- of first principles
20 -- as a matter of first principles, I don't know
21 how you get there. But I'm saying that Texas
22 has no quarrel with it --

23 JUSTICE GORSUCH: Okay. And -- and --

24 MR. NIELSON: -- because Texas does
25 have the usual thing.

1 JUSTICE GORSUCH: I've got -- I've got
2 it. I've got it. I just want to -- I just want
3 to clear up two other things.

4 MR. NIELSON: Sure.

5 JUSTICE GORSUCH: What is the common
6 law cause of action and what is the state
7 constitutional cause of action that does exist
8 that you say could have but wasn't brought?

9 MR. NIELSON: That's right. So the --
10 the easiest place to see it because it's the
11 most recent and I think the most clear is the
12 Texas Supreme Court's City of Baytown --

13 JUSTICE GORSUCH: Right. That just
14 says, though, as I understand it from your
15 colleague --

16 MR. NIELSON: Yeah.

17 JUSTICE GORSUCH: -- go look at the
18 federal Constitution. So how does that help
19 you?

20 MR. NIELSON: Well, they look at both.
21 They say, we resolve takings claims under our
22 constitutions, plural, and then they cite both.
23 And I think --

24 JUSTICE GORSUCH: So Texas has
25 represented to this Court that there is a state

1 constitutional cause of action?

2 MR. NIELSON: Yes, Your Honor.

3 JUSTICE GORSUCH: Okay. And is there
4 a common law cause of action --

5 MR. NIELSON: Well, that --

6 JUSTICE GORSUCH: -- that would
7 achieve the same thing?

8 MR. NIELSON: -- that's what I'm --
9 that's what I'm -- I must have -- I must have
10 misunderstood --

11 JUSTICE GORSUCH: Beyond --

12 MR. NIELSON: -- what you were saying.
13 That is the cause of action.

14 JUSTICE GORSUCH: That is the cause of
15 action?

16 MR. NIELSON: Yeah.

17 JUSTICE GORSUCH: Okay. And it wasn't
18 pled here, is what you're --

19 MR. NIELSON: No, Your Honor. They --

20 JUSTICE GORSUCH: What does --

21 MR. NIELSON: -- vigorously resisted
22 --

23 JUSTICE GORSUCH: Fine. Fine.

24 MR. NIELSON: -- the idea that they
25 have to --

1 JUSTICE GORSUCH: Okay. I got it.

2 And what cause of action remains pendent as you
3 understand it?

4 MR. NIELSON: So they still have
5 claims for federal due process, and they still
6 have claims for the Texas constitution.

7 JUSTICE GORSUCH: Would you oppose
8 leave to amend to add a Texas constitutional
9 claim on an email?

10 MR. NIELSON: On behalf of the State
11 of Texas, we would not oppose that in the
12 district court.

13 JUSTICE GORSUCH: Okay. Thank you.

14 JUSTICE KAVANAUGH: Justice Gorsuch --

15 JUSTICE SOTOMAYOR: Sorry. But I -- I
16 -- I -- I'm sorry.

17 JUSTICE KAVANAUGH: Go ahead.

18 JUSTICE SOTOMAYOR: Point of
19 clarification.

20 MR. NIELSON: Sure.

21 JUSTICE SOTOMAYOR: Tell me how they
22 plead this. Let's assume we affirm the court
23 below. There's no freestanding right to come
24 into federal court and sue Texas under the Fifth
25 Amendment.

1 How would they go to the Texas court
2 and make their Fifth Amendment claim? What
3 would they say in the Texas court?

4 MR. NIELSON: So -- yes. So what they
5 would say here, and, candidly, the pleadings
6 have never been as pellucid as I think anyone
7 would have liked, but what I think that they
8 would say is, we are bringing our claim under
9 state law, see City -- see, e.g., City of
10 Baytown. I think that would be sufficient to
11 get us there.

12 JUSTICE SOTOMAYOR: That -- that's --
13 my gosh. I've never heard of pleadings in any
14 state where you had to mention the law at issue.

