No. 19-30992

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

VIOLET DOCK PORT, INC., L.L.C.,

Plaintiff-Appellant,

v.

DREW M. HEAPHY, in his capacity as Executive Director of St. Bernard Port, Harbor & Terminal District; ST. BERNARD PORT, HARBOR & TERMINAL DISTRICT,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:19-cv-11586

BRIEF OF *AMICI CURIAE* INSTITUTE FOR JUSTICE, PELICAN INSTITUTE FOR PUBLIC POLICY, AND MISSISSIPPI JUSTICE INSTITUTE IN SUPPORT OF PLAINTIFF-APPELLANT

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel certifies that the following listed persons and entities, in addition to those listed in the parties' briefs, have an interest in the outcome of this case.

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Pelican Institute for Public Policy
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Undersigned counsel further certifies, pursuant to Federal Rule of Appellate Procedure 26.1(a), that *amici curiae* Institute for Justice, Pelican Institute for Public Policy, and Mississippi Justice Institute are not publicly held corporations, do not have any parent corporations, and that no publicly held corporation owns 10 percent or more of any corporation's stock.

Dated: February 10, 2020

/s/ Jeffrey Redfern
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INTEREST OF *AMICI CURIAE*[1]

Founded in 1991, the **Institute for Justice** (IJ) is a nonprofit, public-interest legal center dedicated to defending the essential foundations of a free society: private property rights, economic and educational liberty, and the free exchange of ideas. As part of that mission, IJ has litigated cases challenging the use of eminent domain to seize an individual's private property and give it to other private parties. Among the cases that IJ has litigated are *Kelo v. City of New London*, 545 U.S. 469 (2005), in which the Supreme Court infamously held that the U.S. Constitution allows government to take private property and give it to others for purposes of "economic development," and *City of Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006), in which the Ohio Supreme Court expressly rejected *Kelo* and held that the Ohio Constitution provides greater protection for private property than does the U.S. Constitution.

IJ continues to litigate important statutory and constitutional

[1] Pursuant to FRAP 29(a)(2), counsel for *amici* states that counsel for all parties have consented to the filing of this brief. No party or party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than the *amici* or their counsel—contributed money that was intended to fund preparing or submitting this brief.

questions in eminent domain cases around the country, both as counsel for property owners and as amicus curiae. Recent IJ cases include a victory in the New Jersey Appellate Division as counsel of record, *see Casino Reinvestment Development Authority v. Birnbaum*, 203 A.3d 939 (N.J. Super. Ct. App. Div. 2019) and an appearance as amicus curiae (where IJ was invited to participate in oral argument) in the Colorado Supreme Court. *See Carousel Farms Metro. Dist. v. Woodcrest Homes*, 442 P.3d 402 (Colo. 2019).

The **Pelican Institute for Public Policy** is a non-profit and nonpartisan research and educational organization and the leading voice for free markets in Louisiana. The Institute's mission is to conduct scholarly research and analysis that advances sound policies based on free enterprise, individual liberty, and constitutionally limited government. The Institute has an interest in protecting Louisiana citizens' private property rights.

The **Mississippi Justice Institute** (MJI) is a nonprofit, public interest law firm and the legal arm of the Mississippi Center for Public Policy, an independent, nonprofit, public policy organization dedicated to advancing the principles of limited government, free markets, strong

families, individual liberty, and personal responsibility. MJI represents Mississippians whose state or federal constitutional rights have been threatened by government actions. MJI's activities include direct litigation on behalf of individuals, intervening in cases important to public policy, participating in regulatory and rulemaking proceedings, and filing amicus briefs to offer unique perspectives on significant legal matters in Mississippi and federal courts.

ARGUMENT

The Fifth Amendment's terms are plain: "nor shall private property be taken for public use. without just compensation." Here, Appellants' property has been taken without just compensation. That establishes an ongoing violation of the Fifth Amendment that federal courts are empowered to remedy.

The district court's decision to the contrary is based on the notion that the Fifth Amendment's command of just compensation need not be contemporaneous with the taking. And since, in the district court's view, payment need not be contemporaneous, a government entity's "delay in paying" a condemnation judgment cannot give rise to a Fifth

Amendment violation.

