

No. 21-30335

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IN THE

**United States Court of Appeals for the Fifth Circuit**

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Ariyan, Incorporated, doing business as Discount Corner; M. Langenstein & Sons, Incorporated; Prytania Liquor Store, Incorporated; West Prytania, Incorporated, doing business as Prytania Mail Service/Barbara West; British Antiques, L.L.C., Bennet Powell; Arlen Brunson; Kristina Dupre; Brett Dupre; Gail Marie Hatcher; Betty Price; Et Al,

Plaintiffs - Appellants,

v.

Sewerage & Water Board of New Orleans; Ghassan Korban, In his Capacity as Executive Director of Sewerage & Water Board of New Orleans,

Defendants - Appellees.

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On Appeal from the United States District Court, Eastern District of Louisiana  
Case No. 21-534, Judge Martin L.C. Feldman

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**BRIEF OF *AMICI CURIAE* SOUTHEASTERN LEGAL FOUNDATION,  
CATO INSTITUTE, PELICAN INSTITUTE FOR PUBLIC POLICY, AND  
OWNER'S COUNSEL OF AMERICA**

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**SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons and entities as described in the Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

1. Southeastern Legal Foundation, *amicus curiae*
2. Kimberly S. Hermann, counsel for Southeastern Legal Foundation
3. Cato Institute, *amicus curiae*
4. Ilya Shapiro, Trevor Burrus, and Sam Spiegelman, counsel for Cato Institute
5. Pelican Institute for Public Policy, *amicus curiae*
6. Sarah Harbison, counsel for Pelican Institute for Public Policy
7. Owners' Counsel of America, *amicus curiae*
8. W. Scott Hastings and Locke Lord LLP, counsel for *Amici*

/s/ W. Scott Hastings

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### **IDENTITY AND INTEREST OF THE AMICI**

The Southeastern Legal Foundation (“SLF”) was established in 1976 as a national constitutional public interest firm and policy center that advocates limited government, individual economic freedom, and the free enterprise system in the courts of law and public opinion. SLF’s mission is to engage in advocacy, including by filing amicus briefs, to support these principles. SLF has filed many amicus briefs supporting property owners in cases involving government takings of private property for alleged public use in accordance with the Fifth and Fourteenth Amendments to the U.S. Constitution.

The Cato Institute (“Cato”) was established in 1977 as a nonpartisan public policy foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato’s Robert A. Levy Center for Constitutional Studies works to restore limited constitutional government, which is the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual Cato Supreme Court Review.

The Pelican Institute (the “Institute”) is a nonpartisan research and educational organization-a think tank-and the leading voice for free markets in Louisiana. The Institute’s mission is to conduct research and analysis that advances sound policies based on free enterprise, individual liberty, and constitutionally limited government.

The Owners' Counsel of America ("OCA") is an invitation-only national network of the most experienced eminent domain and property rights attorneys. They have joined together to advance, preserve, and defend the rights of private property owners, and thereby further the cause of liberty, because the right to own and use property is "the guardian of every other right," and the basis of a free society. *See* James W. Ely, *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* (3d ed. 2008). OCA is a non-profit 501(c)(6) organization sustained solely by its members. OCA members have authored and edited treatises, books, and law review articles on property law and property rights.

*Amici* are interested in this case because it involves an issue of great public importance to protect property owners (whether individuals, families, small businesses, or otherwise) against abuse of governmental authorities that fail or refuse to pay the just compensation that is due under the Constitution.<sup>1</sup>

### **ISSUE PRESENTED**

Whether property owners may pursue a claim under 42 U.S.C. §1983 to compel state or local government actors to pay judgments reflecting the just

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<sup>1</sup> This brief was prepared by *Amici* and its counsel. No party to this appeal, counsel for a party, or other person has authored this brief or contributed money for its preparation. All parties to this appeal have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

compensation that is mandated under the Fifth and Fourteenth Amendments to the U.S. Constitution whenever government takes private property for a public use.

### **INTRODUCTION**

This case presents an important issue of law regarding the role of the federal courts in enforcing the constitutional mandate to pay just compensation under the Fifth and Fourteenth Amendments when government takes private property for public use. The Supreme Court recently expanded the role of the federal courts to enforce Fifth and Fourteenth Amendment rights when it explained in *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019), that a property owner “may bring a Fifth Amendment claim under § 1983” any time when government takes private property without compensation. *Id.* at 2177. Last term, the Court reaffirmed that “[t]he government must pay for what it takes.” *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063, 2071 (2021). “The Founders recognized that the protection of private property is indispensable to the promotion of individual liberty. As John Adams tersely put it ‘[p]roperty rights must be secured or liberty cannot exist.’” *Id.* (quoting *Discourses on Davila*, 6 Works of John Adams 280 (C. Adams ed. 1851)).