15 MR. NIELSON: Well, that's the --

16 JUSTICE SOTOMAYOR: Usually you
17 mention the facts --

18 MR. NIELSON: Well --

19 JUSTICE SOTOMAYOR: -- or you state
20 the facts and then you --

21 MR. NIELSON: Well --

22 JUSTICE SOTOMAYOR: But putting that
23 aside, here, they say violation of Article I,
24 Section 17 of the Texas constitution for the
25 taking, damaging, or the destruction of their

1 property. That's Count 1.

2 MR. NIELSON: Yes, Your Honor.

3 JUSTICE SOTOMAYOR: And Count 2 says
4 violation of the Fifth Amendment of the U.S.
5 Constitution.

6 MR. NIELSON: Yes, Your Honor.

7 JUSTICE SOTOMAYOR: Summarizing
8 basically. I don't know what else they would
9 have had to do in Texas court if I cite that
10 case.

11 MR. NIELSON: It --

12 JUSTICE SOTOMAYOR: They said, I'm
13 suing you in Texas court. You're the one who
14 removed to federal court.

15 MR. NIELSON: Yes, Your Honor.

16 JUSTICE SOTOMAYOR: This seems to me
17 like a totally made-up case because they did
18 exactly what they had to do under Texas law.
19 It's you who are telling me -- it's almost a
20 bait and switch -- that you wanted to get to
21 federal court to basically have a class action
22 and you couldn't do it in state court, so -- but
23 you had to fight something, which I don't know
24 what you're fighting because you're telling me
25 that Texas lets them have a cause of action

1 under the Fifth Amendment.

2 MR. NIELSON: Yes, Your Honor.

3 There's no bait and switch here, I want to be
4 clear on that, no bait and switch.

5 JUSTICE SOTOMAYOR: Well, you're the
6 one who removed.

7 MR. NIELSON: We removed, and they
8 didn't come back and say, oh, no, you
9 misunderstand what we're saying. Instead, every
10 step along the way, they have doubled down all
11 the way going to cert, you know, seek certiorari
12 review from this Court.

13 So, if we misunderstood what they were
14 saying --

15 JUSTICE SOTOMAYOR: So, if -- if they
16 go back down and say to the district court, this
17 has been remanded to the district court, all we
18 want is just compensation under the Texas
19 Constitution and the Fifth Amendment under that
20 case that you're mentioning, that's okay and
21 you're not going to resist that?

22 MR. NIELSON: We -- we -- we would not
23 resist that, Your Honor.

24 JUSTICE SOTOMAYOR: Okay.

25 JUSTICE KAVANAUGH: Justice Gorsuch's

1 injunction-to-pay hypothetical, I just want to
2 make sure I'm clear on that.

3 MR. NIELSON: Yeah.

4 JUSTICE KAVANAUGH: I thought you were
5 saying we don't need to answer that question in
6 this case because Texas provides forums for
7 compensation.

8 MR. NIELSON: Yes, Your Honor.
9 Conceptually, I don't know how you get an
10 injunction to pay money.

11 JUSTICE KAVANAUGH: But -- but --

12 MR. NIELSON: -- I'm not familiar with
13 that, but that's blowing apart --

14 JUSTICE KAVANAUGH: I -- I understand
15 that, but even in the --

16 MR. NIELSON: Yeah.

17 JUSTICE KAVANAUGH: -- the theoretical
18 possibility of it is just not present here,
19 right?

20 MR. NIELSON: Correct, Your Honor.
21 And, as I said, it's hard for me to quarrel with
22 it because Texas does pay money. But,
23 conceptually, I don't know how you get there.