That is wrong. A central purpose of the Takings Clause was to enshrine a rule that dates back to Magna Carta: that takings of private property must be paired with contemporaneous cash payments rather than unenforceable IOUs. Indeed, just last Term, the Supreme Court of the United States confirmed in *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), that a property owner's injury begins the moment his property is taken and continues until it is remedied by the payment of just compensation. But even before *Knick*, there was no question that a property owner whose property had been taken, but who (like Appellant) had no available state remedy to compel compensation, had a viable cause of action under § 1983. This Court should confirm the availability of a federal remedy here because states otherwise cannot be compelled to provide their citizens with a full remedy for violations of their federal rights.

I. "Just compensation" has always meant contemporaneous cash payment—not a paper promise.

The decision below held that Appellants have no Fifth Amendment claim because they have already received a judgment in

their favor and a mere "delay" in paying cannot give rise to a Fifth Amendment violation. The district court cited no law for these propositions. Nor could it have: Its holding runs squarely contrary to 800 years of precedent, dating back to Magna Carta.

The just-compensation requirement dates back at least to the signing of Magna Carta in 1215. Among the grievances of the barons who compelled King John to sign Magna Carta was the King's abuse of the royal prerogative of "purveyance." Purveyance was, as Blackstone explained, the right of the king to "bu[y] up provisions and other necessaries *** at an appraised valuation, in preference to all others, and even without consent of the owner." 1 William Blackstone, *Commentaries* *277. In other words, purveyance was a species of what we now call eminent domain. *See Little Rock Junction Ry. v. Woodruff*, 5 S.W. 792, 793 (Ark. 1887) ("[Eminent domain] bears a striking analogy to the king's ancient prerogative of purveyance, which was recognized and regulated by the twenty-eighth section of *magna charta*"). This prerogative was important to English kings because the royal court in John's time was "very frequently" "removed from one part of the kingdom to another." 1 Blackstone *277. The king's right to purchase

provisions at market rates ensured "that the work of government should not be brought to a stand-still for want of supplies." William Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John, with an Historical Introduction* 330 (1914).

At the time of Magna Carta, there was no dispute that the king and his deputies were obligated to pay for the provisions they took. But controversy arose because "[p]ayment was often indefinitely delayed or made not in coin but in exchequer tallies." McKechnie at 330. Exchequer tallies were sticks used to memorialize royal debts owed to particular subjects. Marks would be made along the length of the stick to record the size of the debt, and then the stick would be split lengthwise. Each half of the stick would contain a portion of all of the lines, and because of irregularities in the wood, the sticks were difficult to forge. Each party would keep half of the stick; those halves later could be matched up to prove their authenticity. See Christine Desan, *Making Money: Coin, Currency, and the Coming of Capitalism* 175-185 (2014).

The problem with exchequer tallies was that they were less transferable than coins. It was difficult or impossible to prove to

potential transferees that one half of a stick actually conformed to another half held by the Exchequer. So, in practice, Exchequer tallies' primary use was to offset the creditor's future taxes. *Id.* In that regard, those exchequer tallies bear a striking resemblance to the paper judgment issued by the Louisiana court in this case. Neither has any real value except to offset possible future debts to the condemnor.

King John's barons were so dissatisfied with this state of affairs that they included several clauses in Magna Carta specifically addressing the issue of purveyance. Most notably, Clause 28 provided (in translation) that "[n]o constable or other bailiff of ours shall take corn or other provisions from any one ***without immediately tendering money therefor***, unless he can have postponement thereof by permission of the seller." (emphasis added). The purpose of this clause was not to establish that the King had to pay for what he took. Even King John didn't dispute that. It was to establish that he had to pay cold, hard cash—IOUs wouldn't cut it—and he had to pay immediately. It is no exaggeration to say that the district court's opinion, by holding that "just compensation" need be no more than an unenforceable promise to pay at some point in the future, would turn

back the clock over 800 years.

This basic principle of just compensation has been reaffirmed countless times in the centuries since. Magna Carta was reissued in England four times—by Henry III in 1216, 1217 and 1225, and by Edward I in 1297. A.E. Dick Howard, *Magna Carta: Text and Commentary* 24 (1964). And Magna Carta was confirmed by parliaments at least fifty more times by 1422. J.C. Holt, *The Ancient Constitution in Medieval England, in The Roots of Liberty: Magna Carta, Ancient Constitution, and the Anglo-American Tradition of Rule of Law* 55 (Ellis Sandoz ed., 1993).