In contrast to the Supreme Court’s opening the doors for takings litigation in federal court, the district court foreclosed an entire category of landowners who have suffered uncompensated takings from seeking relief in federal court under

Section 1983. For those landowners who pursued and exhausted their takings claims in state court as they were previously required to do under *Williamson County Regional Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985), overruled by *Knick*, 139 S.Ct. at 2167, the district court held that there is no federal remedy to enforce the state court compensation judgments. This allows local government entities to hide behind state law provisions such as La. Const. Art. XII, § 10(C) or La. R.S. 13:5109 to deny or defer paying just compensation indefinitely. Without a federal remedy (which preempts these state law obstacles), landowners are being denied the just compensation that is due to be paid under the Fifth and Fourteenth Amendments. *See Baltimore & Ohio R. Co. v. United States*, 298 U.S. 349 (1936) (the just compensation clause “may not be evaded or impaired by any form of legislation”); *see also Fla. Dep’t of Agric. & Consumer Servs. v. Dolliver*, 283 So. 3d 953, 963-64 (Fla. Dist. Ct. App. 2019) (rejecting attempt to avoid payment of just compensation due to the lack of legislative appropriation of funds).<sup>2</sup>

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<sup>2</sup> When faced with an enforceable obligation to pay the Florida judgment, the Florida Legislature appropriated the funds to pay the landowners during the next legislative session, which mooted further review of that case. *See Fla. Dep’t of Agric. & Consumer Servs. v. Dolliver*, 2020 WL 4697860 (Fla. 2020) (dismissing case as moot after judgments were paid); *see also* Dockets and filings for Case No. SC19-2047, available at <http://onlinedocketssc.flcourts.org/>, which explain the circumstances under which the case became moot.

## **ARGUMENT**

### **A. Government stonewalling to defer or avoid paying just compensation awards is a recurring problem.**

The Fifth Amendment’s mandate to pay compensation is clear: “nor shall private property be taken for public use, without just compensation.” U.S. Const. amend. V. The just compensation clause applies regardless whether the government affirmatively acquires title to property, whether it inversely condemns the property (such as causing property to flood to build a dam), or whether it impairs the use of the property through regulations rising to the level of a taking. *Cedar Point Nursery*, 141 S.Ct. at 2071. This just compensation clause applies to state and local government entities too. *See Penn-Central Transp. Co. v. City of New York*, 438 U.S. 104, 122-23 (1978); *see also* U.S. Const. amend XIV, §1 (state shall not “deprive any person of life, liberty, or property, without due process of law”). The compensation clause protects property owners from being forced to bear more than their share of the burdens of government that should be spread across the public as a whole. *See Monongahela Nav. Co. v. United States*, 148 U.S. 312, 315 (1893).

“[A] property owner acquires an irrevocable right to just compensation immediately upon a taking[.]” *Knick*, 139 S.Ct. at 2172 (citing *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315, 318 (1987)). Yet, government intransigence has made the right to

compensation illusory in many cases.<sup>3</sup> When property is taken, it often spawns years of litigation seeking to establish the amount of “just” compensation. In other situations, landowners spend years in litigation just to establish that a taking has occurred as in inverse condemnation cases. *See Knick*, 139 S.Ct. at 2169 (recognizing that inverse condemnation claims are asserted after the fact of a government taking). Commentators report that under-compensation has become a common and growing problem across the country. *See Jarrette Dieterle, The Sandbagging Phenomenon: How Governments Lower Eminent Domain Appraisal to Punish Landowners*, FED. SOC. REV. Vol. 17, Issue 3 (Nov. 10, 2016).

In their dissenting opinions in *Kelo v. City of New London*, 545 U.S. 649 (2005), Justices Thomas and O’Connor recognized that the victims of government takings are often the poor or disadvantaged, which confirms that government is often taking property directly or by inverse condemnation from those who are least able to defend themselves.<sup>4</sup> *Id.* at 505 (O’Connor, J., dissenting); *Id.* at 521-22 (Thomas, J., dissenting). Of course, the Fifth Amendment safeguards are intended to protect “owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority’s will.” *Id.* at 496 (O’Connor, J.,

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<sup>3</sup> *See, e.g., Sherman v. Town of Chester*, 752 F.3d 554 (2d Cir. 2014) (detailing local government’s effort to avoid takings claim for ten years, only to argue (unsuccessfully) that the property owner’s Section 1983 claim should be barred by limitations).