24 JUSTICE KAVANAUGH: Yeah.

25 MR. NIELSON: If I may --

1 JUSTICE JACKSON: What about a
2 declaration? What about a declaration? Is that
3 something different?

4 MR. NIELSON: A declaration?

5 JUSTICE JACKSON: Could you sue for --
6 for --

7 MR. NIELSON: Sure.

8 JUSTICE JACKSON: -- declaratory
9 judgment that Texas or whatever state is not
10 paying you?

11 MR. NIELSON: So my understanding of a
12 declaratory judgment action is it sounds in
13 equity, not in damages. So I think it would
14 fall within the universe of Ex parte Young type
15 remedies. So we wouldn't have any objection to
16 that either, though, again, I -- I'm a little
17 bit shooting from the hip, so I apologize it
18 wasn't briefed on that one, so I'm -- I'm a bit
19 nervous on that.

20 JUSTICE JACKSON: Yes.

21 MR. NIELSON: Though, I mean, if I --
22 if I may, I would like just to make a couple of
23 affirmative points.

24 CHIEF JUSTICE ROBERTS: Well, no, you
25 can do that when --

1 MR. NIELSON: Oh, I apologize, Your
2 Honor.

3 CHIEF JUSTICE ROBERTS: Yeah.
4 Justice Thomas?
5 Justice Alito?

6 JUSTICE ALITO: Well, why don't you
7 quickly make an affirmative point.

8 (Laughter.)

9 MR. NIELSON: Well, I would just like
10 to say that as far as I am aware, Texas is the
11 only party here that has offered evidence on the
12 original public meaning of the actual language
13 of the text, not the ideas, the actual language
14 of the Constitution. And when courts looked at
15 that language, they read it precisely the same
16 way that Texas does now.

17 CHIEF JUSTICE ROBERTS: Anything
18 further?

19 JUSTICE ALITO: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Sotomayor?

22 Justice Gorsuch?

23 Justice Jackson?

24 Thank you, counsel.

25 MR. NIELSON: Thank you, Your Honor.

1 CHIEF JUSTICE ROBERTS: Mr. Kneedler.
2 ORAL ARGUMENT OF EDWIN S. KNEEDLER
3 FOR THE UNITED STATES, AS AMICUS CURIAE,
4 SUPPORTING THE RESPONDENT

5 MR. KNEEDLER: Mr. Chief Justice, and
6 may it please the Court:

7 The Fifth Amendment to the United
8 States Constitution does not of its own force
9 create a cause of action against the government
10 under the Fifth Amendment against the United
11 States Government for damages.

12 Numerous provisions of the
13 Constitution make that clear, including the text
14 of the just compensation clause itself. It says
15 property shall not be taken, no person --
16 property shall not be taken for public use
17 without just compensation.

18 The right is not to have the property
19 taken without compensation. It's not a right to
20 compensation. And this -- it's prohibitory. It
21 has a condition for the governmental action to
22 be lawful. That condition is the payment of
23 compensation. If there's not compensation, then
24 the action is unlawful, and what lies is an
25 injunction to cease the taking of the property.

1 This Court in -- in a number of
2 recent -- relatively recent cases has made that
3 point. In *Ruckelshaus versus Monsanto*, in *Dames*
4 & *Moore*, in the railroad reorganization cases,
5 the question really was, should there be an
6 injunction preventing this statute from going
7 into effect, or is there compensation available
8 under the Tucker Act such that an injunction
9 would not be appropriate?

10 In all of those cases, that's what the
11 Court held, that there was compensation
12 available. But the very question presupposed
13 that there might be situations in which
14 compensation was not available. That's the
15 violation.

16 And the same thing, if you look at the
17 overall context of the Fifth Amendment, that is
18 also true. The preceding clause, as Justice
19 Alito pointed out, says that no person shall be
20 deprived of property without due process. The
21 prohibition is the deprivation, the condition --
22 without -- without the condition of due process.

23 If a court finds a violation, it
24 doesn't order due process. It orders -- it
25 enjoins the conduct that was undertaken without

1 due process. The government can always go back
2 and do it over again with due process.