American courts over the centuries also affirmed their commitment to Magna Carta's just-compensation principle, even before independence and the incorporation of the Fifth Amendment against the states. *See, e.g.*, *Hooper v. Burgess* (Provincial Ct. of Md. 1670), *reprinted in 57 Archives of Maryland, Proceeding of the Provincial Court 1666-1670*, at 571, 574 (J. Hall Pleasants ed., 1940) (holding that an uncompensated seizure of cattle was "Contrary to the Act of Parliamt [sic] of Magna Charta" and awarding the plaintiff compensation of "Forty Five Thousand Nyne Hundred & Fifty poundes of Tobaccoe");

Bowman v. Middleton, 1 Bay 252 (S.C. Ct. Common Pleas 1792) (declaring that it would be "against common right, as well as against Magna Charta, to take away the freehold of one man, and vest it in another without any compensation"); *Gardner v. Village of Newburgh*, 2 Johns Ch. 162, 166 (N.Y. Chancery Ct. 1816) (striking down a law that failed to provide for just compensation as inconsistent with the "ancient and fundamental maxim of common right to be found in *Magna Charta*" and holding that compensation must be made "previous[]" to the taking); *Young v. McKenzie*, 3 Ga. 31, 41–45 (1847) (holding that the just-compensation principle dates to Magna Carta and is an inherent limit on the power of all governments, regardless of whether their constitutions contain an explicit just-compensation clause).The just-compensation principle—which includes the requirement of immediate cash payment—is one of the oldest and most firmly established rights protected by the Constitution.

II. The Supreme Court in *Knick* confirmed that the Fifth Amendment requires immediate compensation when property is taken for public uses.

Last summer, the Supreme Court explained that the Fifth Amendment means precisely what it says: "Nor shall private property

be taken for public use, without just compensation.' It does not say: 'Nor shall private property be taken for public use, without an available procedure that will result in compensation.'" *Knick*, 139 S. Ct. at 2170. Still less does the Fifth Amendment say what the district court below implicitly held: "nor shall private property be taken . . . without an unenforceable promise of future payment."

The Court in *Knick* went even further by explicitly clarifying when just compensation is due. Echoing Magna Carta, the court held that "a property owner has a Fifth Amendment entitlement to compensation as soon as the government takes his property without paying for it." *Id.* Yet the decision below inexplicably rejects *Knick* by holding that "delay in paying the remaining amount of the state court's judgment has not given rise to a Fifth Amendment violation." (Order at 5.)

But that analysis simply gets the question backwards. The Fifth Amendment injury is not caused by the condemnor's delay in paying the judgment. The Fifth Amendment injury is caused by the condemnor's *taking of Appellant's property*. The taking is the injury, and the compensation (assuming the taking is otherwise lawful) is the remedy. The delay in payment simply means that the claim that arose at the

moment of the taking has not been remedied. *See Knick*, 139 S. Ct. at 2171 ("The fact that the State has provided a property owner with a procedure that may subsequently result in just compensation cannot deprive the owner of his Fifth Amendment right to compensation under the Constitution, leaving only the state law right.").

Admittedly, some older Supreme Court cases have held that contemporaneous payment is not always required so long as compensation is "reasonably just and prompt." *Crozier v. Fried. Krupp Aktiengesellschaft*, 224 U.S. 290, 306 (1912). But the *Knick* Court explained those cases had been read "too broadly," and that "[t]hey concerned requests for injunctive relief, and the availability of subsequent compensation [in those cases] meant that such an equitable remedy was not available." *Knick*, 139 S. Ct. at 2175. In other words, these cases mean that courts will generally not enjoin a taking of property because it is uncompensated so long as the compensation is forthcoming. They do not negate the longstanding rule that under the Fifth Amendment compensation is due at the moment of the taking. *Cf. Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 305–06 (1923) (holding that if payment is delayed, it must be made with interest from

the date of the taking).

But regardless of the continuing validity of the dicta in cases like *Crozier*, this case concerns payment that is neither just nor prompt. Rather, the Port District's position is that it will not pay and cannot be made to pay any compensation for the property it took. But the U.S. Constitution says the Port District *must* pay, and a federal court is empowered to remedy that constitutional violation by either compelling payment or by enjoining the District's ongoing trespass on land it has not paid for. Indeed, that kind of equitable relief is historically how courts have dealt with uncompensated seizures of property where there was a question whether the court would, as a practical matter, be able to compel payment. *See Knick*, 139 S. Ct. at 2176 ("Until the 1870s, the typical recourse of a property owner who had suffered an uncompensated taking was to . . . obtain . . . retrospective damages, as well as an injunction ejecting the government from his property going forward.").

III. Even before *Knick*, there was no legal basis for dismissing this claim.

Knick makes this case particularly easy, but *Knick* is not necessary to the outcome of this case. To the contrary, property owners in Appellant's circumstances have always been entitled to a federal remedy.