<sup>4</sup> *See also Ilya Somin, America’s Weak Property Rights Are Harming Those Most in Need*, THE ATLANTIC (March 24, 2020) (“studies show that owners often don’t get that amount [fair market value] if they are poor and lack legal sophistication”).

dissenting). Justice O'Connor viewed deference to state government to protect Fifth Amendment rights as “an abdication” of federal court responsibility. *Id.* at 504.

The *Violet Dock Port* case, *Violet Dock Port Inc., LLC v. Heaphy*, 2019 WL 6307945 (E.D. La. Nov. 25, 2019), on which the district court heavily relied, provides an illustration of this recurring problem when government denies property owners the compensation that is due. In that case, St. Bernard Port Harbor & Terminal District (“St. Bernard”) took Violet’s riverfront port facility in 2010. *Id.* at \*1. The St. Bernard Parish trial court held over 20 days of trial testimony before rendering its compensation judgment that wholly adopted the local government’s position. That judgment was appealed all the way to the Louisiana Supreme Court, which reversed the just compensation award. *Id.* at \*1; *see also St. Bernard Port, Harbor, & Terminal Dist. v. Violet Dock Port, Inc., LLC*, 293 So.3d 243, 246 & 252-55 (La. 2018). On remand, following two more appellate arguments, Violet was awarded more than \$20 million in additional compensation, including interest and fees. *St. Bernard Port, Harbor, & Terminal Dist. v. Violet Dock Port, Inc., LLC*, 255 So.3d 257, 62-63 (La. 4 Cir. 2018). But when the final judgment was entered 8 1/2 years after Violet was dispossessed of its property, St. Bernard refused to pay the judgment, invoking the same Louisiana state court protections

that are at issue here. St. Bernard argued that it did not need to pay the judgment because it had not appropriated the funds to pay that judgment.

Having been denied relief in state court, Violet filed a Section 1983 action in federal district court, which was dismissed for failure to state a claim. 2019 WL 6307945, at \*2. Violet's appeal was Case No. 19-30992 in this Court, which was assigned to a three-judge panel consisting of Judges Barksdale, Elrod, and Ho. *Amici* cannot predict the ultimate outcome of the *Violet* appeal because the case settled shortly after an oral argument. *See Violet Dock Port, Inc. LLC v. Heaphy*, No. 19-30992, 2020 WL 9848394 (5th Cir. Dec. 29, 2020). However, during the oral argument, the Court members expressed significant concerns regarding St. Bernard's failure to pay the judgment. For example, Judge Ho asked St. Bernard's counsel: "When is your client going to pay" (Or. Arg. at 19:50) and continued to follow up from there. Judge Barksdale aptly told St. Bernard that: "you've got the money. Pay up. This is really ludicrous." (Or. Arg. at 23:54). Judge Elrod expressed similar concerns when pressing St. Bernard for its legal position on why it had not paid the compensation judgment awarded to Violet. Ultimately, the panel referred the appeal to mediation, which promptly resulted in resolution and *payment* of the long-overdue compensation to Violet. *See Anthony McAuley, Port Nola Board Approves Land Purchase for \$1.5B St. Bernard Container Ship Terminal*, THE TIMES-PICAYUNE (Dec. 17, 2020) (acknowledging that St. Bernard

sold Violet's former property to New Orleans in return for New Orleans funding the payment of Violet's compensation judgment).<sup>5</sup>

Rather than heed the concerns expressed by the panel in *Violet Dock Port*, the district court here followed the *Violet* district court's reasoning hook, line, and sinker with no real analysis of the issues on the merits. If anything, *Violet Dock Port* should stand as an example of the abuse landowners face when seeking just compensation, as well as an illustration of how federal court review may encourage and insure constitutional compliance with the just compensation clause of the Fifth and Fourteenth Amendments. Constitutional compensation judgments should be enforced, not ignored.