3 And -- and, finally, there's another
4 clause in the Fifth Amendment that is written in
5 exactly the same way, the indictment clause. It
6 says a person shall not be held for a capital or
7 otherwise infamous crime unless on a presentment
8 of an indictment. An indictment is the
9 condition precedent to having a lawful holding
10 of somebody for a crime, and one --

11 CHIEF JUSTICE ROBERTS: Mr. Kneedler,
12 in the --

13 MR. KNEEDLER: Yeah.

14 CHIEF JUSTICE ROBERTS: -- brief that
15 you filed in First English 38 years ago, you
16 argued that the Constitution does not of its own
17 force furnish a basis for a court to award money
18 damages against the government.

19 Now, in the decision in First English,
20 Justice Rehnquist rejected the idea "that the
21 Constitution does not of its own force furnish a
22 basis for the court to award money damages
23 against the government."

24 Now it seems to me that the question
25 turns on basis. And what you seem to be saying

1 is it created a general theory of what the
2 government had to do, but that doesn't mean that
3 anybody could take that and recover
4 compensation. They have to go get an injunction
5 or they -- they can't proceed at all because
6 there's no cause of action?

7 MR. KNEEDLER: Yes, Your Honor.

8 CHIEF JUSTICE ROBERTS: I mean, are
9 you just rearguing the point that the Court
10 rejected?

11 MR. KNEEDLER: Not at all. Not at
12 all. Our -- our point -- that portion of our
13 brief was really going to the cause of action
14 question and -- and for the reasons that we said
15 in that brief and this brief, and I don't think
16 the Court rejected this.

17 For all the reasons we said, not just
18 the text of the clause, but -- but the
19 Appropriations Clause, the Fifth Amendment only
20 applied to the United States, the Appropriations
21 Clause would have prohibited any court from
22 awarding a money judgment or an injunction to
23 pay money because only Congress can authorize
24 the payment of money from the Treasury.

25 CHIEF JUSTICE ROBERTS: Well, but it's

1 --

2 MR. KNEEDLER: OPM versus Richmond
3 makes that clear.

4 CHIEF JUSTICE ROBERTS: Well, the
5 Constitution can do it too, which is what the
6 rest of that footnote rejecting the arguments
7 that the government made in First English said.
8 It says that the cases made clear that it is the
9 Constitution that dictates the remedy for
10 interference with property rights amounting to a
11 taking.

12 So I -- I'm not sure how you get
13 around the fact that the Constitution speaks in
14 terms of just compensation and not an
15 injunction.

16 MR. KNEEDLER: Well, as I said, it
17 speaks in terms of compensation, in terms of
18 defining the right, which is not to have
19 property taken without just compensation. But
20 that footnote, I think it's important to
21 understand the context of that footnote.

22 In fact, all of First English was
23 about the Agins rule in the -- in the -- in
24 California, which said there was not even a
25 taking. Sometimes they said no compensation,

1 but there was no taking until a court first
2 determined that there was a taking.

3 And that was the rule, that was the
4 controversy at the time, the so-called temporary
5 taking. Does -- does the taking arise in a
6 regulatory context at the time the regulation is
7 effective or later? That was the issue that the
8 Court rejected, and in that respect, it said no,
9 compensation is owed from the moment of -- of
10 the Constitution. And what --

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 JUSTICE ALITO: Mr. Kneedler, I have a
14 little trouble understanding your argument about
15 the Tucker Act. In your view, neither the
16 Tucker Act nor the Takings Clause provides a
17 cause of action, but then you say the
18 combination of the two somehow provides a cause
19 of action.

20 And -- and the Petitioner says that
21 what you're saying is that nothing plus nothing
22 equals something. So this -- you must be
23 relying on some kind of higher math that I can't
24 understand.