While this case was brought under 42 U.S.C. § 1983, the Supreme Court has long recognized "the self-executing character of the [Fifth Amendment] with respect to compensation." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987). As the Court put it, the right to sue for just compensation:

> rest[s] upon the Fifth Amendment. Statutory recognition [i]s not necessary. A promise to pay [i]s not necessary. Such a promise [i]s implied because of the duty to pay imposed by the amendment. The suits [are] thus founded upon the Constitution of the United States.

Jacobs v. United States, 290 U.S. 13, 16 (1933); *see also Seaboard Air*, 261 U.S. at 304 ("Just compensation is provided for by the Constitution and the right to it cannot be taken away by statute. Its ascertainment is a judicial function."). Historically, Congress could channel just compensation claims to particular courts, *see, e.g.*, *Broughton Lumber Co. v. Yeutter*, 939 F.2d 1547, 1557 (Fed. Cir. 1991), but it could not

otherwise qualify or limit the right.

In 1985, the Supreme Court modified this state of affairs as it applied to state and local defendants. Reasoning that an uncompensated taking had not occurred until the government refused to pay a claim, the Supreme Court held that plaintiffs must first exhaust their state remedies—including judicial remedies such as inverse-condemnation suits—before bringing a takings claim in federal court. *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 ("the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation"), *overruled by Knick*, 139 S. Ct. at 2167.

But even under *Williamson County*, nothing would have stood in the way of a property owner like Appellant. The Appellant has done exactly what *Williamson County* demanded: It has exhausted its state court remedies, and the defendant still refuses to pay. That would have cleared the road for this federal just-compensation suit with or without the Supreme Court's decision in *Knick*.

The only thing that is unusual about this case is that here the

property owner completed the state-court litigation without foreclosing its federal claim. In the mine-run of cases, a state-court proceeding will result either in the payment of just compensation or in the resolution of certain factual disputes (about, for example, whether a taking has occurred at all) that make subsequent federal litigation impossible. *See San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 347 (2005) (holding that federal courts hearing a subsequent federal takings claim must apply ordinary preclusion principles to the state-court action). But here, the state-court litigation resulted in a determination of the value of the property taken (which is res judicata as between these parties), but it did *not* result in any enforceable compensation remedy. This case therefore presents the rare instance in which federal litigation subsequent to a state-court condemnation proceeding is not only possible but affirmatively necessary.

IV. Rejecting a federal remedy here will leave federal rights at the mercy of state legislatures.

When facing analogous situations where state actors have taken property but refused to pay, federal courts have sometimes reassured themselves by presuming that state courts are perfectly capable of

enforcing—and are indeed required to enforce—federal rights. *See Jachetta v. United States*, 653 F.3d 898, 909 (9th Cir. 2011) ("sovereign immunity may not stand in the way of recovery in *state court* " because of the "self-executing" character of the Takings Clause"); *DLX, Inc. v. Kentucky*, 381 F.3d 511, 528 (6th Cir.2004) ("[W]here the Constitution requires a particular remedy, such as . . . through the Takings Clause . . . , the state is required to provide that remedy in its own courts, notwithstanding sovereign immunity.").

This Court should not be so reassured: As demonstrated by the proceedings here, state courts themselves are not always so sanguine about their power and duty to enforce federal rights. And they may in fact not be required to enforce them. To be sure, state courts generally cannot decline to adjudicate federal claims. *See Howlett v. Rose*, 496 U.S. 356, 369 (1990) ("A state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of 'valid excuse.'"). But "federal law takes the state courts as it finds them," *Id.* at 372 (quoting Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 508 (1954)), and the Supreme Court has recognized that there are circumstances where

recovery on a federal claim might not be possible "because of a neutral state rule regarding the administration of the courts." *Id.* In other words, the Supremacy Clause does not require states to have courts that are imbued with particular powers—or, indeed, to have courts at all. This means that states are generally permitted to de-fang their own judicial systems and leave their citizens without meaningful remedies for violations of their federal rights, so long as they also provide no meaningful remedy for state rights.[2]

And this case illustrates that some states are willing to do exactly that. Louisiana courts have repeatedly held that they cannot enforce monetary judgments—including takings judgments—against government defendants. *Vogt v. Bd. of Comm'rs of Orleans Levee Dist.*, 814 So. 2d 648, 656 (La. Ct. App. 2002) ("This court recognizes and sympathizes with plaintiffs' plight in getting a judgment against the State or political subdivision satisfied. Nonetheless, this court is without constitutional or statutory authority to compel the Levee Board to pay the judgment rendered against it."); *see also Jazz Casino Co. v.*

[2] Attempts at this sort of de-fanging, of course, may run afoul of a state's own constitution. *See, e.g.*, *Fla. Dep't of Agric. & Consumer Servs. v. Dolliver*, 283 So. 3d 953 (Fla. Dist. Ct. App. 2019) (holding unconstitutional state statute that stripped state courts of power to enforce takings judgments).