**B. Section 1983 actions to enforce the constitutional right to just compensation will materially protect private property owners against government stonewalling.**

Recognizing Section 1983 as a proper vehicle to enforce state court compensation awards will prevent government from erecting procedural hurdles to avoid the amounts due under the Fifth and Fourteenth Amendments. As this Court recognized in *Gary W. v. Louisiana*, 622 F.2d 804, 806 (5th Cir. 1980), states may not use procedural rules (such as the appropriation of funds requirements in La. Const. Art. XII, § 10(C) and La. R.S. 13:5109, which have been invoked by the Sewerage & Water Board here), to avoid execution on the federally-recognized

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<sup>5</sup> [https://www.nola.com/news/business/article\\_557c3bb2-40b3-11eb-90ec-4b75b41c6f98.html](https://www.nola.com/news/business/article_557c3bb2-40b3-11eb-90ec-4b75b41c6f98.html).

compensation judgment. “Where a state expresses its unwillingness to comply with a valid judgment of a federal district court, the court may use any of the weapons generally at its disposal to ensure compliance ...” *Gary W.*, 622 F.2d at 806 (citing *Gates v. Collier*, 616 F.2d 1268 (5th Cir. 1980)).

This Court has previously recognized the viability of Section 1983 claims to enforce a state court takings judgment. *See Vogt v. Board of Comm’rs of the Orleans Levee Dist.*, 294 F.3d 684 (5th Cir. 2002). After the Louisiana state courts recognized the plaintiffs’ property rights in mineral royalties relating to previously-expropriated property, the plaintiff filed suit in federal court seeking to collect on the compensation judgment that was owed relating to their royalty interest that had been taken by the government. This Court recognized that the landowners had a viable federal claim to compel payment of compensation:

We find no support for the levee board’s premise that a decree of the Louisiana courts somehow converted private property (the mineral royalties) into public funds subject to an unenforceable lien. *Cf. [Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163-64 (1980)] (“[A] State, by ipse dixit, may not transform private property into public property without compensation.”)

*Vogt*, 294 F.3d at 688. The landowners prevailed on their federal takings claim under Section 1983 on remand. *See Vogt v. Board of Commissioners of the Orleans Levee District*, No. 00–3195, 2002 WL 31748618 (E.D. La. Dec. 5, 2002).

Following *Vogt*, Judge Morgan of the Eastern District of Louisiana recognized the viability of a similar Section 1983 claim against the City of New

Orleans. *See LaFaye v. City of New Orleans*, 2021 WL 886118 (E.D. La. Mar. 9, 2021) (appeal pending).<sup>6</sup> LaFaye arises out of a multi-year dispute regarding the City of New Orleans Automated Traffic Enforcement System (“ATES”), which was declared invalid and void *ab initio* by the Louisiana state courts. *Id.* at \*1-2. While the ATES program was in place, and prior to November 4, 2010, the City collected a substantial amount of fines and fees from those captured on automated traffic cameras. *Id.* The Louisiana courts ordered the City to return the unlawfully collected fines and fees. *Id.* When the City failed to do so, LaFaye invoked Section 1983 and initiated a class action in federal court seeking to compel payment, arguing that the City’s retention of the fines and fees was an unconstitutional taking of the plaintiffs’ property. *Id.* at \*7-10. The district court agreed that the plaintiffs asserted a viable Section 1983 claim for the taking of their property rights in violation of the Fifth and Fourteenth Amendments. *Id.* Accordingly, the district court denied the City’s motion to dismiss.

The same result should follow here. When Appellants filed and pursued their inverse condemnation claims against the Sewerage & Water Board (as they

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<sup>6</sup> On June 28, 2021, this Court granted permission to appeal the district court’s ruling denying the City of New Orleans motion to dismiss. *See* Case No. 21-90019 *LaFaye* directly conflicts with the district court’s decision in this case. However, there is a noticeable difference between the cases. The primary issue on appeal in *LaFaye* addresses whether the plaintiffs have a property right in their refunds of unlawfully collected fines and fees, which is a predicate question to the right to compel payment of those amounts in federal court. Here, the state courts have already determined that a constitutional taking of property rights occurred. The only issue here is the right to compel payment.

were required to do at that time under *Williamson County*), they were not ceding their federal constitutional rights to the whims of Louisiana government. When Appellants obtained judgments reflecting the just compensation that was due, those judgments did not extinguish Appellants' constitutional rights to be paid just compensation. A paper judgment is no substitute for the money required to be paid under the Fifth and Fourteenth Amendments.

