



1 IN THE SUPREME COURT OF THE UNITED STATES

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3 RICHARD DEVILLIER, ET AL., )

4 Petitioners, )

5 v. ) No. 22-913

6 TEXAS, )

7 Respondent. )

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.

10 Doesn't that seem to be at odds -- the  
11 fact that the courts there had to resort to  
12 extra-constitutional causes of action, isn't  
13 that at odds with your argument 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 that,  
25 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 hear 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 --  
12 do 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 ejection 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 cause 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           St. 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 St. 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  
16 Court's decision in evaluating an action brought  
17 as a -- a writ of debt in *Gedney v. Inhabitants*  
18 of *Tewksbury*, where the justices -- the judges  
19 of 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  
16 accomplished here by making the unusual decision  
17 to remove is that it's eliminated the Fifth  
18 Amendment question from this case and given  
19 itself what it believes -- I'm not conceding  
20 that they're right about Texas law -- but what  
21 it believes is a more favorable rule of Texas  
22 law.

23 But, if First English is right and the  
24 just compensation remedy is mandatory, then the  
25 just compensation remedy is mandatory, and Texas



1 can't extinguish it through procedural maneuvers  
2 like removing this case to federal court. The  
3 -- a claim for just compensation simply takes  
4 the form of saying the government has taken a  
5 property interest and I as the former owner am  
6 entitled to the fair market value of that  
7 property interest.

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

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

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

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

25 JUSTICE JACKSON: If you had sought

1 remand and it went back to Texas court, are you  
2 saying that there wouldn't be the opportunity to  
3 make this claim in state court? I'm just trying  
4 to understand if the claim is totally gone as --  
5 as a general matter here.

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

8 CHIEF JUSTICE ROBERTS: No, go ahead.

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

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

1 just compensation, not, as far as I'm aware, an  
2 independent common law cause of action.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel.

5 Let's suppose you bring -- the state  
6 takes some action, you claim that as a taking,  
7 you bring that claim for just compensation. In  
8 the state court, they decide yes, it was a  
9 taking, and so the government owes you \$3  
10 million. 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 & Electric dissent that ending the  
18 taking just creates an uncompensated temporary  
19 taking. And that is why, as this Court noted in  
20 Knick, Justice Brennan's dissent became the law  
21 in First English, that just stopping the taking  
22 creates an uncompensated temporary taking.

23 Certainly, the state is within its  
24 rights to cease a taking if it wants to cease a  
25 taking, and it may be that evidence at trial

1 shows Texas has chosen to cease the taking here,  
2 but the question is and always based on the full  
3 factual record what property interest has Texas  
4 actually taken or has the defendant actually  
5 taken --

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

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

14 CHIEF JUSTICE ROBERTS: And they can  
15 say that after the fact?

16 MR. McNAMARA: I -- I think --

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

22 MR. McNAMARA: I -- I think that would  
23 be a valid ground for going back to the district  
24 court and saying that the facts have changed.  
25 The way --

1 CHIEF JUSTICE ROBERTS: Okay. Thank  
2 you.

3 MR. McNAMARA: Thank you, Your Honor.

4 CHIEF JUSTICE ROBERTS: Justice  
5 Thomas?

6 Justice Alito?

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

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

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

24 MR. McNAMARA: The -- the remedy --  
25 so, to the extent the Court found on the facts

1 that Texas had taken a temporary easement, it  
2 would be the fair market value of that temporary  
3 easement.

4 JUSTICE ALITO: Would that be  
5 different from damages?

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

7 JUSTICE ALITO: In what way would it  
8 be different from damages?

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

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

18 MR. McNAMARA: It would be --  
19 generally speaking, there is testimony from  
20 dueling appraisers who talk about at fair market  
21 value what rent someone would pay for -- for  
22 that kind of easement, what a -- a willing  
23 seller would have sold that kind of easement  
24 for, but it's limited to the fair market value.  
25 It's limited to what the government took as

1 distinct from what the property owner may have  
2 lost.