25 MR. KNEEDLER: We're --

1 JUSTICE ALITO: What is the cause of
2 action --

3 MR. KNEEDLER: I --

4 JUSTICE ALITO: -- in a Tucker Act
5 suit?

6 MR. KNEEDLER: As I said, I think it's
7 the combination of the two. It's not zero plus
8 zero; it's one-half plus one-half. The -- as we
9 say, the -- the -- the Constitution, the Fifth
10 Amendment itself, does not create a cause of
11 action. It would have -- would have been
12 extraordinary. We went for 200 years, as
13 pointed out, with that not being the case.

14 But what the Tucker Act does is, as
15 the Court said two terms ago, three terms ago, I
16 guess, it provides the framework under which
17 it's -- it can be determined whether Congress
18 has provided the ability to sue under the Tucker
19 Act.

20 The Tucker Act standard is whether the
21 particular substantive provision that is being
22 relied upon creates a -- can reasonably be read
23 to mandate compensation, if there is a
24 violation. By definition, and the Court made
25 this point in Bormes, the Tucker Act is there

1 for something where there is an obligation but
2 no elements of a cause of action. So the --
3 the -- for example, the Fifth Amendment or the
4 statute that may be involved, particular statute
5 that may be involved, by definition does not
6 create a cause of action.

7 Congress provided in the Tucker Act
8 that you can recover compensation if -- if the
9 other provision of law can reasonably be
10 construed. That's -- that's a Tucker Act
11 standard --

12 JUSTICE ALITO: All right. Suppose
13 there -- suppose that the Takings Clause was not
14 in the Constitution but Congress enacted a
15 statute that said the federal government shall
16 not take private property for public use without
17 just compensation.

18 Would that be a money-mandating
19 statute that creates a cause of action?

20 MR. KNEEDLER: I don't think so. I --
21 because it's a -- it's a -- it's a prohibition,
22 I think it's the same -- the same as the Fifth
23 Amendment itself. It -- it is a directive to
24 Congress not to -- or executive not to take
25 property without affording compensation.

1 Now, it may be that the particular
2 statute would be understood or could be
3 interpreted that way, but here we're talking
4 about the Constitution, and no other provision
5 of the Constitution provides of its own force a
6 remedy, particularly a remedy for damages.

7 And that would have been extraordinary
8 at the time the Constitution was adopted because
9 of the Appropriations Clause, sovereign
10 immunity, and the Debt Clause. If -- if
11 compensation is not paid, that is a debt of the
12 United States --

13 JUSTICE ALITO: I find it hard to
14 understand how that would not be a statute that
15 mandates the payment of money. It says you --
16 you can't take property for a public use without
17 just compensation. It's talking about paying
18 money. If that's not a money-mandating
19 provision, then --

20 MR. KNEEDLER: It might -- it might be
21 -- it might be money -- money-mandating under
22 the Tucker Act. I -- I think I understood you
23 to say this wasn't the Tucker Act.

24 JUSTICE ALITO: No.

25 MR. KNEEDLER: But that's because the

1 Tucker Act has been --

2 JUSTICE ALITO: It's another -- it's
3 another statute, and we would interpret it like
4 we interpreted the statute in Maine Community
5 Health. Does -- does it mandate the payment of
6 money? I would think the answer to that would
7 be yes. And if that's the case with the
8 statute, why isn't it the same with the --

9 MR. KNEEDLER: Because the --

10 JUSTICE ALITO: -- with the Fifth
11 Amendment?

12 MR. KNEEDLER: -- money mandating is
13 not -- is not something under the Tucker Act.
14 It is -- it is a provision in the Tucker Act
15 that --

16 JUSTICE ALITO: All right.

17 MR. KNEEDLER: It's not -- it's not
18 the other statute. It's a provision in the
19 Tucker Act. And that is a Tucker Act-specific
20 standard for when Congress --

21 JUSTICE ALITO: Thank you.

22 JUSTICE JACKSON: Mr. --

23 JUSTICE ALITO: Thank you, Mr.
24 Kneedler.

25 JUSTICE JACKSON: Mr. Kneedler, I

1 thought your answer to Justice Alito was going
2 to be going back to what you said at the
3 beginning, which is the compensation is
4 conditional in the same way as the Due Process
5 Clause is conditional.