Bridges, 223 So. 3d 488, 496 (La. 2017). Setting aside the question whether the Louisiana courts have correctly interpreted their own constitution,[3] their holdings are consistent: State officials may take property with impunity.

This impunity has real and predictable consequences. For instance, one Louisiana jurisdiction simply adopted a policy of never paying tort judgments "unless the plaintiff agreed to waive legal interest on the judgment and to accept quarterly payments on the principal." *Scarbrough v. Simpson*, No. CV 04-812-C-M3, 2006 WL 8432552, at *1 (M.D. La. Feb. 6, 2006), *report and recommendation adopted*, No. CV 04-812-C, 2006 WL 8432695 (M.D. La. Feb. 27, 2006); *see also Freeman Decorating Co. v. Encuentro Las Americas Trade Corp.*, No. CIV.A. 02-2103, 2008 WL 4922072, at *3 (E.D. La. Nov. 12, 2008), *aff'd*, 352 F. App'x 921 (5th Cir. 2009) ("[I]t borders on the absurd that a political sub-division of this state may negotiate a contract for services, receive those negotiated-for services, then never have to pay

[3] *See Foreman v. Vermilion Par. Police Jury*, 336 So. 2d 986, 989 (La. Ct. App. 1976) (Miller, J., concurring) (arguing that, while Louisiana courts cannot enforce a judgment when the judgment creditor is making efforts to comply, "When it appears that a political subdivision has set upon a course of conduct leading to an absolute refusal to pay a judgment, then Art. 12, s 10(A) must be read to provide relief to the judgment creditor.")

because there is 'no coercive means' to collect an outstanding payment.").

In short, Louisiana political subdivisions are candidly admitting that they won't pay judgments simply because they don't want to and nobody can make them. They are only half right. To be sure, federal courts do not typically enforce state court judgments *on state law claims* to a greater extent than state courts. *E.g.*, *Freeman Decorating Co.*, 2008 WL 4922072, at *3 ("It is with good reason that this federal court is restricted to the same power and authority as state courts when adjudicating claims made under state law."). But federal courts retain the power to compel compensation for the violation of federal rights, notwithstanding any state-law immunities. *See City of Detroit v. City of Highland Park*, 878 F. Supp. 87, 90 (E.D. Mich. 1995) ("it is inconceivable that state and local entities can thwart federal courts' ability to enforce judgments 'through the adoption of immunizing procedures and vague statutory schemes"') (*quoting Arnold v. BLaST Intermediate Unit 17*, 843 F.2d 122, 128 (3rd Cir. 1988)). Indeed, the Fifth Circuit has held, with regard to the specific Louisiana constitutional provision at issue in this case, that federal courts must

nevertheless enforce federal law and compel "the responsible state official to satisfy the judgment out of state funds." *Gary W. v. Louisiana*, 622 F.2d 804, 807 (5th Cir. 1980). That should settle this case.

CONCLUSION

When private property is taken for public use, the Constitution requires compensation, not an IOU. Federal courts are empowered to compel government entities to compensate property owners—or to compel them to vacate the property and return it to the owner's possession. This Court should reverse and remand with instructions to do one or the other.

Dated: February 10, 2020

Respectfully submitted,

/s/ Jeffrey Redfern

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because this brief contains 3941 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and the Rules of this Court.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font with 12-point Times New Roman footnotes.

Dated: February 10, 2020

/s/ Jeffrey Redfern
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2020, I caused the foregoing Brief of *Amici Curiae* Institute for Justice, Pelican Institute for Public Policy, and Mississippi Justice Institute in Support of Plaintiff-Appellant to be filed electronically with the Clerk of the Court using the Court's CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

Upon acceptance by the Clerk of the Court of the electronically filed document, the required number of bound copies of the Brief of *Amici Curiae* Institute for Justice, Pelican Institute for Public Policy, and Mississippi Justice Institute in Support of Plaintiff-Appellant will be filed with the Clerk of the Court.

/s/ Jeffrey Redfern
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