3 JUSTICE ALITO: Okay. Thank you.

4 CHIEF JUSTICE ROBERTS: Justice  
5 Sotomayor?

6 Justice Kagan?

7 Justice Barrett?

8 Justice Jackson?

9 Okay. Thank you, counsel.

10 MR. McNAMARA: Thank you, Your Honor.

11 CHIEF JUSTICE ROBERTS: Mr. Nielson.

12 ORAL ARGUMENT OF AARON L. NIELSON

13 ON BEHALF OF THE RESPONDENT

14 MR. NIELSON: Mr. Chief Justice, and  
15 may it please the Court:

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

23 This appeal thus isn't about  
24 substantive rights. All Petitioners had to do  
25 was use Texas's cause of action. Instead,

1 Petitioners insist they can bring a cause of  
2 action directly under the federal Takings Clause  
3 itself. This argument is wrong for many  
4 reasons.

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

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

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

23 And as this Court explained in Knick,  
24 states didn't start recognizing state causes of  
25 action until after the Fourteenth Amendment's



1       ratification.

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

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

11                   We welcome the Court's questions.

12                   JUSTICE THOMAS: How would that cause  
13 of action -- what would it look like?

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

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

24                   MR. NIELSON: Well, in federal court.  
25 The problem is they haven't pleaded the claim.

1 So, at this point, you'd have to have leave from  
2 the district court to amend their complaint if  
3 they wanted to bring a claim under the Texas  
4 cause of action.

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

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

15 JUSTICE SOTOMAYOR: I'm --

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

21 In Knick, it said First English  
22 rejects the view that the Constitution does not  
23 of its own force furnish a basis for a court to  
24 award money damages against the government.

25 Now we've -- we've said those in many

1 cases. Those are just two recent ones --

2 MR. NIELSON: Correct, Your Honor.

3 CHIEF JUSTICE ROBERTS: -- where I  
4 wrote the opinions. So --

5 (Laughter.)

6 MR. NIELSON: Correctly wrote the  
7 opinions.

8 CHIEF JUSTICE ROBERTS: -- so do you  
9 have any dispute with those -- those holdings?

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

15 CHIEF JUSTICE ROBERTS: But it -- it's  
16 --

17 MR. NIELSON: -- in federal court --  
18 yes, Your Honor.

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

22 MR. NIELSON: Yes, Your Honor.

23 CHIEF JUSTICE ROBERTS: So you can  
24 require that a federal assertion of rights like  
25 that be brought in state court and not in

1 federal court?

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

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

12 CHIEF JUSTICE ROBERTS: Well, it said  
13 -- what we said in --

14 MR. NIELSON: -- that's how we've done  
15 it.

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

22 MR. NIELSON: When the claim is  
23 against a state, in Knick, the Court said 19  
24 times by our count 1983. Every time the Court  
25 states the holding in Knick, they tie it to

1 Section 1983 because there's a difference  
2 between the substantive right and the cause of  
3 action.

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

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

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

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

23 The second reason for that was Texas  
24 courts don't have a lot of experience with  
25 implied rights of action, alleged implied rights

1 of action under federal law. This is the bread  
2 and butter of this Court's -- you guys' court  
3 resolves factual -- those types of issues all of  
4 the time. So we thought let's just get it  
5 there, we'll get everybody in one case, and we  
6 can take out this, you know, putative federal  
7 cause of action, which we think is flatly  
8 irreconcilable to begin with.

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

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

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

24 CHIEF JUSTICE ROBERTS: Well, isn't  
25 that a -- a Catch-22 or -- I mean, you say they

1 have to proceed in -- in state court. They  
2 can't proceed in federal court. And as soon as  
3 they do, you remove it to federal court under  
4 1983, where you say they can't proceed?

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

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

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

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

1 with that?

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

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

11 MR. NIELSON: Yes, Your Honor.

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

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

19 JUSTICE KAGAN: Yeah.

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

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

24 MR. NIELSON: Sure.

25 JUSTICE KAGAN: You know, in the usual



1 case, we have a constitutional -- let's take a  
2 Fourth Amendment case. You know, it's you've  
3 searched somebody's home illegally.

4 MR. NIELSON: Mm-hmm.

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

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

15 MR. NIELSON: Mm-hmm.

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

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

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

25 MR. NIELSON: Sure.

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

4 MR. NIELSON: Yep.

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

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

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

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

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

24 Well, then what happens? Before they  
25 could do anything, you would rush to court and

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

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

13 MR. NIELSON: Sure.

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

20 MR. NIELSON: Yeah.

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

1 does not have the prerogative to do and the  
2 thing that the landowner has a right to have is  
3 payment.