6 I thought that was very interesting.
7 And maybe you want to repeat it.

8 MR. KNEEDLER: Yeah. No, no, that --
9 I think that's a fundamental point about the
10 text, not -- of the Just Compensation Clause
11 itself, but the entire Fifth Amendment is -- is
12 prohibitory. I mentioned the Indictment Clause,
13 but the Self-Incrimination Clause is the same
14 way. The Double Jeopardy Clause is -- is the
15 same.

16 JUSTICE JACKSON: And so to the extent
17 that we see a condition there, it -- you're not
18 interpreting that as mandating that condition
19 necessarily. It's about the prohibition?

20 MR. KNEEDLER: Right. Exactly. If I
21 could -- I'm sorry. If I could go back to the
22 Chief Justice's question about First English,
23 the language in that footnote is directed to, it
24 says, remedial. But what it is referring to is
25 the computation of just compensation as a

1 remedial matter.

2 If you have a cause of action, how do
3 you calculate the remedy? All of the cases, it
4 says ^ it's as -- , as the cases in the text
5 make clear, it -- it's a remedy, and it does
6 provide a basis for compensation, but in a cause
7 of action where there already is one.

8 CHIEF JUSTICE ROBERTS: Thank you.

9 MR. KNEEDLER: Every one of the cases
10 the Court cited --

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 MR. KNEEDLER: I'm sorry.

14 CHIEF JUSTICE ROBERTS: Justice
15 Thomas? Anything further?

16 JUSTICE SOTOMAYOR: Is your position
17 -- is there any daylight between Texas's
18 position and the government's position here?

19 MR. KNEEDLER: Well, some --

20 JUSTICE SOTOMAYOR: Your -- you
21 representing the government?

22 MR. KNEEDLER: Yeah. To the extent
23 there was a suggestion that there could be an
24 injunction to pay money, we would disagree with
25 that because of the Appropriations Clause, I

1 think. The Fifth Amendment cannot be read --

2 JUSTICE SOTOMAYOR: So would it be --

3 MR. KNEEDLER: -- to allow that.

4 JUSTICE SOTOMAYOR: -- a matter of
5 semantics, you can't take this property? You
6 have to stop flooding it? You have to do --

7 MR. KNEEDLER: Not -- you have to stop
8 whatever it is that would constitute a taking.
9 And -- and --

10 JUSTICE SOTOMAYOR: Right. And just
11 to clarify your answer to Justice Alito in my
12 head, you're saying it's the Tucker Act plus the
13 statute --

14 MR. KNEEDLER: Yes.

15 JUSTICE SOTOMAYOR: -- mandating
16 payment that gets you into court?

17 MR. KNEEDLER: That is -- that's --
18 that's correct, and it's certainly not the --
19 it's certainly not the other provision itself,
20 the Just -- the Just Compensation Clause or the
21 other statute, which by definition --

22 JUSTICE SOTOMAYOR: So that's your
23 half-point/half-point --

24 MR. KNEEDLER: Yes.

25 JUSTICE SOTOMAYOR: -- equals one?

1 MR. KNEEDLER: Yes.

2 JUSTICE SOTOMAYOR: Okay.

3 MR. KNEEDLER: Sorry.

4 CHIEF JUSTICE ROBERTS: Justice Kagan?
5 Justice Gorsuch?

6 JUSTICE GORSUCH: Two questions.

7 First, the rogue state example, why shouldn't we
8 worry about that? It -- why shouldn't we worry
9 about the incentive structure we create that
10 would allow states to withdraw compensation
11 schemes, and maybe the federal government too,
12 to exploit this loophole?

13 MR. KNEEDLER: With respect, it's not
14 a loophole. It's a -- it's a fundamental aspect
15 of the Constitution that the Constitution does
16 not -- does not require this.