**C. Government may not defer payment of compensation indefinitely or for unreasonable periods of time.**

When government action rises to the level of a taking (such as the Sewerage & Water Board's actions here),<sup>7</sup> it requires compensation, not indefinite delays. As the *Knick* Court explained, landowners are “‘entitled to reasonable, certain and adequate provision for obtaining compensation’ after a taking.” *Knick*, 139 S. Ct. at 2175. “Allowing the government to keep the property pending subsequent compensation to the owner ... was not what they envisioned.” *Id.* at 2176.

There is a long line of authority recognizing the duty of prompt payment of just compensation awards:

- the Constitution requires “reasonably prompt ascertainment and payment,” “adequate provision for enforcing,” with the landowner being “paid—and

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<sup>7</sup> *Amici* recognize that not every government interference with property will rise to the level of a taking by inverse condemnation. In the present case, however, there has already been a determination by the Louisiana state courts that the Sewerage & Water Board's actions rose to the level of an inverse condemnation, which require the payment of compensation to the landowners.

paid promptly;” *Joslin Mfg. Co. v. Providence*, 262 U.S. 668, 677-678 (1923);

- quick takes are allowed only “where adequate provision is made for the certain payment of the compensation without unreasonable delay,” *Bragg v. Weaver*, 251 U.S. 57, 62 (1919);
- the landowner has “an unqualified right to a judgment for the amount of such damages, which can be enforced—that is, collected—by judicial process;” *Sweet v. Rechel*, 159 U.S. 380, 402 (1895).

This Court similarly recognized that “just compensation is satisfied when the public faith and credit are pledged to a reasonably prompt ascertainment and payment, and there is adequate provision for enforcing the pledge.” *Allain-Lebreton Co. v. Department of the Army*, 670 F.2d 43, 45 (5th Cir. 1982).

Collectively, these cases establish the standard for determining whether a state or local government’s delay in paying just compensation awards is unconstitutional. If the government fails to pay the judgment promptly and within a reasonable time, that failure is in itself a violation of the Fifth and Fourteenth Amendments. Stated differently, the local government entity that has taken a landowner’s property directly or through inverse condemnation may not compound that error by delaying indefinitely the just compensation that is constitutionally required. Constitutional violations of this type are not even tolerated for a limited period of time or for a limited scope. *See Webb’s Fabulous Pharmacies*, 449 U.S. at 452; *see also Cedar Point Nursery*, 141 S.Ct. at 2073 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), for the proposition “a

permanent physical occupation constitutes a *per se* taking regardless whether it results in only a trivial economic loss.”).

It is no answer for the Sewerage & Water Board to say that the compensation award is being delayed with interest accruing on that amount. This is the equivalent of saying that injured landowners should be compelled to make an involuntary loan to the government until such time that government is ready to pay the compensation judgment. This has the effect of placing the burdens of government on the unfortunate few whose land is taken, which runs afoul of the underlying premise of the just compensation clause—*i.e.* to prevent government from disproportionately placing burdens on a select few rather than the public as a whole. *See Monongahela Nav. Co.*, 148 U.S. at 315. When landowner’s suffer direct or indirect condemnation of their property, they need just compensation promptly so that they can relocate, rebuild or repair the damage, pay the bills for businesses that were disrupted or displaced, etc. An empty paper judgment is no substitute for landowners when trying to address these government-imposed expenses.

### **CONCLUSION**

Given that this appeal is from a dismissal under Fed. R. Civ. P. 12(b)(6), the ultimate question of whether a constitutional violation has already occurred is likely one for the district court on remand. But the multi-year delay in paying the

judgments by the Sewerage & Water Board speaks for itself. Compensation is due now. And the Sewerage & Water Board cannot hide behind state procedures to delay paying the judgments. As noted above, the Fifth and Fourteenth Amendment require an enforceable judgment for just compensation, not just an empty paper promise. *Amici* request that the Court reverse the district court's judgment.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on August 25, 2021, a copy of this document was filed using the U.S. Court of Appeals for the Fifth Circuit's ECF/CM system and all counsel of record using the court's electronic Notice of Docket Activity pursuant to 5<sup>th</sup> Cir. R. 25.2.5.

/s/ W. Scott Hastings

W. Scott Hastings

**CERTIFICATE OF COMPLIANCE**

1. In accordance with Fed. R. App. P. 32(g)(1), this brief complies with the type-volume limit of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,532 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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 2016 in 14 pt. Times New Roman.

/s/ W. Scott Hastings

W. Scott Hastings