4 MR. NIELSON: Yes, Your Honor.

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

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

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

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

21 (Laughter.)

22 MR. NIELSON: Sure. All right. So  
23 that's the answer I'm going to say. So, if we  
24 -- if a court says, we read First English and it  
25 requires not just a substantive relief, it

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

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

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

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

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

17 MR. NIELSON: Yeah.

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

23 MR. NIELSON: Mm-hmm.

24 JUSTICE BARRETT: And Texas says:  
25 And, by the way, our state cause of action -- we

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

4 MR. NIELSON: Sure.

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

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

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

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

23 Congress has never done that --

24 JUSTICE BARRETT: So they have to wait  
25 for Congress to enforce it through legislation?

1 Would there be some sort of due process  
2 violation or an argument that the state has to  
3 provide some sort of forum?

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

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

12 MR. NIELSON: Sure.

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

15 MR. NIELSON: Okay. Sure. Sure.

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

18 MR. NIELSON: Okay.

19 JUSTICE BARRETT: You're -- you're  
20 really saying that the state could shut down and  
21 give no administrative forum, no legislative  
22 forum, no judicial forum, and because the Fifth  
23 Amendment doesn't create an implied cause of  
24 action, then the property owner would have to  
25 say, Congress, can you please use your Section 5

1 power?

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

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

9 JUSTICE GORSUCH: Why --

10 JUSTICE ALITO: Why --

11 JUSTICE GORSUCH: I'm sorry, Chief.

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

19 MR. NIELSON: Mm-hmm.

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

23 MR. NIELSON: Well, this Court has  
24 cases that says we trust that Congress takes  
25 itself seriously. We trust that the states take



1 their oath seriously. That's one of the  
2 premises of Alden v. Maine, that they're going  
3 to do that. But --

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

6 MR. NIELSON: Sure.

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

14 MR. NIELSON: Yeah.

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

17 MR. NIELSON: What we --

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

20 MR. NIELSON: Sorry.

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

23 MR. NIELSON: So that's a question  
24 that has not been litigated, whether you could  
25 have injunctive relief to pay.

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

3 MR. NIELSON: Correct.

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

6 MR. NIELSON: Yeah.

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

9 MR. NIELSON: And --

10 JUSTICE GORSUCH: But the Constitution  
11 commands it.

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

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

22 MR. NIELSON: Yeah.

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

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

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

10 MR. NIELSON: Mm-hmm.

11 JUSTICE GORSUCH: -- to pay?

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

14 JUSTICE GORSUCH: Okay.

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

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

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

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

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

25 JUSTICE GORSUCH: I've got -- I've got

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

3 MR. NIELSON: Sure.

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

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

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

15 MR. NIELSON: Yeah.

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

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

23 JUSTICE GORSUCH: So Texas has  
24 represented to this Court that there is a state  
25 constitutional cause of action?

1 MR. NIELSON: Yes, Your Honor.

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

4 MR. NIELSON: Well, that --

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

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

10 JUSTICE GORSUCH: Beyond --

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

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

15 MR. NIELSON: Yeah.

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

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

19 JUSTICE GORSUCH: What does --

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

22 JUSTICE GORSUCH: Fine. Fine.

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

25 JUSTICE GORSUCH: Okay. I got it.

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

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

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

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

12 JUSTICE GORSUCH: Okay. Thank you.

13 JUSTICE KAVANAUGH: Justice Gorsuch --

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

16 JUSTICE KAVANAUGH: Go ahead.

17 JUSTICE SOTOMAYOR: Point of  
18 clarification.

19 MR. NIELSON: Sure.

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

25 How would they go to the Texas court

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

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

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

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

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

17 MR. NIELSON: Well --

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

20 MR. NIELSON: Well --

21 JUSTICE SOTOMAYOR: But putting that  
22 aside, here, they say violation of Article I,  
23 Section 17 of the Texas Constitution for the  
24 taking, damaging, or the destruction of their  
25 property. That's Count 1.

1 MR. NIELSON: Yes, Your Honor.

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

5 MR. NIELSON: Yes, Your Honor.

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

10 MR. NIELSON: It --

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

14 MR. NIELSON: Yes, Your Honor.

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



1 MR. NIELSON: Yes, Your Honor.

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

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

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

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

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

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

23 JUSTICE SOTOMAYOR: Okay.

24 JUSTICE KAVANAUGH: On Justice  
25 Gorsuch's injunction-to-pay hypothetical, I just

1 want to make sure I'm clear on that.