17 And the rogue state is answered by
18 it's a prohibition, and if -- if Congress does
19 not provide the condition necessary to render it
20 lawful, you have an injunction -- injunctive
21 action. And as the Court said in Knick, that
22 was the way --

23 JUSTICE GORSUCH: Okay.

24 MR. KNEEDLER: -- that just
25 compensation issues were raised before.

1 JUSTICE GORSUCH: Okay. And then,
2 second, this may be a question better directed
3 to Mr. McNamara when he speaks on rebuttal, but
4 Justice Sotomayor pointed out an interesting
5 feature of the procedural history of this case.
6 The complaint has two counts about takings. One
7 is under the state constitution, and the other
8 is under the federal Constitution.

9 How do we read what the Fifth Circuit
10 did here? Did it only dismiss the second, the
11 federal claim, and is the first claim under,
12 what is it, City of Bayview and the -- and the
13 Texas Constitution still live? Do they even
14 need to amend their complaint to add it? Is it
15 already there?

16 MR. KNEEDLER: There's a footnote in
17 the court of appeals' opinion that says that the
18 Texas constitution or Texas provides a cause of
19 action. And that is not further elaborated
20 upon, but it's --

21 JUSTICE GORSUCH: No. Exactly.

22 MR. KNEEDLER: -- it's remanded for
23 further proceedings.

24 JUSTICE GORSUCH: So do you take it
25 that that first count under the state

1 constitution is still alive and available to the
2 plaintiffs?

3 MR. KNEEDLER: I -- it is still alive
4 and available. If it required an amendment to
5 the complaint, I --

6 JUSTICE GORSUCH: Do you think it
7 requires amendment --

8 MR. KNEEDLER: I --

9 JUSTICE GORSUCH: -- to the complaint,
10 or because it was remanded for further
11 proceedings, the court only expressly addressed
12 the federal Constitution, that that first count
13 is still alive?

14 MR. KNEEDLER: I think it would depend
15 on whether that first count, in -- in relying on
16 the state constitution, was just relying on a
17 state substantive right to compensation or
18 whether it was also relying --

19 JUSTICE GORSUCH: But Texas --

20 MR. KNEEDLER: -- on a cause of
21 action.

22 JUSTICE GORSUCH: -- represented to us
23 that it provides a cause of action --

24 MR. KNEEDLER: Right. And --

25 JUSTICE GORSUCH: -- right? So --

1 MR. KNEEDLER: So, yes, if -- if the
2 complaint is read to be invoking the state cause
3 of action for the federal taking, then, yes, I
4 think that would be open on remand.

5 JUSTICE GORSUCH: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Kavanaugh?

8 Justice Barrett?

9 JUSTICE BARRETT: Mr. Kneedler, I just
10 want to clarify something. So your position in
11 response to, say, the rogue state hypothetical,
12 when you said an injunction is the solution,
13 it's not an injunction to pay money because you
14 said the United States thinks that can't happen.

15 So is it your position that if, say, a
16 state or the United States takes property,
17 refuses to get -- give just compensation for it,
18 that the property owner could get an injunction
19 essentially saying give me my property back if
20 you're not going to pay, and perhaps get that
21 injunction but not get reimbursed for the
22 temporary taking that happened in between the
23 seizure and the award of the injunction?

24 MR. KNEEDLER: That -- that is -- that
25 is correct. And the thing would be true, there

1 could be a temporary deprivation of due process
2 and if you get an injunction preventing the
3 government from doing whatever it did without
4 due process, there is an interim period but a
5 person can go to court, get a TRO, get a
6 preliminary injunction to -- to prevent that
7 from going on a long -- a long time. That's
8 just the nature of litigation and an injunction
9 but it doesn't lead to the question of damages.

10 In this Court's cases, First English
11 and others had to do with the calculation
12 whether interest should be paid. And that's
13 what the Court meant about the Fifth Amendment
14 being a basis for the award of compensation, not
15 that there was a cause of action.