2 MR. NIELSON: Yeah.

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

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

10 JUSTICE KAVANAUGH: But -- but --

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

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

15 MR. NIELSON: Yeah.

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

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

23 JUSTICE KAVANAUGH: Yeah.

24 MR. NIELSON: If I may --

25 JUSTICE JACKSON: What about a

1 declaration? What about a declaration? Is that  
2 something different?

3 MR. NIELSON: A declaration?

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

6 MR. NIELSON: Sure.

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

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

19 JUSTICE JACKSON: Yes.

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

23 CHIEF JUSTICE ROBERTS: Well, no, you  
24 can do that later.

25 MR. NIELSON: Oh, I apologize, Your

1 Honor.

2 CHIEF JUSTICE ROBERTS: Yeah.

3 Justice Thomas?

4 Justice Alito?

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

7 (Laughter.)

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

16 CHIEF JUSTICE ROBERTS: Anything  
17 further?

18 JUSTICE ALITO: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice  
20 Sotomayor?

21 Justice Gorsuch?

22 Justice Jackson?

23 Thank you, counsel.

24 MR. NIELSON: Thank you, Your Honor.

25 CHIEF JUSTICE ROBERTS: Mr. Kneidler.

1                   ORAL ARGUMENT OF EDWIN S. KNEEDLER  
2                   FOR THE UNITED STATES, AS AMICUS CURIAE,  
3                   SUPPORTING THE RESPONDENT

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

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

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

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

25                  This Court in -- in a number of

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

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

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

22 If a court finds a violation, it  
23 doesn't order due process. It orders -- it  
24 enjoins the conduct that was undertaken without  
25 due process. The government can always go back

1 and do it over again with due process.

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

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

12 MR. KNEEDLER: Yeah.

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

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

23 Now it seems to me that the question  
24 turns on basis. And what you seem to be saying  
25 is it created a general theory of what the

1 government had to do. But that doesn't mean  
2 that anybody could take that and recover  
3 compensation. They have to go get an injunction  
4 or they -- they can't proceed at all because  
5 there's no cause of action?

6 MR. KNEEDLER: Yes, Your Honor.

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

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

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

24 CHIEF JUSTICE ROBERTS: Well, but it's  
25 --



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

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

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

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

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

1 determined that there was a taking.

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

10           CHIEF JUSTICE ROBERTS: Thank you,  
11 counsel.

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

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

25           MR. KNEEDLER: I --

1                   JUSTICE ALITO:  -- in a Tucker Act  
2                   suit?

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

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

17                  The Tucker Act standard is whether the  
18                  particular substantive provision that is being  
19                  relied upon creates a -- can reasonably be read  
20                  to mandate compensation if there is a violation.  
21                  By definition -- and the Court made this point  
22                  in *Bornes* -- the Tucker Act is there for  
23                  something where there is an obligation but no  
24                  elements of a cause of action.  So the -- the --  
25                  for example, the Fifth Amendment or the statute

1 that may be involved, particular statute that  
2 may be involved, by definition does not create a  
3 cause of action.

4 Congress provided in the Tucker Act  
5 that you can recover compensation if -- if the  
6 other provision of law can reasonably be  
7 construed. That's -- that's a Tucker Act  
8 standard for when --

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

15 Would that be a money-mandating  
16 statute that creates a cause of action?

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

23 Now it may be that the particular  
24 statute would be understood or could be  
25 interpreted that way, but, here, we're talking

1 about the Constitution, and no other provision  
2 of the Constitution provides of its own force a  
3 remedy, particularly a remedy for damages.

4 And that would have been extraordinary  
5 at the time the Constitution was adopted because  
6 of the Appropriations Clause, sovereign  
7 immunity, and the Debt Clause. If -- if  
8 compensation is not paid, that is a debt of the  
9 United States, and it's clear --

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

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

21 JUSTICE ALITO: No.

22 MR. KNEEDLER: But that's because the  
23 Tucker Act has been under --

24 JUSTICE ALITO: It's another -- it's  
25 another statute, and we would interpret it like

1 we interpreted the statute in Maine Community  
2 Health. Does -- does it mandate the payment of  
3 money? I would think the answer to that would  
4 be yes. And if that's the case with the  
5 statute, why isn't it the same with the --

6 MR. KNEEDLER: Because the --

7 JUSTICE ALITO: -- with the Fifth  
8 Amendment?

9 MR. KNEEDLER: -- money mandating is  
10 not -- is not something under the Tucker Act.  
11 It is -- it is a provision in the Tucker Act  
12 that --

13 JUSTICE ALITO: All right.

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

18 JUSTICE ALITO: Thank you.

19 JUSTICE JACKSON: Mr. --

20 JUSTICE ALITO: Thank you, Mr.  
21 Kneedler.

22 JUSTICE JACKSON: -- Mr. Kneedler, I  
23 thought your answer to Justice Alito was going  
24 to be going back to what you said at the  
25 beginning, which is the compensation is

1 conditional in the same way as the Due Process  
2 Clause is conditional.

3 I thought that was very interesting,  
4 and maybe you want to repeat it.

5 MR. KNEEDLER: Yeah. No, no, that --  
6 I think that's a fundamental point about the  
7 text, not -- of the just compensation clause  
8 itself, but the entire Fifth Amendment is pro --  
9 is prohibitory. I mentioned the indictment  
10 clause, but the self-incrimination clause is the  
11 same way. The Double Jeopardy Clause is -- is  
12 the same.

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

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

25 If you have a cause of action, how do

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

6 CHIEF JUSTICE ROBERTS: Thank you.

7 MR. KNEEDLER: Every one of the cases  
8 the Court cited --

9 CHIEF JUSTICE ROBERTS: Thank -- thank  
10 you, counsel.

11 MR. KNEEDLER: I'm sorry.

12 CHIEF JUSTICE ROBERTS: Justice  
13 Thomas?

14 JUSTICE THOMAS: No.

15 CHIEF JUSTICE ROBERTS: Anything  
16 further?

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

20 MR. KNEEDLER: Well, some --

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

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



1 that because of the Appropriations Clause, I  
2 think. The Fifth Amendment cannot be read --

3 JUSTICE SOTOMAYOR: So would it be --

4 MR. KNEEDLER: -- to allow that.

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

8 MR. KNEEDLER: You have to -- you have  
9 to stop whatever it is that would constitute a  
10 taking. And -- and --

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

15 MR. KNEEDLER: Yes.

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

18 MR. KNEEDLER: That is -- that's --  
19 that's correct, and it's certainly not the --  
20 it's certainly not the other provision itself,  
21 the just -- the just compensation clause or the  
22 other statute, which by definition --

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

25 MR. KNEEDLER: Yes.

1 JUSTICE SOTOMAYOR: -- equals one?

2 MR. KNEEDLER: Yes.

3 JUSTICE SOTOMAYOR: Okay.

4 MR. KNEEDLER: Sorry.

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

7 JUSTICE GORSUCH: Two questions.

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

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

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

24 JUSTICE GORSUCH: Okay.

25 MR. KNEEDLER: -- that just

1 compensation issues were raised before.

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

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

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

22 JUSTICE GORSUCH: No. Exactly.

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

25 JUSTICE GORSUCH: So do you take it

1 that that first count under the state  
2 constitution is still alive and available to the  
3 plaintiffs?

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

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

9 MR. KNEEDLER: I --

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

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

20 JUSTICE GORSUCH: Well, Texas --

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

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

25 MR. KNEEDLER: Right. And --

1 JUSTICE GORSUCH: -- right? So --

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

6 JUSTICE GORSUCH: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Kavanaugh?

9 Justice Barrett?

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

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

25 MR. KNEEDLER: That -- that is -- that

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

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

17 CHIEF JUSTICE ROBERTS: Justice  
18 Jackson?

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

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

10           But the interim period is endemic  
11 to -- to litigation, due process violation being  
12 held on an indictment, but that is the proper  
13 remedy and that's the -- the remedy that existed  
14 until the Tucker Act was passed. It was the  
15 remedy that this Court said in Knick was the way  
16 to vindicate Fifth Amendment rights until the  
17 Tucker Act or state constitutions came along and  
18 provided a monetary 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 from Texas to say that the City of Baytown  
5 decision means that Texas courts hear claims  
6 "under the federal 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,  
7 as 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's Lessee, where  
16 the Court ejected the United States military  
17 from its own base because it didn't have clean  
18 title. 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.

19                  The case is submitted.

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

22

23

24

25



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