16 CHIEF JUSTICE ROBERTS: Justice
17 Jackson?

18 JUSTICE JACKSON: Just to clarify from
19 what Justice Barrett just said, the government's
20 position would be that you might be able to have
21 a cause of action, say, under state law or
22 whatnot for that temporary taking. It's not
23 that you would be out the compensation entirely,
24 right?

25 MR. KNEEDLER: Right. It -- that --

1 that would depend on state law and the
2 availability of state cause of action on that.
3 But we're -- I'm only talking about the federal
4 causes of action which that there's no basis for
5 an award of money out of the treasury and
6 overcoming sovereign immunity and all that in
7 federal court for a compensation, even for that
8 interim period.

9 But the interim period is endemic
10 to -- to litigation, due process violation being
11 held on an indictment, but that is the proper
12 remedy and that's the -- the remedy that existed
13 until the Tucker Act was passed.

14 It was the remedy that this Court said
15 in Knick was the way to vindicate Fifth
16 Amendment rights until the Tucker Act or state
17 constitutions came along and provided a monetary
18 remedy.

19 JUSTICE JACKSON: Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Rebuttal, Mr. McNamara.

23 REBUTTAL ARGUMENT OF ROBERT J. McNAMARA
24 ON BEHALF OF THE PETITIONERS

25 MR. McNAMARA: Thank you, Your Honor.

1 To begin with Justice Gorsuch's
2 question, I think it's important to remember the
3 procedural posture here. I understood my friend
4 to say that the City of Baytown decision means
5 that Texas courts here claims "under the federal
6 Constitution."

7 The complaint pleads a claim under the
8 federal Constitution and to the extent Texas's
9 only complaint with that was that it failed to
10 cite directly to a Texas Supreme Court decision,
11 it's not clear why Texas moved to dismiss it,
12 sought an interlocutory appeal of that decision
13 as a dispositive issue and then extinguished it
14 on the merits in the Fifth Circuit.

15 To the extent that claim exists, that
16 claim has been extinguished and that warrants
17 reversal.

18 To the original meaning, and I think,
19 Your Honor, the -- the rogue state example is
20 not a hypothetical. It's a real example because
21 state after state has looked to federal law and
22 to First English as the thing that prevents the
23 state from denying compensation.

24 That's true in Oregon, as I mentioned,
25 but also New Mexico, South Carolina, Nebraska,

1 the list goes on of states that provide
2 compensation under the Fifth Amendment because
3 they understand the Fifth Amendment to require
4 compensation.

5 And they're correct to understand
6 that, Your Honor. The original understanding as
7 evidenced by writings from James Madison to
8 St. George Tucker is that the Fifth Amendment
9 creates an obligation to pay, which is why you
10 can sue under the Tucker Act because the Fifth
11 Amendment creates an obligation to pay.

12 Only in the absence of a court of
13 competent jurisdiction to enforce that
14 obligation does -- do the federal courts resort
15 to cases like Meigs v. McClung Lessee where the
16 court ejected the United States military from
17 its own base because it didn't have clean title.

18 That -- that is the last resort in the
19 absence of a court that has the jurisdiction to
20 enforce that obligation.

21 That's why in Maine Community Health,
22 this Court specifically pointed to the Takings
23 Clause as the analogy for what sort of
24 money-mandating inquiry it means to create the
25 obligation to pay.

1 But more broadly, Your Honor, I -- I
2 think Texas's understanding of the Fifth
3 Amendment would relegate property rights to the
4 status of the poor relation of the Bill of
5 Rights.

6 It would be the only acknowledged
7 ongoing obligation in the Constitution that is
8 entitled to no enforcement. That is left
9 entirely to the discretion of the government
10 entities that are supposedly obligated to pay.
11 But surely, as evidenced by the writings and by
12 the adoption of the Fifth Amendment itself, the
13 framers meant for property rights to mean more
14 than that.

15 If the Court has no further questions,
16 we'll rest on our briefs.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel. The case is submitted.

19 (Whereupon, at 12:23 p.m., the case
20 was submitted.)

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